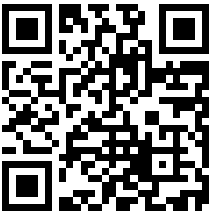
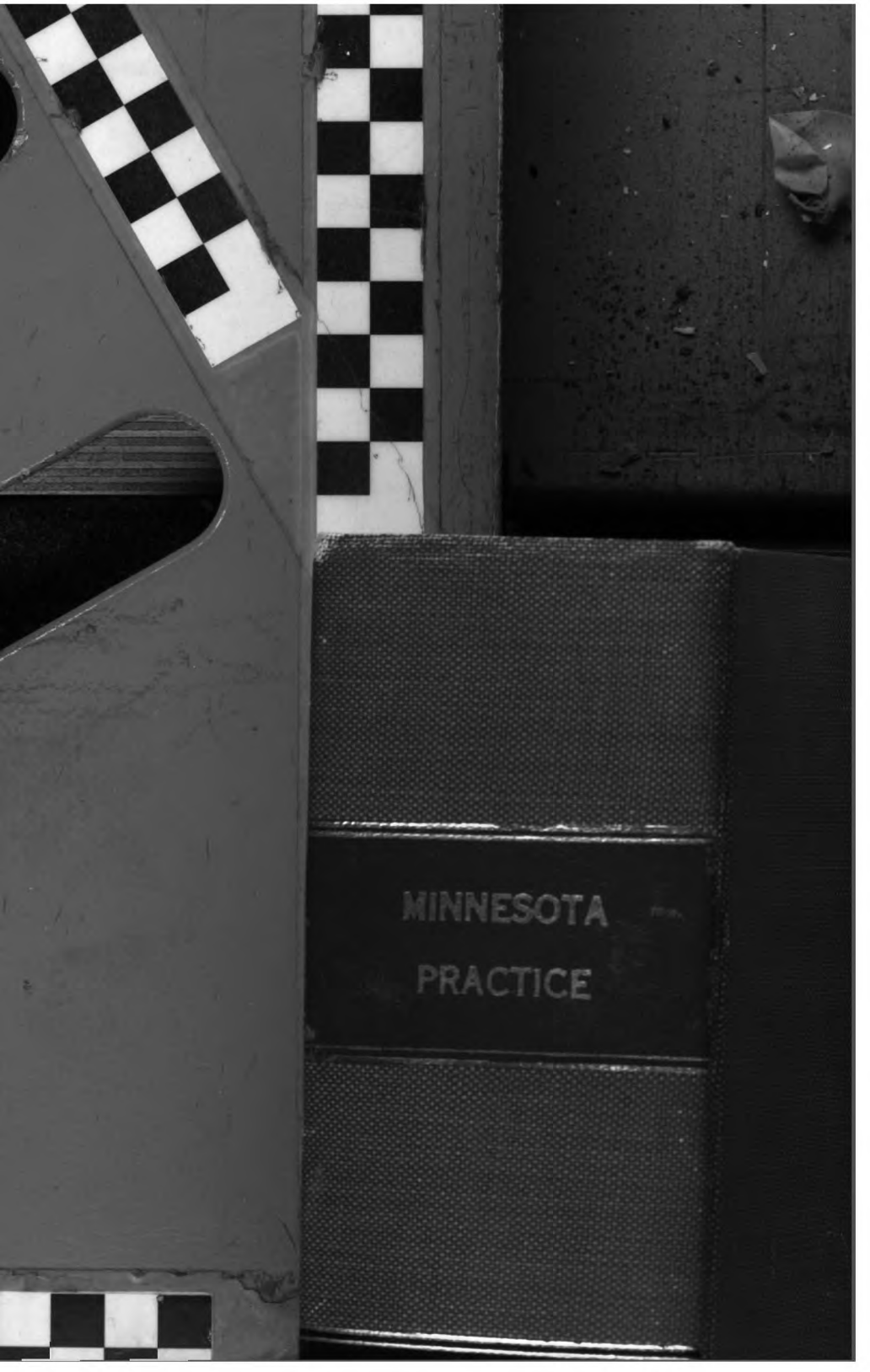
This is a reproduction of a library book that was digitized by Google as part of an ongoing effort to preserve the information in books and make it universally accessible.

Google™ books

https://books.google.com





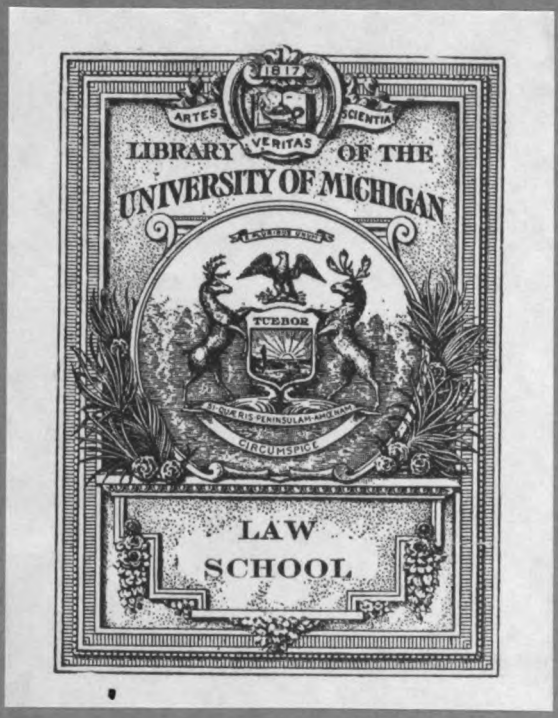
Digitized by Google

Digitized by Google

5930
D86
1903x
Digitized by Google


Digitized by Google


Digitized by Google



Digitized by Google

D926m
1903

Digitized by Google

Digitized by Google

Digitized by Google

Digitized by Google

MINNESOTA PRACTICE

A DIGEST OF THE LAW OF PROCEDURE OF THE STATE OF MINNESOTA WITH FORMS

UNIV. OF MICH. LAW LIBRARY.

C b U

BY

MARK B. DUNNELL

AUTHOR OF MINNESOTA PLEADING; MINNESOTA TRIAL BOOK

29510
C

St. Paul, Minn.
WEST PUBLISHING CO.
1903

Digitized by Google

COPYRIGHT, 1908
BY
MARK B. DUNNELL

Digitized by Google

CHAPTER 1

THE DISTRICT COURT

One district court throughout state.

§ 1. In a sense the several district courts constitute one court of general jurisdiction coextensive with the boundaries of the state. This one general court is divided into districts as a matter of convenience. With consent of the parties any action, at least any civil action, may be tried in any district of the state. So far as jurisdiction over the subject matter is concerned the several district courts stand upon perfect equality.

Smith v. Barr, 76 Minn. 513, 79 N. W. 507; State v. District Court, 52 Minn. 283, 53 N. W. 1157; Flowers v. Bartlett, 66 Minn. 213, 68 N. W. 976; Darelius v. Davis, 74 Minn. 345, 77 N. W. 214.

Original jurisdiction.

§ 2. The district courts have original jurisdiction of all civil and criminal actions regardless of the amount in controversy or the punishment inflicted, except in cases where exclusive jurisdiction is given by the constitution to the supreme and probate courts.[1] "The district court is the one great court of general jurisdiction to which all may apply to have justice judicially administered, in every case where the constitution itself does not direct application to be made elsewhere. The authority possessed by the legislature to confer on other courts a portion of the jurisdiction vested by the constitution in the district court, does not imply the right to deprive the latter of such jurisdiction, but simply to authorize other courts to exercise it concurrently with the district court in such cases."[2] The district courts have jurisdiction of civil actions although the amount in controversy is less than one hundred dollars.[3] "The district courts have original jurisdiction in equity; and all suits or proceedings instituted for equitable relief are to be commenced, prosecuted, and conducted to a final decision and judgment, by the like process, pleadings, trial and proceedings as in civil actions, and shall be called civil actions."[4]

[1] Agin v. Heyward, 6 Minn. 110 Gil. 53; Fowler v. Atkinson, 6 Minn. 503 Gil. 350; Cressey v. Gierman, 7 Minn. 398 Gil. 316; Thayer v. Cole, 10 Minn. 215 Gil. 173; Barber v. Kennedy, 18 Minn. 216 Gil. 196; State v. Kobe, 26 Minn. 148, 1 N. W. 1054; State v. Bach, 36 Minn. 234, 30 N. W. 764; State v. Russell, 69 Minn. 499, 72 N. W. 832.

[2] Agin v. Heyward, 6 Minn. 110 Gil. 53.

[3] Id.; Fowler v. Atkinson, 6 Minn. 503 Gil. 350; Cressey v. Gierman, 7 Minn. 398 Gil. 316; Thayer v. Cole, 10 Minn. 215 Gil. 173.

[4] G. S. 1894 § 4834; Gates v. Smith, 2 Minn. 31 Gil. 21.

Digitized by Google

Concurrent jurisdiction with Wisconsin courts—statute.

§ 3. "All courts and officers now having and exercising jurisdiction in any county or counties which are now formed, or which may hereafter be formed in any part of this state bordering eastward upon the Mississippi, St. Croix or St. Louis rivers, shall have and exercise jurisdiction in all civil and criminal cases upon such rivers concurrently with the courts and officers of the state of Wisconsin, so far and to such extent as the said rivers, or either of them, shall form a common boundary between this state and the state of Wisconsin. The concurrent territorial jurisdiction of every such county, and of all courts and officers exercising jurisdiction throughout the same, shall extend over such river area as would be included within the northerly and southerly boundary line of such county if the same were produced and extended easterly across the said river or rivers to the Wisconsin shore."

[G. S. 1894 §§ 4835, 4836] See Const. Minn. Art 2, § 2; Enabling Act, Feb. 26, 1857, § 2; Const. Wis. Art. 2; Stat. Wis. 1898 ch. 1 § 1; State v. George, 60 Minn. 503, 63 N. W. 100; Opsahl v. Judd, 30 Minn. 126, 14 N. W. 575; Osborne v. Knife Falls Boom Corp., 32 Minn. 412, 21 N. W. 704; Osborne v. C. N. Nelson Lumber Co., 33 Minn. 285, 22 N. W. 540; Mississippi etc. Co. v. Prince, 34 Minn. 79, 24 N. W. 361; Green v. Knife Falls Boom Corp. 35 Minn. 155, 27 N. W. 924; J. S. Keator Lumber Co. v. St. Croix Boom Corp. 72 Wis. 62; Iowa v. Illinois, 147 U. S. 1.

Power to issue writs throughout state—statute.

§ 4. "The said courts in term time, and the judges thereof in vacation, have power to award throughout the state, returnable to the proper county, any and all writs necessary for the abatement of any nuisance, writs of injunction,[1] ne exeat,[2] certiorari,[3] and all other writs or processes necessary to the perfect exercise of the powers with which they are vested and the due administration of justice."

[Laws 1897 ch. 7]

[1] See Dunnell, Minn. Pl. §§ 1398–1456.

[2] See § 5. [3] See § 1980.

§ 5. The writ of ne exeat is practically obsolete in this state. Its issuance was authorized by our insolvency law,[1] which has been superseded by the federal bankruptcy act. The issuance of the writ lies in the discretion of the court. It is a discretion that ought rarely, if ever, to be exercised, as the writ is contrary to the spirit of our laws. In proceedings supplementary to execution a judgment debtor may be prevented from leaving the state.[2] Under another statute the "court" undoubtedly has authority to issue writs in vacation.[3] The court of one county cannot issue a writ of execution "throughout the state" but only to counties where the judgment is docketed.[4] The rule is otherwise as to writs of attachment.[5] A subpœna may run throughout the state.[6] This section has the effect of making all the courts of the state one court, in a sense.[7]

[1] G. S. 1894 § 4242. See Rule 26, District Court.

Digitized by Google

[2] See § 1629. [3] See § 17. [4] See § 1447.
[5] G. S. 1894 § 5291. [6] See § 683. [7] See § 1.

Writs and processes—formal requisites.

§ 6. The style of all process shall be "The State of Minnesota." [1] * * * "All writs or processes issuing from or out of any of the said district courts, shall be tested in the name of the presiding judge thereof." [2] * * * "In all cases where, by the statutes of this state, any writ or process is required to be issued out of any of the courts of record, the same shall be sealed with the seal of the court, dated on the day on which it issued, signed by the clerk, and made returnable on the first day of the term succeeding its date, when no other time is fixed by law, or allowed by the rules or practice of the court, for the return thereof." [3] * * * "All writs or processes issuing from or out of said courts shall, before the delivery thereof to the officer whose duty it is to serve the same, be indorsed by the clerk with the name of the attorney or other person demanding the process." [4]

[1] Const. Minn. Art. VI § 14. [2] G. S. 1894 § 4847.
[3] G. S. 1894 § 4848. [4] G. S. 1894 § 4849.

§ 7. A summons is not a process or writ required to run in the name of the state.[1] That an execution does not run in the name of the state is a defect of form only which does not render it void.[2] A writ of attachment signed by the judge, but not by the clerk, and without the seal of the court is absolutely void.[3] A writ of attachment need not show by what officer it was allowed.[4] An execution should be dated as of the day it issues from the clerk's office and not as of the day it is delivered to the sheriff.[5] The seal of the court and not the seal of the clerk must be used.[6]

[1] See § 305.
[2] Thompson v. Bickford, 19 Minn. 17 Gil. 1.
[3] Wheaton v. Thompson, 20 Minn. 196 Gil. 175; O'Farrell v. Heard, 22 Minn. 189.
[4] Shaublut v. Hilton, 7 Minn. 506 Gil. 412.
[5] Mollison v. Eaton, 16 Minn. 426 Gil. 383.
[6] State v. Barrett, 40 Minn. 65, 41 N. W. 459.

Qualifications of judges.

§ 8. "The judges of the supreme and district courts shall be men learned in the law, and shall receive such compensation at stated times, as may be prescribed by the legislature, which compensation shall not be diminished during their continuance in office, but they shall receive no other fee or reward for their services."

[Const. Minn. Art. 6 § 6] See Steiner v. Sullivan, 74 Minn. 498, 77 N. W. 286.

Judicial districts—terms of office.

§ 9. "The state shall be divided by the legislature into judicial districts, which shall be composed of contiguous territory, be bounded by county lines, and contain a population as nearly equal as may be practicable. In each judicial district one or more judges, as the legislature may prescribe, shall be elected by the electors thereof,

Digitized by Google

whose term of office shall be six years; and each of said judges shall severally have and exercise the powers of the court under such limitations as may be prescribed by law. Every district judge shall, at the time of his election, be a resident of the district for which he shall be elected, and shall reside therein during his continuance in office."

[Const. Minn. Art. 6 § 4]

§ 10. A district judge does not hold over until his successor is elected and qualified.

State v. O'Leary, 64 Minn. 207, 66 N. W. 264.

Judges not to practice law—reside in district.

§ 11. "No judge of any of the courts of record in this state, judges of probate courts excepted, shall practice as an attorney or counsellor at law, except in a cause in which he is a party in interest; nor shall he receive any fees for any legal or judicial service other than those prescribed by law; nor shall he be the partner of any practicing attorney in the business of his profession. Each of the judges of the several district courts shall reside permanently within their respective judicial districts during their term of office."

[G. S. 1894 § 4840] See Const. Minn. Art. 6 § 4.

Sickness or absence of judge.

§ 12. In the case of sickness or absence of a judge for any cause our statutes provide that another judge of the same district may act,[1] or the governor may appoint a judge of another district to act,[2] or the sheriff or clerk may adjourn the term.[3] But if a judge becomes sick during the course of a trial another judge cannot take up the trial; the jury must be discharged.[4]

[1] G. S. 1894 § 4842. [2] G. S. 1894 § 4839. [3] G. S. 1894 § 4844.
[4] Rossman v. Moffett, 75 Minn. 289, 77 N. W. 960.

Several judges in same district.

§ 13. When there are several judges in the same district provision is made by statute for the distribution of business by them. All may sit together in the trial of causes, including jury trials. The senior in office presides and if there is no senior in office the one who is senior in age presides. The decision of the majority is the decision of the court. If two judges sit together and disagree the decision of the presiding judge prevails and he may decide the case after his junior associate has resigned.

See G. S. 1894 §§ 4853–4855; 4856–4859; 4868–4870; 4878–4880; 4881–4884; Darelius v. Davis, 74 Minn. 345, 77 N. W. 214; In re State Bank, 57 Minn. 361, 59 N. W. 315.

When judge of one district may act for judge of another district.

§ 14. Our constitution provides that "the legislature may provide by law that the judge of one district may discharge the duties of the judge of any other district not his own, when convenience or the public interest may require it."[1] The legislature, at an early day enacted that "the judge of any district shall discharge the duties of the judge of any other district, when convenience or the public inter-

Digitized by Google

est requires it; and whenever a district judge is a party or otherwise interested in any cause, another district judge, in an adjoining district, shall, within his district, transact any ex parte business, hear and determine motions and grant orders in such causes, when brought before him." [2] This provision was repealed by Laws 1891 ch. 77. As the law now stands the judge of one district can act for the judge of another district only in the following cases:

(1) When assigned by the governor, the local judge being disqualified by interest or unable to act for any cause.[3]

(2) When the local judge is disqualified by interest and all the parties consent; no assignment by the governor being necessary.[4]

(3) When the local judge is disqualified by interest or other cause and he orders a change of venue.[5]

(4) Motions may be made in an adjoining district.[6]

[1] Const. Minn. Art. 6 § 5.

[2] G. S. 1878 ch. 64 § 5; Board of County Com'rs v. Smith, 22 Minn. 97; Ingram v. Conway, 36 Minn. 129, 30 N. W. 447; Drake v. Sigafoos, 39 Minn. 367, 40 N. W. 257; State v. District Court, 52 Minn. 283, 53 N. W. 1157.

[3] G. S. 1894 §§ 4839, 4843. [4] G. S. 1894 § 4839.

[5] See § 285. [6] See § 2062.

Effect of vacancy of office of judge.

§ 15. "No process, proceeding or writ, civil or criminal, before any of the said courts, shall abate or be discontinued by reason of any vacancy in the office, or change of any judge, or of holding said court, but shall be proceeded in as if the said vacancy or change had not occurred."

[G. S. 1894 § 4846] See Darelius v. Davis, 74 Minn. 345, 77 N. W. 214.

Terms of court.

§ 16. In this state terms of court have no such importance as at common law. A jury trial can only take place at a general or special term, but all other judicial business may be transacted at any time. The court is always open for the transaction of all business except the trial of issues of facts and such issues may be tried by the court at any time with consent of all the parties. Orders may be made at any time and judgments entered. Jury trials begun in term may be concluded after the term. The term, in our practice, is simply a convenience for the massing of business and does not go to the authority of the court to act, except, possibly, in jury trials.

See §§ 17, 18, 1230, 1358, 1396.

Jurisdiction of court out of term—statutes.

§ 17. "In addition to the general terms, the district court is always open for the transaction of all business; for the entry of judgments, of decrees, of orders of course, and all such other orders as have been granted by the court or judges, and for the hearing and determination of all matters brought before the court or judge, except the trial of issues of fact." [1] * * * "When any matter is

Digitized by Google

heard by the court or judge the decision may be made out of term and such decision may be an order, or a direction that an order or judgment or decree be entered, and upon filing in the office of the clerk in the county where the action or proceeding is pending, the decision in writing, signed by the judge, an order or judgment or decree, as the case may require, if any, shall be entered by such clerk in conformity with such decision." [2] * * * "The judges of the several district courts of this state may, with consent of parties, try issues of law and fact in vacation, and decide such issues either in or out of term; and thereupon judgment may be rendered, with the same effect as upon issues tried and determined in term time." [3] * * * "Whenever the trial of any civil action or proceeding, or of any indictment, which has been commenced at any term of the district court, is not concluded at the expiration of said term, the trial may nevertheless be proceeded with and concluded, and all proceedings may be had in said case in the same manner and with like effect as if the same had been concluded at the term at which the same was begun." [4]

[1] G. S. 1894 § 5388. [2] Id.
[3] G. S. 1894 § 5390. [4] G. S. 1894 § 5389.

§ 18. These statutes are a radical departure from common law procedure. At common law the jurisdiction of the court in vacation was extremely limited. All causes came on to be disposed of at some term, and all judgments were entered as of the term at which the cause was heard and the court was supposed to retain control over causes during the entire term at which they came on to be heard, and not to have finally disposed of them until the term closed. In our practice the term has comparatively little significance. The summons is not made returnable at any term; the cause need not be brought on for trial at a term unless there is an issue of fact to be tried, and not even then if the adverse party will consent to a trial by the court out of term; and the judgment is not entered as of any term.[1] All matters except the trial of issues of fact may be brought on before the court at chambers at any time, either in or out of term, and without the consent of the adverse party.[2] Usually in the larger districts, such matters are noticed for a special term fixed by the court for that purpose. If it is desired to bring them on at an unusual time or place it is necessary to arrange with the judge in advance.[3] The court has jurisdiction to hear and determine such matters at any time and in any place within the district and, probably, at any place within the state.[4] Issues of fact cannot be tried out of term unless both parties and the court consent.[5]

[1] Grant v. Schmidt, 22 Minn. 1.
[2] Rollins v. Nolting, 53 Minn. 232, 54 N. W. 1118 (appeal from a justice of the peace on questions of law alone); Fallgatter v. Lammers, 71 Minn. 238, 73 N. W. 860; Johnson v. Velve, (Minn.) 90 N. W. 126.
[3] See §§ 2062, 2063. [4] Id. [5] See statute supra.

Digitized by Google

Jurisdiction of the court at chambers.

§ 19. The court at chambers has jurisdiction to hear and determine all matters except issues of fact.[1] In our practice, contrary to common law, the "court" as well as the "judge" may sit at chambers.[2] Excepting trials by consent in vacation, the court is "at chambers" when it exercises its judicial powers not at a regular session. "At chambers" may be in the court-room, or in the private office of the judge, or on a train, or at a hotel—anywhere in the district,[3] and probably, anywhere in the state.[4] The mere fact that the court exercises judicial functions at its chambers does not make the business "chamber business." The jurisdiction of the "court" at chambers is greater than that of the judge at chambers. The distinction, however, is not of much practical importance in this state.[5]

[1] Rollins v. Nolting, 53 Minn. 232, 54 N. W. 1118; Fallgatter v. Lammers, 71 Minn. 238, 73 N. W. 860; Hoskins v. Baxter, 64 Minn. 226, 66 N. W. 969.

[2] Id.

[3] Hoskins v. Baxter, 64 Minn. 226, 66 N. W. 969; In re Neagle, 39 Fed. 855; Id. 135 U. S. 1; Von Schmidt v. Widber, 99 Cal. 513.

[4] See § 1. [5] See § 2086.

Adjourned sessions—adjourned terms—special terms—statutes.

§ 20. "The judge of any district court may adjourn the same from time to time during any term thereof, hold adjourned terms of said court at any time he may deem proper, or appoint special terms in any county of his district, for the trial of civil and criminal cases and issues of law, giving twenty days' previous notice thereof, by advertisement, published four successive weeks in a newspaper printed in the said county, if there is one, if not, in a paper published at the capital, and also by posting a notice thereof on the door of the place for holding the court, in the county in which said term is to be held; and may direct grand and petit jurors to be drawn and summoned for any adjourned or special term, in the manner prescribed by law. Special terms may also be appointed by said judge for the hearing of issues of law, applications, motions, and all matters except the trial of issues of fact, by causing an order appointing said term to be made on the court journal of the county, and a copy thereof to be posted in the office of the clerk of the county for three successive weeks prior to the time of holding the same."[1] * * * "The judges of the several district courts may, by order, appoint such special terms in the counties of their respective districts as may be deemed necessary or convenient and at such terms all business hereinbefore mentioned [all judicial business except the trial of issues of fact] may be transacted."[2]

[1] G. S. 1894 § 4850. See G. S. 1894 § 4942 and Laws 1897 ch. 361.

[2] G. S. 1894 § 5388.

§ 21. The district court has authority, under this section, to discharge the grand jury impaneled at a regular general term of the district court, adjourn the term to a future day, and order a new

Digitized by Google

venire of grand jurors to be summoned for such adjourned term. Such new venire may be drawn from the regular jury list selected by the county commissioners and certified and filed with the clerk of the court.[1] The judge or judges of the district court have no authority under our statutes to provide by a standing order for the holding, year after year, of regular terms of court for the trial of issues of fact. Their authority is limited to the appointment of special terms for that purpose[2] and for the hearing and determination of all matters except issues of fact.[3] Undoubtedly the court may, with consent of all the parties, try issues of fact at a special term appointed "for the hearing of issues of law, applications, motions, and all matters except the trial of issues of fact" as questions relating to "terms" do not, in this state, go to the jurisdiction of the court over the subject matter. The court can try an issue of fact at any time, if all the parties consent.

[1] State v. Peterson, 61 Minn. 73, 63 N. W. 171.

[2] Flanagan v. Borg, 64 Minn. 394, 67 N. W. 216.

[3] Hoffman v. Parsons, 27 Minn. 236, 6 N. W. 797; N. W. Fuel Co. v. Kofod, 74 Minn. 448, 77 N. W. 206.

Temporary place of holding court—statute.

§ 22. "Whenever the court-house or place of holding court in any county is destroyed, unsafe, unfit or inconvenient for the holding of any court, or if no court-house is provided, the judge of the district may appoint some convenient building, in the vicinity of the place where the court is required to be held, as a temporary place for the holding thereof."

[G. S. 1894 § 4851]

Special venires.

§ 23. "Whenever, at any term of any district court, there is a deficiency of jurors, the court may order a special venire to issue to the sheriff of the county, commanding him to summon, from the county at large, a number therein named of competent persons, to serve as jurors for the term, or for any specified number of days. If, at any term of such court, there is an entire absence of jurors of the regular panel, whether from an omission to draw, or to summon such jurors, or because of a challenge to the panel, or from any other cause, the court may in like manner order a special venire to issue to the sheriff of the county, commanding him to summon, from the county at large, a number therein named of competent persons, to serve as jurors during the term."

[G. S. 1894 § 4852]

§ 24. Under this section jurors are not "drawn" but simply "summoned," that is selected by the sheriff from the county at large.[1] The venire does not state the names of the jurors to be summoned but leaves the selection to the sheriff.[2] In making the selection it is improper for the sheriff to inquire as to the opinions of the jurors in regard to the case and to make the selection with reference thereto.[3] The deficiency may be due to any cause, as, for example, sickness, death, or challenges to the panel or to individual jurors.[4] A

Digitized by Google

special venire may be ordered when the whole of the original panel has been discharged;[5] when a challenge to the original panel has been sustained[6] or when a portion of the original jurors do not appear.[7] The court may summon a grand as well as a petit jury by special venire.[8] The grounds of challenge to the panel of a special venire are the same as to the original panel.[9] A second special venire may be issued upon the exhaustion of the first,[10] or talesmen may be summoned.[11]

[1] State v. Peterson, 61 Minn. 73, 63 N. W. 171.
[2] State v. Stokely, 16 Minn. 282 Gil. 249.
[3] State v. McCartey, 17 Minn. 76 Gil. 54.
[4] State v. Froiseth, 16 Minn. 313 Gil. 277.
[5] Steele v. Maloney, 1 Minn. 347 Gil. 257; State v. McCartey, 17 Minn. 76 Gil. 54.
[6] Dayton v. Warren, 10 Minn. 233 Gil. 185; State v. Grimes, 50 Minn. 123, 52 N. W. 275; State v. Gut, 13 Minn. 341 Gil. 315.
[7] State v. Brown, 12 Minn. 538 Gil. 448.
[8] State v. Grimes, 50 Minn. 123, 52 N. W. 275.
[9] State v. Gut, 13 Minn. 341 Gil. 315.
[10] State v. Stokely, 16 Minn. 282 Gil. 249.
[11] State v. Brown, 12 Minn. 538 Gil. 448.

Judges may fix time for convening petit jury—statute.

§ 25. "The judge or judges of any judicial district may, by order filed with the clerk of the court of the county where a term of court is to be held, at least fifteen days before the sitting of such court, direct that the petit jurors for such or any subsequent term be summoned for any day of the term fixed by such order other than the day now fixed by law, and the venire issued by the clerk for summoning such jurors shall be made returnable on the day so fixed by such order. Such order may be at any time modified or vacated by the court by an order in like manner made and filed with the clerk at any time before the issuing of such venire."

[Laws 1901 ch. 80]

Sunday—courts how far open on—statute.

§ 26. "No one of the courts of this state shall be open for any purpose on Sunday, other than to receive a verdict, or discharge a jury; but this section shall not in any wise prevent the judges of any of said courts exercising jurisdiction in any case where it is necessary for the preservation of the peace, the sanctity of the day, or for arresting and committing an offender."

[G. S. 1894 § 4841] See §§ 837, 921.

May pass title to land—statute.

§ 27. "The district court has power to pass the title to real estate by a judgment without any other act to be done on the part of the defendant, when such appears to be the proper mode to carry its judgments into effect; and such judgment, being recorded in the registry of deeds of the county where such real estate is situated, shall,

Digitized by Google

while in force, be as effectual to transfer the same as the deed of the defendant."

[G. S. 1894 § 5864] See St. Paul etc. Ry. Co. v. Brown, 24 Minn. 517, 575; Gowen v. Conlow, 51 Minn. 213, 53 N. W. 365; Corson v. Shoemaker, 55 Minn. 386, 934, 57 N. W. 134.

Jurisdiction of special proceedings.

§ 28. By statute the district court is invested with jurisdiction to issue writs of mandamus,[1] quo warranto,[2] injunction,[3] ne exeat,[4] habeas corpus,[5] certiorari,[6] and prohibition.[7] It has jurisdiction of proceedings against steamboats and vessels on waters wholly within the state;[8] to change the names of persons;[9] to commit children to orphan asylums;[10] to authorize the adoption of children;[11] to commit infants to reform schools.[12]

[1] See Dunnell, Minn. Pl. §§ 1562–1593.

[2] See Dunnell, Minn. Pl. §§ 1701–1710; State v. Moriarty, 82 Minn. 68, 84 N. W. 495; State v. School District, 85 Minn. 230, 88 N. W. 751.

[3] See Dunnell, Minn. Pl. §§ 1398–1456. [4] See § 5.

[5] See Dunnell, Minn. Pl. §§ 1384–1397.

[6] See § 1980. [7] See § 2013.

[8] G. S. 1894 §§ 6085–6107; Laing v. St. Forest Queen, 69 Minn. 537, 72 N. W. 809 (maritime lien); Stapp v. St. Clyde, 43 Minn. 193, 45 N. W. 430; Id. 44 Minn. 510, 47 N. W. 160 (maritime lien); Griswold v. St. Otter, 12 Minn. 465 Gil. 364 (action on contract of affreightment on navigable waters of U. S. cannot be brought in state court); St. Reveille v. Landreth, 2 Minn. 178 Gil. 146 (action will not lie against vessel for breach of contract out of state); Irvine v. St. Hamburg, 3 Minn. 192 Gil. 124 (action will lie against a vessel, where the cause of action arose wholly within the state, or upon a contract made within and broken without the state, or upon one made without and to be performed within the state; but not where the cause of action arose wholly without the state); Reynolds v. St. Favorite, 10 Minn. 242 Gil. 190 (action under statute a common law remedy —assignee of claim may sue); Boutiller v. St. Milwaukee, 8 Minn. 97 Gil. 72 (action against vessel for causing death); The Menominie, 36 Fed. 197 (how far jurisdiction of federal courts exclusive); The J. E. Rumbell, 148 U. S. 1; Workman v. New York City, 179 U. S. 552 (how far state law followed in federal courts).

[9] G. S. 1894 § 8025. [10] G. S. 1894 § 8013.

[11] G. S. 1894 § 8017. [12] G. S. § 3525.

Miscellaneous powers.

§ 29. The district court has power, by statute, to summon special venires;[1] to fix time for convening petit jury;[2] to transfer title to land;[3] to appoint attorney to assist county attorney;[4] to remove notaries public;[5] to appoint counsel to represent county;[6] to vacate streets in villages;[7] to vacate plats;[8] to alter or vacate cemeteries;[9] to enforce obedience to subpœna issued by railroad and warehouse

Digitized by Google

commission;[10] to order moneys paid into court to be deposited in bank;[11] to control officers of corporations;[12] to prevent usurpation of corporate powers;[13] to abate nuisances;[14] to enforce orders of state board of health;[15] to act as trustee of cemetery association funds.[16]

[1] See § 23. [2] See § 25. [3] See § 27.
[4] G. S. 1894 § 813; State v. Borgstrom, 69 Minn. 508, 72 N. W. 799, 975; State v. Rue, 72 Minn. 296, 75 N. W. 235.
[5] G. S. 1894 § 2277. [6] G. S. 1894 § 811. [7] G. S. 1894 § 1356.
[8] G. S. 1894 § 2315. [9] G. S. 1894 § 3135. [10] G. S. 1894 § 391.
[11] G. S. 1894 § 856. [12] G. S. 1894 § 5895. [13] G. S. 1894 § 5893.
[14] See § 4. [15] G. S. 1894 § 1496. [16] G. S. 1894 §§ 3128, 3115.

APPEALS FROM JUSTICE TO DISTRICT COURT

I CIVIL ACTIONS

In what cases allowed—statute.

§ 30. "Any person aggrieved by any judgment rendered by any justice, when the judgment exceeds fifteen dollars, or, in an action of replevin, when the value of the property as sworn to in the affidavit exceeds fifteen dollars, or when the amount claimed in the complaint exceeds thirty dollars, may appeal by himself or agent, to the district court of the county where the same was rendered; but this does not apply to an action of forcible entry and detainer: provided, that an appeal upon questions of law, as herein provided, may be taken in any action without reference to the amount in controversy, or the amount of the judgment."

[G. S. 1894 § 5067]

§ 31. A defendant may appeal to the district court on questions of fact or of law and fact, where the amount claimed in the complaint exceeds thirty dollars although the recovery against him is less than fifteen dollars.[1] The right of plaintiff to appeal is not affected by the amount claimed in the answer for a counterclaim.[2] In determining whether a judgment "exceeds fifteen dollars" the costs are not to be considered.[3] Jurisdiction to entertain an appeal to review questions of law cannot be given by consent of parties.[4] When a city lies in two counties an appeal from the city justice may be taken to the district court of either county.[5] An appeal lies from the judgment of a justice of the peace in the city of St. Paul, in a civil action against the city, to the municipal court of the city.[6]

[1] Shunk v. Hellmiller, 11 Minn. 164 Gil. 104; Koetke v. Ringer, 46 Minn. 259, 48 N. W. 917.
[2] Ross v. Evans, 30 Minn. 206, 14 N. W. 897.
[3] Dodd v. Cady, 1 Minn. 289 Gil. 223.
[4] Id.
[5] Minneapolis Threshing Machine Co. v. Voigt, 63 Minn. 145, 65 N. W. 261.
[6] Dickerman v. City of St. Paul, 72 Minn. 332, 75 N. W. 591.

Digitized by Google

Mode of taking an appeal—statute.

§ 32. "No appeal shall be allowed in any case unless the following requisites are complied with within ten days after judgment rendered, viz:

(1) An affidavit shall be filed with the justice before whom the cause was tried, stating that the appeal is made in good faith, and not for the purpose of delay.

(2) A bond shall be executed by the party appealing, his agent or attorney, to the adverse party, in a sum sufficient to secure such judgment and costs of appeal, with one or more sureties to be approved by the justice, conditioned that the appellant shall prosecute his appeal with effect, and abide the order of the court therein.

(3) The party appealing shall serve a notice upon the opposite party, his agent or attorney who appeared for him on the trial, specifying the ground of the appeal, generally, as follows: That the appeal is taken upon questions of law alone, or upon questions of fact alone, or upon questions of both law and fact. Said notice shall be served by delivering a copy thereof to the person upon whom service is made, or by leaving a copy at the residence of such person; and the original notice, with proof of service thereof, shall be filed with the justice who rendered the judgment appealed from, within ten days after such service is made.

(4) The party appealing shall pay to the justice his fees for making the return, if demanded by the justice." * * * "Upon a compliance with the foregoing provisions, the justice shall allow the appeal, and make an entry of such allowance in his docket; and all further proceedings on the judgment before the justice shall be suspended by the allowance of the appeal."

[G. S. 1894 §§ 5068, 5069]

Affidavit.

§ 33. The affidavit is jurisdictional and unless it is included in the return the district court is without jurisdiction.[1] If one was in fact properly filed with the justice it may be carried to the district court by a supplementary return.[2] It need not be made before the justice who tried the case and it is not invalid because of a mistake in the date of the judgment.[3] It must appear on its face to have been made before a proper officer;[4] but if it appears on the face of the affidavit that the person subscribing the jurat was a proper officer to take the affidavit, it is sufficient, though the official designation be not affixed to such subscription.[5] All appellants must join in the affidavit.[6] An affidavit purporting to be made before a notary public is a nullity without the notarial seal.[7] A defective affidavit cannot be amended after the statutory time for appealing has expired.[8]

[1] McFarland v. Butler, 11 Minn. 72 Gil. 42; Knight v. Elliott, 22 Minn. 551; Stolt v. Chicago etc. Ry. Co. 49 Minn. 353, 51 N. W. 1103; Harm v. Davies, 79 Minn. 311, 82 N. W. 585.

[2] McFarland v. Butler, 11 Minn. 72 Gil. 42.

[3] Rahilly v. Lane, 15 Minn. 447 Gil. 360.

[4] Knight v. Elliott, 22 Minn. 551.

Digitized by Google

[5] Bandy v. Chicago etc. Ry. Co. 33 Minn. 380, 23 N. W. 547.
[6] Harm v. Davies, 79 Minn. 311, 82 N. W. 585.
[7] Grimes v. Fall, 81 Minn. 225, 83 N. W. 835.
[8] Id.

Bond.

§ 34. A bond is not jurisdictional in the same sense as the affidavit and notice. Defects in the bond may be cured in the district court.

See G. S. 1894 § 5076; Laws 1897 ch. 46; Mills v. Wilson, 59 Minn. 107, 60 N. W. 1083; Eidam v. Johnson, 79 Minn. 249, 82 N. W. 578; Anderson v. County of Meeker, 46 Minn. 237, 48 N. W. 1022; Riley v. Mitchell, 38 Minn. 9, 35 N. W. 472.

Notice of appeal.

§ 35. It is a jurisdictional prerequisite to the allowance of an appeal that the original notice of appeal and proof of service thereof be filed with the justice within the prescribed time and the return must include these papers to give the district court jurisdiction.[1] If they were in fact properly filed but not included in the original return they may be carried to the district court by a supplementary return.[2] It seems that the filing of notice and proof cannot be waived.[3] A notice signed by a party's attorney as such is good although neither the party nor his attorney appeared in the justice court.[4] The affidavit of service is to be liberally construed.[5] Proof of service on the "wife" of a party without showing that it was at his residence is insufficient.[6] A notice served on a county attorney need not designate him as such.[7] The notice must be in writing and properly signed.[8] Proof of service of a notice of appeal by the admission of an agent who did not act or appear for the party on the trial and whose authority is not shown is insufficient.[9] A notice which wholly fails to show by what justice or in what county the judgment was rendered is a nullity.[10] A defective notice or proof of service cannot be aided by extrinsic evidence or amended after the statutory time has expired.[11] An admission of service is a sufficient proof of service.[12] An error in the date of the judgment is immaterial.[13] Proof of service on "Empey & Empey" is not proof of service on E. E. Empey.[14] A notice of appeal must state specifically the grounds upon which the appeal is taken, whether "upon questions of law alone, or upon questions of fact alone, or upon questions of both law and fact." Docket entries certified to the district court are not conclusive as against jurisdictional facts contained in the notice itself.[15]

[1] Looney v. Drometer, 69 Minn. 505, 72 N. W. 797; Marsile v. Milwaukee etc. Ry. Co. 23 Minn. 4; Larrabee v. Morrison, 15 Minn. 196 Gil. 151; Pettingill v. Donnelly, 27 Minn. 332, 7 N. W. 360; Cremer v. Hartmann, 34 Minn. 97, 24 N. W. 341; Stolt v. Chicago etc. Ry. Co. 49 Minn. 353, 51 N. W. 1103; Smith v. Kistler, 84 Minn. 102, 86 N. W. 876.
[2] Looney v. Drometer, 69 Minn. 505, 72 N. W. 797; Rahilly v. Lane, 15 Minn. 447 Gil. 360.

Digitized by Google

[3] Larrabee v. Morrison, 15 Minn. 196 Gil. 151.
[4] Conrad v. Swanke, 80 Minn. 438, 83 N. W. 383.
[5] Toner v. Advance Thresher Co. 45 Minn. 293, 47 N. W. 810.
[6] Stolt v. Chicago etc. Ry. Co. 49 Minn. 353, 51 N. W. 1103.
[7] State v. Jones, 55 Minn. 329, 56 N. W. 1068.
[8] Larrabee v. Morrison, 15 Minn. 196 Gil. 151.
[9] Cremer v. Hartmann, 34 Minn. 97, 24 N. W. 341.
[10] Pettingill v. Donnelly, 27 Minn. 332, 7 N. W. 360.
[11] Id.; Stolt v. Chicago etc. Ry. Co. 49 Minn. 353, 51 N. W. 1103; Cremer v. Hartmann, 34 Minn. 97, 24 N. W. 341; Graham v. Conrad, 66 Minn. 471, 69 N. W. 334; Grimes v. Fall, 81 Minn. 225, 83 N. W. 835.
[12] Rahilly v. Lane, 15 Minn. 447 Gil. 360.
[13] Id.
[14] Graham v. Conrad, 68 Minn. 471, 69 N. W. 334.
[15] Smith v. Kistler, 84 Minn. 102, 86 N. W. 876.

Payment of fees and costs.

§ 36. Under an old statute, which has since been repealed, the payment of costs was a condition precedent to the right of appeal.[1] Under the existing law it is necessary for the appellant to pay the justice his fees for making the return, if demanded. It is probably not necessary that the return should affirmatively show this payment, unless it shows that the fees were demanded.[2] A party may appeal without paying his own witnesses.[3]

[1] Trigg v. Larson, 10 Minn. 220 Gil. 175; Rahilly v. Lane, 15 Minn. 447 Gil. 360.
[2] See § 32 (4).
[3] Trigg v. Larson, 10 Minn. 220 Gil. 175.

The return—statutes.

§ 37. "Within twenty days after filing the notice of appeal, and before the first day of the next term of the district court, the justice shall file in the office of the clerk of the district court wherein he resides, a transcript of all the entries made in his docket, together with all the process and other papers relating to the action, and filed with the justice; and upon the filing of his return, the district court shall become possessed of the action, and shall proceed therein in the same manner, as near as may be, as in actions originally commenced in that court, except as herein otherwise provided: provided, that upon an appeal upon questions of law alone, the justice before whom the action is tried shall, upon the request of either party to the suit, return to the district court a true transcript of all the evidence given upon the trial, and the same shall be filed with the clerk of the district court as a part of the return of said justice." [1] * * * "Upon an appeal being made and allowed, the district court may, by attachment, compel a return by a justice of the proceedings in the action, and of the papers required of him to be returned." [2] * * * "Whenever the court is satisfied that the return of the justice is essentially erroneous or defective, the court may, by attachment, compel him to amend the same." [3] * * * "Whenever an appeal is

Digitized by Google

taken after any justice has gone out of office, from a judgment rendered by him while in office, such person shall make return to such appeal, in like manner and with like effect as if such appeal had been taken while he was in office." [4]

[1] G. S. 1894 § 5070. [2] G. S. 1894 § 5073.
[3] G. S. 1894 § 5075. [4] G. S. 1894 § 5081.

§ 38. In dismissing an appeal for want of a return the court cannot enter a judgment of affirmance under Laws 1895 ch. 24.[1] The return must show affirmatively compliance with every jurisdictional prerequisite to an appeal; otherwise the district court will not acquire jurisdiction and must either dismiss the appeal or compel a return.[2] The return cannot be disputed or supplemented by affidavits.[3] Upon an appeal on questions of law the justice is not required to return the evidence unless requested and unless it affirmatively appears from the return that such a request was made or that all the evidence is returned without request it will be presumed that sufficient competent evidence was introduced under the issues to support the judgment.[4] If all the evidence is returned it will be considered by the district court although no request was made for its return by the appellant.[5] The certificate of the justice that the return contains all the evidence must be positive and certain.[6] A further or supplementary return may be ordered.[7] A judgment will not be reversed for any defect in the return, the party's remedy being a supplementary return.[8] The return must show jurisdiction both of the person and the cause of action.[9] It need not show the county of the court.[10] Docket entries certified are not conclusive as against jurisdictional facts contained in the notice itself. A certificate that all papers have been returned, will be presumed to refer to the only notice found in the files so returned, and, if its identity is questioned, the burden is on the party who denies it to secure an amended return, if necessary to determine the question.[11]

[1] Rowell v. Tier, 66 Minn. 432, 69 N. W. 222.

[2] McFarland v. Butler, 11 Minn. 72 Gil. 42; Looney v. Drometer, 69 Minn. 505, 72 N. W. 797; Knight v. Elliott, 22 Minn. 551; Stolt v. Chicago etc. Ry. Co. 49 Minn. 353, 51 N. W. 1103; Harm v. Davies, 79 Minn. 311, 82 N. W. 585; Grimes v. Fall, 81 Minn. 225, 83 N. W. 835; Smith v. Kistler, 84 Minn. 102, 86 N. W. 876.

[3] Plymat v. Brush, 46 Minn. 23, 48 N. W. 443.

[4] See § 44 (7).

[5] Smith v. Force, 31 Minn. 119, 16 N. W. 704.

[6] Payson v. Everett, 12 Minn. 216 Gil. 137; Smith v. Force, 31 Minn. 119, 16 N. W. 704; Dean v. St. Paul etc. Ry. Co. 53 Minn. 504, 55 N. W. 628; Continental Ins. Co. v. Richardson, 69 Minn. 433, 72 N. W. 458; Kloss v. Sanford, 77 Minn. 510, 80 N. W. 628; Plymat v. Brush, 46 Minn. 23, 48 N. W. 443.

[7] Plymat v. Brush, 46 Minn. 23, 48 N. W. 443; Cour v. Cowdery, 53 Minn. 51, 54 N. W. 935; Smith v. Victorin, 54 Minn. 338, 56 N. W. 47; McFarland v. Butler, 11 Minn. 72 Gil. 42; Rahilly v. Lane, 15 Minn. 447 Gil. 360; Looney v. Drometer,

Digitized by Google

69 Minn. 505, 72 N. W. 797; Craighead v. Martin, 25 Minn. 41; State v. Christensen, 21 Minn. 500; Smith v. Kistler, 84 Minn. 102, 86 N. W. 876.

[8] Cour v. Cowdery, 53 Minn. 51, 54 N. W. 935; Rahilly v. Lane, 15 Minn. 447 Gil. 360.

[9] Barnes v. Holton, 14 Minn. 357 Gil. 275; Larrabee v. Morrison, 15 Minn. 196 Gil. 151.

[10] Barber v. Kennedy, 18 Minn. 216 Gil. 196.

[11] Smith v. Kistler, 84 Minn. 102, 86 N. W. 876.

Entering appeal for trial.

§ 39. "The appellant shall cause an entry of the appeal to be made by the clerk of the district court, upon the calendar of actions for trial, on or before the second day of the term, unless otherwise ordered by said court; and the plaintiff in the court below shall be plaintiff in said district court. And if the appellant fails or neglects to enter the appeal as aforesaid, the appellee may have the same entered at any time during that or some succeeding term, and the judgment of the court below shall be entered against the appellant for the same, with interest and the costs of both courts: provided, that it shall not be necessary for either party to notice the appeal for trial, nor file a note of issue with the clerk."

[G. S. 1894 § 5072] Cited, Minnesota Valley Ry. Co. v. Doran, 17 Minn. 191 Gil. 165; Gulickson v. Bodkin, 78 Minn. 33, 80 N. W. 783.

§ 40. The absolute right of an appellant to enter his appeal for trial on the district court calendar terminates with the second day of the term and does not continue until the respondent has exercised his right, under the last clause of the section, to have the judgment of the justice affirmed and entered against the appellant.[1] The omission of the appellant to cause the entry does not affect the jurisdiction of the district court over the action. The court may relieve the appellant from the consequences of his omission and try the cause on its merits.[2] Where such relief has been improvidently granted the court may subsequently vacate its order and restore the respondent to the right to enter the judgment of the justice against the appellant.[3] The setting aside of a judgment entered upon motion of appellee, for failure to place the appeal on the calendar, is discretionary with the district court and its action will not be reviewed on appeal except for a clear abuse of discretion.[4] An appeal on questions of law alone may be brought on for hearing at any time [5] and at any place in the district.[6] An appeal may be placed on the calendar although thirty days have not elapsed since its allowance.[7]

[1] Sundet v. Steenerson, 69 Minn. 351, 72 N. W. 569.

[2] Christian v. Dorsey, 69 Minn. 346, 72 N. W. 568; Sundet v. Steenerson, 69 Minn. 351, 72 N. W. 569.

[3] Sundet v. Steenerson, 69 Minn. 351, 72 N. W. 569.

[4] Locke v. Osborne-McMillan Elevator Co. 80 Minn. 22, 82 N. W. 1084.

Digitized by Google

[5] Rollins v. Nolting, 53 Minn. 232, 54 N. W. 1118.
[6] Chesterson v. Munson, 27 Minn. 498, 8 N. W. 593.
[7] Id.

When appeal to be tried—statute.

§ 41. "All appeals allowed thirty days before the first day of the term of the district court next after the appeal allowed, shall be determined at such term, unless continued for cause."

[G. S. 1894 § 5077] See Chesterson v. Munson, 27 Minn. 498, 8 N. W. 593; Rollins v. Nolting, 53 Minn. 232, 54 N. W. 1118.

The action in the district court—statute.

§ 42. "Upon an appeal upon questions of law alone, the action shall be tried in the district court upon the return of the justice;[1] upon an appeal upon questions of fact alone, or upon questions of law and fact, the action shall be tried in the district court in the same manner as actions originally commenced in said court.[2] And in all cases where an appeal has been allowed by a justice of the peace in any case, and return thereof made to the district court, and said appeal shall be for any cause dismissed, the said district court shall nevertheless enter its judgment in said action affirming the judgment of the court below, and the costs of both courts may be taxed before the clerk of said district court and entered in said judgment, and the respondent have execution therefor against the appellant and his sureties upon the appeal bond, as in other cases."[3]

[Laws 1895 ch. 24]

[1] See § 44. [2] See § 43.

[3] Rowell v. Tier, 66 Minn. 432, 69 N. W. 222; Graham v. Conrad, 66 Minn. 470, 69 N. W. 215.

Practice on appeal on questions of fact.

§ 43. An appeal on questions of law and fact or of fact alone carries the case to the district court for a trial de novo upon the merits irrespective of errors or irregularities occurring in the course of the trial in the justice court or in the judgment rendered therein.[1] By taking such an appeal a party waives all objection to the jurisdiction of the court over his person.[2] The district court may allow an amendment of the complaint increasing the amount of plaintiff's claim beyond that to which the jurisdiction of the justice is limited.[3] or an amendment of the answer setting up a new defence.[4] If the plaintiff amends his complaint in the district court the defendant has a strict right to answer it.[5] Where a defendant who defaults in the justice court appeals to the district court he is not entitled to answer in the latter court as a matter of course. He must show facts tending to excuse his default. If any fair excuse is offered the discretion of the court is to be liberally exercised in allowing such an application.[6] By appealing on questions of law and fact the appellant waives the objection that the justice was without jurisdiction because of the amount in controversy.[7] Where, before the justice, judgment was for one defendant, and against the other, and the lat-

Digitized by Google

ter appeals, the trial in the district court proceeds against both defendants and judgment may be rendered against both.[8] The trial in the district court is of the issues made by the pleadings in the justice court unless other pleadings are ordered or allowed.[9]

[1] Hooper v. Farwell, 3 Minn. 106 Gil. 58; Bingham v. Stewart, 14 Minn. 214 Gil. 153; Barber v. Kennedy, 18 Minn. 216 Gil. 196; Craighead v. Martin, 25 Minn. 41; Seurer v. Horst, 31 Minn. 479, 18 N. W. 283; Webb v. Paxton, 36 Minn. 532, 32 N. W. 749; Welter v. Nokken, 38 Minn. 376, 37 N. W. 947; McOmber v. Balow, 40 Minn. 388, 42 N. W. 83; Finke v. Lukensmeyer, 51 Minn. 252, 53 N. W. 546; McCubrey v. Lankis, 74 Minn. 302, 77 N. W. 144.

[2] Seurer v. Horst, 31 Minn. 479, 18 N. W. 283; McCubrey v. Lankis, 74 Minn. 302, 77 N. W. 144. See Lee v. Parrett, 25 Minn. 128.

[3] McOmber v. Balow, 40 Minn. 388, 42 N. W. 83.

[4] Bingham v. Stewart, 14 Minn. 214 Gil. 153.

[5] Conrad v. Swanke, 80 Minn. 438, 83 N. W. 383.

[6] Id.; Libby v. Mikelborg, 28 Minn. 38, 3 N. W. 903; Webb v. Paxton, 36 Minn. 532, 32 N. W. 749.

[7] Lee v. Parrett, 25 Minn. 128.

[8] Hooper v. Farwell, 3 Minn. 106 Gil. 58.

[9] Desnoyer v. L'Hereux, 1 Minn. 17 Gil. 1; Barth v. Horejs, 45 Minn. 184, 47 N. W. 717.

Practice on appeal upon questions of law alone.

§ 44. Upon an appeal upon questions of law alone the district court does not act strictly as an appellate court to "review" the determination of the justice court; it tries the issues presented by the record and renders the proper judgment. The statute does not say that the judgment appealed from shall be reversed, affirmed or modified, but that the appeal shall be tried. The appeal is to be heard and examined solely upon the return of the justice and is to be determined so as to administer complete justice so far as the return will permit.[1] The court may affirm, or reverse, or modify the judgment of the justice, and in case of a reversal it may, in a proper case, determine the merits, and render judgment thereon for the appellant.[2] The statute makes no provision for remanding a cause to the justice and ordering a retrial, in case of reversal. A simple reversal, not determining the merits, has the same effect as a judgment of dismissal. It annuls all the proceedings before the justice, and leaves the parties to proceed de novo, as though no action had been commenced; and in rendering such a judgment the court may and ought to restore the parties to the situation they were in before the action was commenced.[3] In all cases there is no remanding to the justice court; the judgment entered on the appeal is the judgment of the district court and execution issues out of the district court rather than the justice court, even in case of a simple affirmance. An appeal properly perfected operates to supersede the judgment of the justice whether it is upon questions of law alone

Digitized by Google

or upon questions of law and fact or fact alone.[4] When all the evidence is returned the appellant may raise, as a question of law, the point that there is no evidence to justify the judgment; but in such a case the court can go no further than to determine whether there is any evidence reasonably tending to support the judgment and cannot consider the question of the preponderance of the evidence.[5] The district court will consider the sufficiency of the evidence if all the evidence is included in the return although it was included without request.[6] If the return does not contain all the evidence or any request for its return the sufficiency of the evidence will not be considered but it will be presumed that sufficient competent evidence was introduced under the issues to support the judgment.[7] A judgment cannot be reversed merely because the justice, having been requested to do so, has not returned all the evidence. The party's remedy in such a case is by proceedings to compel a full return.[8] By appealing on questions of law alone a party does not waive objection to the jurisdiction of the court over his person.[9] After the district court has rendered its decision it may reconsider and modify it.[10] Where the return fails to specify the items of the costs taxed the judgment will not be reversed or modified on that account, unless it appears that items not taxable have been erroneously included. The remedy is an amended return.[11] The pleadings will be construed with great liberality when objection is made to them for the first time on appeal.[12] A judgment will not be reversed for any mere defect in the return.[13] Dismissing an appeal instead of affirming the judgment where the respondent is entitled to an affirmance is immaterial error.[14] Failure to file a note sued on is not a ground for reversal.[15] Objection to the jurisdiction of the justice over the subject matter may be taken in the district court.[16] Admissions to an unauthorized reply in the justice court may be treated in the district court as formal admissions on the trial.[17] Under existing statutes the scope of the review in the district court is not limited to objections raised and passed upon in the justice court.[18] Formerly the rule was otherwise.[19] But it is still necessary to except to rulings of a justice as to the admission of evidence, the competency of witnesses, and to all other rulings made during the course of the trial, in order to review them on an appeal on questions of law alone.[20]

[1] Kates v. Thomas, 14 Minn. 460 Gil. 343; Craighead v. Martin, 25 Minn. 41.

[2] Id.; Thorson v. Sauby, 68 Minn. 166, 70 N. W. 1083; Terryll v. Bailey, 27 Minn. 304, 7 N. W. 261; Watson v. Ward, 27 Minn. 26, 6 N. W. 407; Meister v. Russell, 53 Minn. 54, 54 N. W. 935; Johnston Harvester Co. v. Clark, 30 Minn. 308, 15 N. W. 252; State v. Bliss, 21 Minn. 458; Larson v. Johnson, 83 Minn. 351, 86 N. W. 350; Hardenburg v. Roesner, 83 Minn. 7, 85 N. W. 719; Neuhauser v. Banish, 84 Minn. 286, 87 N. W. 774; Merriman v. Anselment, (Minn.) 89 N. W. 1125.

[3] Terryll v. Bailey, 27 Minn. 304, 7 N. W. 261; Daley v. Mead, 40 Minn. 382, 42 N. W. 85.

Digitized by Google

[4] State v. Bliss, 21 Minn. 458—a criminal case, but the civil practice is the same.
[5] Palmer v. St. Paul etc. Ry. Co. 38 Minn. 415, 38 N. W. 100; Croonquist v. Flatner, 41 Minn. 291, 43 N. W. 9; Larson v. Johnson, 83 Minn. 351, 86 N. W. 350; Neuhauser v. Banish, 84 Minn. 286, 87 N. W. 774.
[6] Smith v. Force, 31 Minn. 119, 16 N. W. 704; Dean v. St. Paul, 53 Minn. 504, 55 N. W. 628.
[7] Hinds v. Am. Express Co. 24 Minn. 95; Warner v. Fischbach, 29 Minn. 262, 13 N. W. 47; Continental Ins. Co. v. Richardson, 69 Minn. 433, 72 N. W. 458; Tune v. Sweeney, 34 Minn. 295, 25 N. W. 628.
[8] Cour v. Cowdery, 53 Minn. 51, 54 N. W. 935.
[9] Craighead v. Martin, 25 Minn. 41; McCubrey v. Lankis, 74 Minn. 302, 77 N. W. 144.
[10] Meister v. Russell, 53 Minn. 54, 54 N. W. 935.
[11] Smith v. Victorin, 54 Minn. 338, 56 N. W. 47.
[12] Thompson v. Killian, 25 Minn. 111; Polk v. Amer. etc. Loan Co. 68 Minn. 169, 70 N. W. 1078.
[13] Rahilly v. Lane, 15 Minn. 447 Gil. 360.
[14] Schroeder v. Harris, 43 Minn. 160, 45 N. W. 4.
[15] Tune v. Sweeney, 34 Minn. 295, 25 N. W. 628.
[16] Mattice v. Litcherding, 14 Minn. 142 Gil. 110. See Barber v. Kennedy, 18 Minn. 216 Gil. 196; Franek v. Vaughan, 81 Minn. 236, 83 N. W. 982.
[17] Warder etc. Co. v. Willyard, 46 Minn. 531, 49 N. W. 300.
[18] Franek v. Vaughan, 81 Minn. 236, 83 N. W. 982; Neuhauser v. Banish, 84 Minn. 286, 87 N. W. 774.
[19] See Bennett v. Phelps, 12 Minn. 326 Gil. 216; Barber v. Kennedy, 18 Minn. 216 Gil. 196.
[20] Franek v. Vaughan, 81 Minn. 236, 83 N. W. 982.

Presumptions on appeal.

§ 45. If the return shows no request to the justice to return the evidence and his certificate does not show that he has returned it the presumption is that sufficient competent evidence was introduced to sustain the judgment.[1] There is no presumption that the appellant complied with the prerequisites of an appeal.[2] The presumption is that the justice did his duty and taxed only such costs as were legally taxable.[3] Where a justice has jurisdiction the same presumption as to regularity is indulged in favor of his proceedings as of those of a court of record.[4] After judgment every reasonable intendment is to be indulged in favor of the validity and regularity of justice court proceedings.[5] A certificate attached to a return is presumed to refer to the papers returned.[6]

[1] See § 44 (7). [2] See §§ 33, 35.
[3] Smith v. Victorin, 54 Minn. 338, 56 N. W. 47.
[4] Clague v. Hodgson, 16 Minn. 329 Gil. 291; Payson v. Everett, 12 Minn. 216 Gil. 137; Burt v. Bailey, 21 Minn. 403; Vaule v. Miller, 64 Minn. 485, 67 N. W. 540; Ellegard v. Haukaas,

Digitized by Google

72 Minn. 246, 75 N. W. 128; Hecklin v. Ess, 16 Minn. 51 Gil. 38.

[5] Polk v. Amer. etc. Loan Co. 68 Minn. 169, 70 N. W. 1078; State v. Christensen, 21 Minn. 500; Smith v. Kistler, 84 Minn. 102, 86 N. W. 876.

[6] Smith v. Kistler, 84 Minn. 102, 86 N. W. 876.

Status of case after appeal.

§ 46. When an appeal from the judgment of a justice of the peace is properly taken, and a return thereto is made, the whole proceedings before the justice become mere lis pendens in the district court.[1] The district court "becomes possessed of" the action and subsequent proceedings are not jurisdictional.[2]

[1] Fallman v. Gilman, 1 Minn. 179 Gil. 153; Bryan v. Farnsworth, 19 Minn. 239 Gil. 198.

[2] Christian v. Dorsey, 69 Minn. 346, 72 N. W. 568.

Dismissal of action.

§ 47. On an appeal from a justice to the district court the plaintiff may dismiss his action under the same circumstances and upon the same conditions as if the action had originated in the district court.

Fallman v. Gilman, 1 Minn. 179 Gil. 153.

Affirmance for failure to prosecute—judgment against sureties.

§ 48. Provision is made by statute for rendering judgment against the appellant upon his default and for judgment against the appellant and his sureties in all cases where the respondent is entitled to judgment.

See G. S. 1894 §§ 5078-5080; Laws 1895 ch. 24; Davidson v. Farrell, 8 Minn. 258 Gil. 225; Libby v. Mikelborg, 28 Minn. 38, 8 N. W. 903; Libby v. Husby, 28 Minn. 40, 8 N. W. 903; Stapp v. The Clyde, 44 Minn. 510, 47 N. W. 160.

II CRIMINAL ACTIONS

When allowed—mode—statute.

§ 49. "The person charged with and convicted by any such justice of any such offence may appeal from the judgment of such justice to the district: provided, that no appeal shall be allowed in any case, unless the following requisites are complied with within ten days after such conviction, viz:

(1) The person so appealing shall enter into a recognizance, with one or more sufficient sureties, to be approved by such justice, conditioned to appear before the district court on the first day of the general term thereof, next to be holden in and for the same county, and abide the judgment of said court therein, and in the meantime to keep the peace and be of good behavior.

(2) The party appealing shall serve a notice upon the county attorney of the county, or in case of his absence from the county, or in case there is no county attorney, on the clerk of the district court of said county, specifying generally the grounds of his appeal,

Digitized by Google

as follows, to wit: that the appeal is taken upon questions of law alone, or upon questions of fact alone, or upon questions of law and fact."

[G. S. 1894 § 5112]

§ 50. Where, on appeal, it appears from the docket entry that the proper recognizance has been given, notice of appeal served, proof thereof made and the appeal allowed, the presumption in favor of the verity of the docket entry, as well as of the performance of duty by the justice, throws upon the party seeking to contradict such entry the burden of affirmatively showing its falsity.[1] An affidavit of service of notice of appeal on the county attorney need not designate him as such.[2] Certiorari will not lie after the time for appealing has expired.[3] The right of appeal is statutory and may be taken away if a remedy by certiorari remains.[4]

[1] State v. Christensen, 21 Minn. 500. See Smith v. Kistler, 84 Minn. 102, 86 N. W. 876.

[2] State v. Jones, 55 Minn. 329, 56 N. W. 1068.

[3] State v. Milner, 16 Minn. 55 Gil. 43.

[4] Tierney v. Dodge, 9 Minn. 166 Gil. 153.

Practice in the district court—statute.

§ 51. "Upon a compliance with the foregoing provisions the justice shall allow the appeal, and make such entry of his allowance in his docket; and all further proceedings on the judgment before the justice shall be suspended by the allowance of the appeal. And if the defendant has been committed to jail, the justice shall make a certificate setting forth that the defendant has perfected an appeal from said judgment, and cause the same to be served upon the sheriff of the county, or keeper of the common jail, who shall thereupon immediately release the defendant from custody. The justice shall thereupon make a return of all the proceedings had before him, and cause the complaint, warrant, recognizance, original notice of appeal, with proof of service thereof, and return, and all other papers relating to said cause, and filed with him, to be filed in the district court of the same county, on or before the first day of the general term thereof next to be holden in and for said county. And the complainant and witnesses may also be required to enter into recognizance, with or without sureties, in the discretion of the justice, to appear at said district court at the time last aforesaid, and abide the order of the court therein. Upon an appeal on questions of law alone the cause shall be tried in the district court upon the return of the justice. On an appeal taken upon questions of fact alone, or upon questions of both law and fact, the cause shall be tried in the same manner as if commenced in the district court: Provided, that upon an appeal upon questions of law alone, the justice before whom the action is tried shall, upon the request of either party to the suit, return to the district court a true and certified transcript of all the evidence offered or received upon the trial, and the same shall be filed with the clerk of the district court as a part of the return of said justice."

[Laws 1901 ch. 24]

Digitized by Google

§ 52. An appeal on questions of law and fact is to be tried in the same manner as if the action were originally commenced in the district court and without regard to any errors that may have been committed in the justice court.[1] An appeal properly taken operates to supersede the judgment of the justice whether it is taken upon questions of law or fact or both. In all cases judgment must be entered in the district court. And whether the appeal is upon questions of law or fact or both it is the duty of the district court to render such judgment as, according to the law of the case, ought to be entered, and if the judgment of the justice is in part valid, and in part erroneous, it may be affirmed in part and reversed as to the remainder.[2] Upon an appeal upon questions of law alone the sufficiency of the evidence to justify the judgment may be considered if the return contains all the evidence.[3] If all the evidence is not returned, and it does not appear that the justice was requested to return it the presumption is that there was sufficient evidence introduced on the trial to sustain the judgment.[4] The clerk of the district court has no authority to revise the taxation of costs by the justice.[5]

[1] State v. Tiner, 13 Minn. 520 Gil. 488.
[2] State v. Bliss, 21 Minn. 458; Village of Elbow Lake v. Holt, 69 Minn. 349, 72 N. W. 564.
[3] State v. Mahoney, 23 Minn. 181—State v. McGinnis, 30 Minn. 48, 14 N. W. 256 is overruled by statute.
[4] State v. McGinnis, 30 Minn. 48, 14 N. W. 256. See § 44 (7).
[5] State v. Reckards, 21 Minn. 47.

Costs on appeal—statute.

§ 53. "The appellant shall not be required to advance any fees in claiming his appeal or in prosecuting the same; but if convicted in the district court, or if sentenced for failing to prosecute his appeal, he may be required, as a part of his sentence, to pay the whole or any part of the costs of prosecution in both courts."

[G. S. 1894 § 5114]

Failure to prosecute—statute.

§ 54. "If the appellant fails to enter and prosecute his appeal, he shall be defaulted on his recognizance; and the district court may award sentence against him for the offence whereof he was convicted, in like manner as if he had been convicted thereof in that court; and if he is not then in custody, process may be issued to bring him into court to receive sentence."

[G. S. 1894 § 5115]

Judgment against defendant and sureties—statute.

§ 55. "If the judgment of the justice is affirmed, or, upon any trial in the district court, the defendant is convicted, and any fine assessed, judgment shall be rendered for such fine, and costs in both courts, against the defendant and his sureties."

[G. S. 1894 § 5116] See Baker v. U. S. 1 Minn. 207 Gil. 181; Borough of St. Peter v. Bauer, 19 Minn. 327 Gil. 282; State v. Bliss, 21 Minn. 458.

Digitized by Google

APPEALS FROM THE PROBATE TO THE DISTRICT COURT

In what cases allowed—statute.

§ 56. "An appeal may be taken to the district court from a judgment, order or decree of the probate court in the following cases:

(1) An order admitting a will to probate and record, or refusing the same.[1]

(2) An order appointing an executor, administrator or guardian, or removing him, or refusing to make such appointment or removal.[2]

(3) An order directing or refusing to direct real property to be sold, mortgaged or leased, or confirming or refusing to confirm such sale, mortgaging or leasing.[3]

(4) An order allowing any claim of any creditor against the estate in whole or in part to the amount of twenty dollars or more.[4]

(5) An order disallowing any claim of any creditor against the estate in whole or in part to the amount of twenty dollars or more.[5]

(6) An order or decree by which a legacy or distributive share is allowed or payment thereof directed, or such allowance or direction refused when the amount in controversy exceeds twenty dollars.[6]

(7) An order setting apart property, or making an allowance for the widow and child, or refusing the same.[7]

(8) An order allowing an account of an executor, administrator or guardian, or refusing to allow the same, when the amount allowed or disallowed exceeds twenty dollars.[8]

(9) An order vacating or refusing to vacate a previous order, judgment, or decree made and rendered, alleged to have been procured by fraud, misrepresentation, or through surprise or excusable inadvertence or neglect.[9]

(10) An order or decree directing or refusing a conveyance of real estate.[10]

(11) A final judgment or decree assigning the residue of the estate of a decedent.[11]

(12) An order denying an application for the restoration to capacity of any person under guardianship." [12]

[G. S. 1894 § 4665 as amended by Laws 1901 ch. 147]

[1] Graham v. Burch, 47 Minn. 171, 49 N. W. 697; In re Brown, 32 Minn. 443, 21 N. W. 474.

[2] State v. Probate Court, 83 Minn. 58, 85 N. W. 917 (overruled by amendment of 1901); Chadwick v. Dunham, 83 Minn. 366, 86 N. W. 351; Brown v. Huntsman, 32 Minn. 466, 21 N. W. 555; Mumford v. Hall, 25 Minn. 347.

[3] State v. Probate Court, 19 Minn. 128 Gil. 95.

[4] State v. Probate Court, 28 Minn. 381, 10 N. W. 209; Berkey v. Judd, 31 Minn. 271, 17 N. W. 618; State v. Probate Court, 72 Minn. 434, 75 N. W. 700; Capehart v. Logan, 20 Minn. 442 Gil. 395.

Digitized by Google

[6] Smith v. Pence, 62 Minn. 321, 64 N. W. 822; State v. Probate Court, 76 Minn. 132, 78 N. W. 1039; State v. Probate Court, 51 Minn. 241, 53 N. W. 463.

[8] State v. Willrich, 72 Minn. 165, 75 N. W. 123 (overruled by amendment of statute. See [11]); Mintzer v. St. Paul Trust Co. 45 Minn. 323, 47 N. W. 973.

[7] Tracy v. Tracy, 79 Minn. 267, 82 N. W. 635. See Mintzer v. St. Paul Trust Co. 45 Minn. 323, 47 N. W. 973.

[8] Watson v. Watson, 65 Minn. 335, 68 N. W. 44; St. Paul Trust Co. v. Kittson, 84 Minn. 493, 87 N. W. 1012.

[9] In re Gragg, 32 Minn. 142, 19 N. W. 651; State v. Probate Court, 33 Minn. 94, 22 N. W. 10; In re Hause, 32 Minn. 155, 19 N. W. 973; Larson v. How, 71 Minn. 250, 73 N. W. 966.

[10] See State v. Probate Court, 33 Minn. 94, 22 N. W. 10.

[11] Overrules State v. Willrich, 72 Minn. 165, 75 N. W. 123.

[12] Overrules State v. Probate Court, 83 Minn. 58, 85 N. W. 917.

Appeal from part of order or judgment.

§ 57. An appeal may be taken from a part of a final order or judgment if the part whereby the appellant is aggrieved is so far distinct and independent that it may be adjudicated on appeal without bringing up for review the entire order or judgment.

St. Paul Trust Co. v. Kittson, 84 Minn. 493, 87 N. W. 1012.

Who may appeal from allowance or disallowance of claim—statute.

§ 58. "The appeal may be taken from the allowance or disallowance of a claim against the estate, by the executor, administrator or guardian, or the creditor. When an executor or administrator declines to appeal from the allowance of a claim against the estate, or the disallowance of a setoff or counterclaim, any person interested in the estate as creditor, devisee, legatee, or heir, may appeal from such decision, in the same manner as the executor or administrator might have done; and the same proceedings shall be had, in the name of the executor or administrator: provided, that the person appealing in such cases gives a bond with sureties, to be approved by the judge of probate, as well to secure the estate from damages and costs as to secure the intervening damages and costs to the adverse party."

[G. S. 1894 § 4666]

§ 59. The notice of appeal should be signed by the creditor, devisee, legatee or heir appealing and should state that he appeals. The statute does not require proof of the fact of the refusal of the executor or administrator to appeal to be made or filed as a prerequisite to such right of appeal. The proof may be made at any time when the fact is called in question, as upon a motion to dismiss the appeal.[1] The payee of a note given for the benefit of another is a "creditor" within this section.[2] The allowance or disallowance is conclusive on creditors and others not appealing.[3] Prior to the adoption of the code this subject was regulated by G. S. 1878 ch. 53 §§ 24–32.[4]

Digitized by Google

[1] Schultz v. Brown, 47 Minn. 255, 49 N. W. 982.
[2] Lake v. Albert, 37 Minn. 453, 35 N. W. 177.
[3] State v. Probate Court, 25 Minn. 22.
[4] See Auerbach v. Gloyd, 34 Minn. 500, 27 N. W. 193; Estate of Columbus v. Monti, 6 Minn. 568 Gil. 403; Wood v. Myrick, 9 Minn. 149 Gil. 139; Capehart v. Logan, 20 Minn. 442 Gil. 395; In re Estate of Charles, 35 Minn. 438, 29 N. W. 170; Lake v. Albert, 37 Minn. 453, 35 N. W. 177; Riley v. Mitchell, 38 Minn. 9, 35 N. W. 472.

Who may appeal generally—statute.

§ 60. "In all other cases [than specified in § 58, supra] the appeal can only be taken by a party aggrieved, who appeared and moved for or opposed the order or judgment appealed from, or who, being entitled to be heard thereon, had not due notice or opportunity to be heard, the latter fact to be shown by affidavit filed and served with the notice."

[G. S. 1894 § 4667; Prob. Code § 254; G. S. 1878 ch. 49 § 14]

§ 61. An aggrieved party is one who, as heir, devisee, legatee, or creditor, has what may be called a legal interest in the assets of the estate and their due administration.[1] A debtor of the estate is not such a party.[2] "Opportunity" as used in this section means such opportunity as the party is entitled to by law. The fact that notice duly served by publication did not convey actual notice to a party does not constitute want of opportunity.[3] The affidavit need not show how the party was deprived of an opportunity.[4]

[1] In re Hardy, 35 Minn. 193, 28 N. W. 219; State v. Bazille, 81 Minn. 370, 84 N. W. 120; Edgerly v. Alexander, 82 Minn. 96, 84 N. W. 653.
[2] In re Hardy, 35 Minn. 193, 28 N. W. 219.
[3] In re Hause, 32 Minn. 155, 19 N. W. 973.
[4] In re Brown, 32 Minn. 443, 21 N. W. 474.

Mode of appealing—statute.

§ 62. "No appeal shall be effectual for any purpose, unless the following requisites are complied with by the appellant within thirty days after notice of the order, judgment or decree appealed from, viz:

(1) The appellant shall serve a notice of such appeal on the opposite party, his agent or attorney, who appeared for him or them in the probate court, or in case no appearance is made in the probate court by the adverse party, then by delivering a copy of such notice to the judge of the probate court for them; such notice shall specify the matter, judgment, order or decree appealed from, or such part thereof as is appealed from, and signed by the appellant or his attorney, and shall be served in the same manner as notices in civil actions, and such notice, with the proof of service of the same, shall be filed in the probate court.

(2) In case any person other than the executor, administrator or guardian appeals, they shall execute a bond to the probate judge, with sufficient sureties to be approved by the probate court, condi-

Digitized by Google

tioned that the appellant will prosecute his appeal with due diligence to a final determination, and pay all costs and disbursements, and abide the order of the court therein. In no case can an appeal from an order, judgment or decree be taken after six months from the entry thereof."

[G. S. 1894 § 4668; Prob. Code § 255]

§ 63. Prior to the enactment of this section appeals were taken, either upon questions of law or of law and fact as in appeal from a justice court.[1] A statement in a notice that the appeal is taken upon questions of law and fact may be treated as surplusage.[2] Notice may be served on the attorney of the proponent of a will.[3] The bond is not jurisdictional and any defect therein may be remedied in the district court.[4] An undertaking may be filed in place of a bond.[5] The notice of appeal cannot be amended.[6]

[1] Washburn v. Van Steenwyk, 32 Minn. 354, 20 N. W. 324; McCloskey v. Plantz, 76 Minn. 323, 79 N. W. 176.

[2] McCloskey v. Plantz, 76 Minn. 323, 79 N. W. 176.

[3] In re Brown, 32 Minn. 443, 21 N. W. 474.

[4] Riley v. Mitchell, 38 Minn. 9, 35 N. W. 472. See § 34.

[5] In re Brown, 35 Minn. 307, 29 N. W. 131.

[6] G. S. 1894 § 4669; Probate Code § 256; McCloskey v. Plantz, 76 Minn. 323, 79 N. W. 176.

Return—statute.

§ 64. "Upon filing such notice and proof of service, the probate court shall forthwith make and return to the district court of the proper county a certified transcript of all the papers and proceedings upon which the order, judgment or decree appealed from shall have been founded, including a copy of such order, judgment or decree, and also copies of the notice of appeal and proof of service and copy of bond on appeal; upon filing such transcript and return the district court shall be deemed to have acquired jurisdiction of the cause and may compel the probate court to make a further or amended return and may allow amendments to be made or mischances to be supplied or corrected, to the same extent as in civil actions in said court, except that the notice of appeal shall not be amended, nor the time extended for taking such appeal."

[G. S. 1894 § 4669; Probate Code § 256]

§ 65. The district court acquires complete jurisdiction of the subject matter of the appeal when the return is filed. Subsequent proceedings are not jurisdictional.[1] Under the old statute provision was made for returning the evidence when the appeal was upon questions of law alone, and the determination of the district court was made on such return.[2] Under the existing law the trial in the district court is de novo and no provision is made for returning the evidence except the "papers" upon which the order or judgment is based. When the appeal is perfected by filing the return proceedings in the probate court are stayed.[3]

[1] Hintermeister v. Brady, 70 Minn. 437, 73 N. W. 145.

[2] In re Post, 33 Minn. 478, 24 N. W. 184.

Digitized by Google

[3] G. S. 1894 § 4670; Probate Code § 257. See Dutcher v. Culver, 23 Minn. 415.

Placing on the calendar—notice of trial—statute.

§ 66. "Upon an appeal the cause may be brought on for trial before the district court by either party upon eight days' notice to the adverse party; such notice shall be served on the attorney of the opposite party if he have one; if not it shall be deposited with the clerk of the district court of the proper county for him; and the appellant shall cause the same to be entered on the calendar for trial on or before the first day of the term at which said cause is noticed for trial, and if not so placed upon the calendar the appeal shall be dismissed."

[G. S. 1894 § 4671; Probate Code § 258]

§ 67. The right of a respondent to have an appeal dismissed upon the failure of the appellant to enter the cause on the calendar as required by this section is prima facie absolute; but the district court may, in the exercise of its discretion, and for cause shown, refuse to dismiss and direct the cause to be placed on the calendar for trial.[1] Of course this section is not jurisdictional. The court, with the consent of all the parties, may undoubtedly hear and determine an appeal out of term.[2]

[1] Hintermeister v. Brady, 70 Minn. 437, 73 N. W. 145.

[2] See §§ 17, 18.

Trial in district court de novo—statute.

§ 68. "When such cause is placed on the calendar the court shall hear, try and determine the same in the same manner as if originally commenced in the district court."

[G. S. 1894 § 4672; Probate Code § 259]

§ 69. That is, the cause is to be tried de novo in all cases and without regard to any errors or rulings of the probate court, just as it was tried under the old statute when the appeal was upon questions of law and fact.[1] The old practice of trying an appeal on the return is abolished.[2] But the jurisdiction of the district court is appellate, not original. That is, on appeal from the probate court the district court exercises probate jurisdiction to make such determination as the probate court ought to have made—but no other or greater.[3]

[1] Washburn v. Van Steenwyk, 32 Minn. 336, 354, 20 N. W. 324; In re Mills, 34 Minn. 296, 25 N. W. 631.

[2] In re Post, 33 Minn. 478, 24 N. W. 184.

[3] Graham v. Burch, 47 Minn. 171, 49 N. W. 697.

Trial on appeal from allowance or disallowance of claim—statute.

§ 70. "In all cases of appeal from the allowance or disallowance of a claim against the estate, the district court shall, on or before the second day of the term, direct pleadings to be made up as in civil actions, but no allegations shall be permitted except such as are essential to the specific matter to which the appeal relates and thereon

Digitized by Google

the proceedings shall be tried; all questions of law arising on the cause shall be summarily heard and determined upon the same pleadings; the issues of fact shall be tried as other issues of fact are tried in the district court."

[G. S. 1894 § 4673; Probate Code § 260] See G. S. 1878 ch. 53 § 27.

§ 71. The trial of such an appeal without pleadings is an irregularity merely.[1] The requirement that the issues in the district court be the same as in the probate court is to be liberally construed so long as the subject matter remains the same.[2] The right to a jury trial is statutory, not constitutional.[3]

[1] Lake v. Albert, 37 Minn. 453, 35 N. W. 177.

[2] Stuart v. Stuart, 70 Minn. 46, 72 N. W. 819. See Chadwick v. Dunham, 83 Minn. 366, 86 N. W. 351.

[3] Schmidt v. Schmidt, 47 Minn. 451, 50 N. W. 598.

Trial of other issues—statute.

§ 72. "All other appeals shall be tried by the court without a jury, unless the court orders that the whole issue or some specific question of fact involved therein be tried by a jury or referred."

[G. S. 1894 § 4674; Probate Code § 261] See G. S. 1878 ch. 49 §§ 19, 20.

§ 73. The legal effect of this section is to extend to this class of appeal cases the provisions of G. S. 1894 § 5361 [§ 580 infra] and to place such cases upon the same footing, in all respects, with those provided for in that section, so far as relates to the trial by jury of any issues of fact involved and the purpose and effect of any verdict rendered thereon. The verdict or finding is conclusive on the court until set aside for cause.[1] Neither party has a constitutional right to a jury trial.[2] The issue of will or no will is frequently submitted to a jury.[3]

[1] Marvin v. Dutcher, 26 Minn. 407, 4 N. W. 685; In re Pinney, 27 Minn. 280, 6 N. W. 791, 7 N. W. 144.

[2] Schmidt v. Schmidt, 47 Minn. 451, 50 N. W. 598.

[3] Id.

Judgment upon affirmance—statute.

§ 74. "In case the appellant fails to prosecute his appeal, or when the order, judgment or decree appealed from is sustained by the court on the merits, the district court shall enter judgment affirming the decision of the probate court with costs. Upon the filing of a certified transcript of the decision and judgment of the district court in the probate court, the same proceedings shall be had as if no appeal had been made." * * * "In all cases of affirmance of the order, judgment or decree appealed from, judgment shall be rendered against the appellant and his sureties on his appeal bond, and execution may issue against him and such sureties."

[G. S. 1894 §§ 4675, 4678; Probate Code §§ 262, 265] See Tracy v. Tracy, 79 Minn. 267, 82 N. W. 635.

Digitized by Google

Reversal—proceedings thereon—statute.

§ 75. "In case the order, judgment or decree of the probate court appealed from or brought up on a writ of certiorari is reversed or modified in whole or in part by the final judgment of the district court or of the supreme court, the appellate court shall make such order or decree as the probate court could have done, if it can do so, or if it cannot, then it shall remand the case to the probate court, with direction that the probate court make such order or decree, or proceed further in compliance with such final decision of the appellate court. Such final decision and judgment shall be certified by the appellate court to the probate court, and upon filing the same in the probate court, such court shall proceed to make any order or proceeding directed by such appellate court. In case the decision and judgment of the appellate court requires no action of the probate court, then such order or decision shall be substituted in place of the original order, judgment or decree, and like proceedings shall be had as if it had been so ordered by the probate court. In case the appellate court remands the case to the probate court with directions, the probate court shall in a summary manner comply with such direction, without notice."

[Laws 1901 ch. 135] See G. S. 1894 § 4676; Probate Code § 263; G. S. 1878 ch. 53 § 28.

§ 76. The district court may render such judgment as the probate court ought to have rendered, but its jurisdiction is appellate, not original, and it exercises probate jurisdiction and not common law jurisdiction. It has no greater or different jurisdiction than the probate court had in the premises.

See Berkey v. Judd, 31 Minn. 271, 17 N. W. 618; Graham v. Burch, 47 Minn. 171, 49 N. W. 697; Huntsman v. Hooper, 32 Minn. 163, 20 N. W. 127; Tracy v. Tracy, 79 Minn. 267, 82 N. W. 635; State v. Probate Court, 83 Minn. 58, 85 N. W. 917; Chadwick v. Dunham, 83 Minn. 366, 86 N. W. 351; Gilman v. Maxwell, 79 Minn. 377, 82 N. W. 669.

Costs—statute.

§ 77. "In all cases of appeal the prevailing party shall be entitled to costs and disbursements, to be taxed as costs in civil actions, and in case judgment is rendered against the estate, they shall become an adjudicated claim against the estate. If the judgment is against a claimant against the estate for costs, or on any counterclaim, execution may issue as in other cases."

[G. S. 1894 § 4677; Probate Code § 264] See Tracy v. Tracy, 79 Minn. 267, 82 N. W. 635; Gilman v. Maxwell, 79 Minn. 377, 82 N. W. 669; State v. Probate Court, 67 Minn. 51, 69 N. W. 609, 908.

Review of discretionary matters.

§ 78. An application to be permitted to present a claim after the time limited is addressed to the discretion of the probate court.[1] On appeal to the district court the application is to be heard and determined de novo.[2]

Digitized by Google

[1] State v. Probate Court, 79 Minn. 257, 82 N. W. 580; Baxter v. Chute, 50 Minn. 164, 52 N. W. 379; State v. Probate Court, 67 Minn. 51, 69 N. W. 609, 908; In re Mills, 34 Minn. 296, 25 N. W. 631; St. Croix Boom Corporation v. Brown, 47 Minn. 281, 50 N. W. 197; Mass. Mut. Life Ins. Co. v. Elliott, 24 Minn. 134; Gibson v. Brennan, 46 Minn. 92, 48 N. W. 460.

[2] In re Mills, 34 Minn. 296, 25 N. W. 631.

Certiorari.

§ 79. When no provision is made by statute for an appeal from a final judgment or order of the probate court certiorari will lie.[1] But certiorari is an extraordinary remedy and will not lie when there is other adequate remedy [2] or to review an intermediate order.[3] The scope of review on certiorari is the same as on appeal. The writ may command the judge of probate to certify up all the evidence, and if it does it will be presumed that he did his duty.[4]

[1] State v. Probate Court, 83 Minn. 58, 85 N. W. 917; State v. Willrich, 72 Minn. 165, 75 N. W. 123; State v. Probate Court, 51 Minn. 241, 53 N. W. 463; State v. Probate Court, 79 Minn. 257, 82 N. W. 580; St. Croix Boom Corporation v. Brown, 47 Minn. 281, 50 N. W. 197; Mass. Mut. Life Ins. Co. v. Estate of Elliott, 24 Minn. 134; State v. Probate Court, 76 Minn. 132, 78 N. W. 1039; State v. Probate Court, 28 Minn. 381, 10 N. W. 209.

[2] State v. Probate Court, 72 Minn. 434, 75 N. W. 700.

[3] Id.; State v. Probate Court, 83 Minn. 58, 85 N. W. 917.

[4] State v. Probate Court, 83 Minn. 58, 85 N. W. 917; State v. Probate Court, 79 Minn. 257, 82 N. W. 580.

Digitized by Google

CHAPTER II

LIMITATION OF ACTIONS

GENERAL PRINCIPLES

Statutory origin.

§ 80. At common law there was no limitation as to the time within which an action could be brought aside from that resulting from the presumption of payment and the adverse possession of real property.

Hoy v. McNeil, 13 Minn. 390 Gil. 362; Hauenstein v. Lynham, 100 U. S. 488.

General policy of statute.

§ 81. Statutes of limitation prescribe a period within which a right may be enforced, afterwards withholding a remedy for reasons of private justice and public policy. It would encourage fraud, oppression, and interminable litigation, to permit a party to delay a contest until it is probable that papers may be lost, facts forgotten or witnesses dead.[1] The law respecting adverse possession rests upon considerations of public policy peculiar to itself.[2]

[1] Baker v. Kelley, 11 Minn. 480 Gil. 358.

[2] See § 220.

Generally affects remedy alone.

§ 82. It is a frequent expression in the books that the statute of limitations affects the remedy alone and not the right.[1] This is generally true, but the effect of adverse possession for the statutory period is to destroy old rights and create new ones.[2]

[1] Baker v. Kelley, 11 Minn. 480 Gil. 358; Cook v. Kendall, 13 Minn. 324 Gil. 297; Holcombe v. Tracy, 2 Minn. 241 Gil. 201; Burwell v. Tullis, 12 Minn. 572 Gil. 486; Brisbin v. Farmer, 16 Minn. 215 Gil. 187; Fletcher v. Spaulding, 9 Minn. 64 Gil. 54; Bradley v. Norris, 63 Minn. 156, 168, 65 N. W. 357; Archambau v. Green, 21 Minn. 520.

[2] See § 260.

Cannot compel party to bring action against adverse claimants.

§ 83. Limitation laws necessarily operate to compel a party to enforce or prosecute his claim within a reasonable time, but a party who is in the enjoyment of his rights cannot be compelled to take measures against an adverse claimant, and a law taking away the rights of a party in such cases is an unlawful confiscation, and in no sense a limitation law.

Baker v. Kelley, 11 Minn. 480 Gil. 358; Sanborn v. Petter, 35 Minn. 449, 29 N. W. 64; Feller v. Clark, 36 Minn. 338, 31 N. W. 175; Burk v. Western Land Assoc. 40 Minn. 506, 42 N. W. 479; Taylor v. Winona & St. Peter Ry. Co. 45 Minn. 66,

Digitized by Google

47 N. W. 453; Russell v. H. C. Akeley Lumber Co. 45 Minn. 376, 48 N. W. 3; Whitney v. Wegler, 54 Minn. 235, 55 N. W. 927; London & N. W. American Mortgage Co. 77 Minn. 394, 80 N. W. 205; State v. Murphy, 81 Minn. 254, 83 N. W. 991; Hayes v. Carroll, 74 Minn. 134, 76 N. W. 134.

Control of legislature.

§ 84. The legislature has full authority to enlarge or lessen the time limited for the commencement of actions except that it cannot withhold a reasonable opportunity to appeal to the courts or impair the obligation of contracts or vested rights. The legislature cannot deny a person a reasonable time within which to bring an action.[1] What is a reasonable time is generally a matter for legislative and not judicial determination. Statutes must allow a reasonable time after they are passed for the commencement of suits upon existing causes of action, but what is a reasonable time must depend upon the sound discretion of the legislature, considering the nature of the subject and the purposes of the enactment; and the courts will not inquire into the wisdom of the exercise of this discretion by the legislature in fixing the period of legal bar, unless the time allowed is manifestly so short as to amount to a practical denial of justice.[2]

[1] Holcombe v. Tracy, 2 Minn. 241 Gil. 201; Baker v. Kelley, 11 Minn. 480 Gil. 358; Cook v. Kendall, 13 Minn. 324 Gil. 297; Burwell v. Tullis, 12 Minn. 572 Gil. 486; Brisbin v. Farmer, 16 Minn. 215 Gil. 187; Heyward v. Judd, 4 Minn. 483 Gil. 375; Stine v. Bennett, 13 Minn. 153 Gil. 138; Burk v. Western Land Assoc. 40 Minn. 506, 42 N. W. 479; Bradley v. Norris, 63 Minn. 156, 65 N. W. 357; Russell v. H. C. Akeley Lumber Co. 45 Minn. 376, 48 N. W. 3; State v. Messenger, 27 Minn. 120, 125, 6 N. W. 457; Hill v. Townley, 45 Minn. 167, 47 N. W. 653; Archambau v. Green, 21 Minn. 520; Duncan v. Cobb, 32 Minn. 460, 21 N. W. 714; Kelley v. Gallup, 67 Minn. 169, 69 N. W. 812; Streeter v. Wilkinson, 24 Minn. 288; Rice v. Dickerman, 47 Minn. 527, 50 N. W. 698; State v. Waholz, 28 Minn. 114, 9 N. W. 578; Powers v. City of St. Paul, 36 Minn. 87, 30 N. W. 433.

[2] State v. Messenger, 120, 125, 6 N. W. 457; Hill v. Townley, 45 Minn. 167, 47 N. W. 653; Russell v. H. C. Akeley Lumber Co. 45 Minn. 376, 48 N. W. 3; Streeter v. Wilkinson, 24 Minn. 288; State v. Westfall, 85 Minn. 437, 89 N. W. 175.

§ 85. No man has a vested right to a mere remedy, or in an exemption from it.[1] The legislature may therefore revive a cause of action on a personal claim against which a statute of limitations has run by a repeal of the statute.[2] The rule is otherwise where the running of the statute gives a vested interest in real or personal property. When the period prescribed by statute has once run, so as to cut off the remedy which one might have had for the recovery of property in the possession of another, the title of the property, irrespective of the original right, is regarded in the law as vested in the possessor, who is entitled to the same protection in respect to it which the owner is entitled to in other cases. A subsequent repeal

Digitized by Google

of the limitation law could not be given a retroactive effect, so as to disturb this title. It is vested as completely and perfectly, and is as safe from legislative interference, as it would have been if it had been perfected in the owner by grant, or by any species of assurance. But what are often indiscriminately called statutes of limitations consist of two distinct classes. The first class are those where the prescription operates as the foundation of title to property in possession. The lapse of time limited by such statutes not only bars the remedy, but extinguishes the right, and vests a perfect title in the adverse holder. The second class are those which merely take away or suspend certain remedies or forms of action, but leave the property rights of the parties unaffected. This last class is rather an exemption from the servitude of certain forms of action than a means of the acquisition of title. In such a case the legislature would have a perfect right to restore the remedy already barred, because it would not take away any vested rights of property.[3]

[1] Kipp v. Johnson, 31 Minn. 360, 17 N. W. 957.

[2] Campbell v. Holt, 115 U. S. 620; Hulbert v. Clark, 128 U. S. 295.

[3] Kipp v. Johnson, 31 Minn. 360, 17 N. W. 957; Gates v. Shugrue, 35 Minn. 392, 29 N. W. 57; Morrison v. Rice, 35 Minn. 436, 29 N. W. 168; Sanborn v. Petter, 35 Minn. 449, 29 N. W. 64; Feller v. Clark, 36 Minn. 338, 31 N. W. 175; Flynn v. Lemieux, 46 Minn. 458, 49 N. W. 238; Whitney v. Wegler, 54 Minn. 235, 55 N. W. 927; Pine County v. Lambert, 57 Minn. 203, 58 N. W. 990; O'Conner v. Finnegan, 60 Minn. 455, 62 N. W. 618; Kipp v. Elwell, 65 Minn. 525, 68 N. W. 105; Streeter v. Wilkinson, 24 Minn. 288.

Courts cannot modify.

§ 86. The courts have no power to extend or modify the periods of limitation prescribed by statute.

Humphrey v. Carpenter, 39 Minn. 115, 39 N. W. 67.

A statute of repose.

§ 87. The statute of limitations is to be upheld and enforced, not as resting only on a presumption of payment from lapse of time, but according to its intent and object, as a statute of repose.

Shepherd v. Thompson, 122 U. S. 231; Willoughby v. Irish, 35 Minn. 63, 27 N. W. 379; McNab v. Stewart, 12 Minn. 407 Gil. 291; Denny v. Marrett, 29 Minn. 361, 13 N. W. 148.

Where party has alternative rights of action.

§ 88. Where a party has alternative rights of action on the same state of facts one is not necessarily barred because the other is.

Jackson v. Holbrook, 36 Minn. 49, 32 N. W. 852.

Joint obligation.

§ 89. In an action against two persons, on a joint contract, judgment may be recovered against one of them, though as to the other the action is barred by the statute of limitations.

Town v. Washburn, 14 Minn. 268 Gil. 199; Foster v. Johnson, 44 Minn. 290, 46 N. W. 350.

Digitized by Google

Not applicable to defences.

§ 90. The statute of limitations does not run against defences but only against remedies.

C. Aultman & Co. v. Torrey, 55 Minn. 492, 57 N. W. 211; Hayes v. Carroll, 74 Minn. 134, 76 N. W. 1017; Robinson v. Glass, 94 Ind. 211; Lebree v. Patterson, 92 Mo. 451; Pinkham v. Pinkham (Neb.) 83 N. W. 837.

Construction of statutes.

§ 91. Statutes of limitations, being now regarded as statutes of repose based on considerations of public policy, are to be liberally construed.[1] Formerly a strict construction prevailed.[2] They will not be construed as retroactive if any other construction is possible.[3] Exceptions must be clear.[4]

[1] City of St. Paul v. Chicago etc. Ry. Co. 45 Minn. 387, 48 N. W. 17; County of Redwood v. Winona & St. Peter Land Co. 40 Minn. 512, 41 N. W. 465, 42 N. W. 473.

[2] See Town v. Washburn, 14 Minn. 268 Gil. 199; Baker v. Kelley, 11 Minn. 480 Gil. 358.

[3] Powers v. City of St. Paul, 36 Minn. 87, 30 N. W. 433.

[4] Erickson v. Johnson, 22 Minn. 380.

Applicable to both legal and equitable actions.

§ 92. The statutes of limitations in this state are applicable to all actions alike whether of a legal or equitable nature.

Ozmun v. Reynolds, 11 Minn. 459 Gil. 341; Cock v. Van Etten, 12 Minn. 522 Gil. 431; McClung v. Capehart, 24 Minn. 17; Humphrey v. Carpenter, 39 Minn. 115, 39 N. W. 67; Lewis v. Welch, 47 Minn. 193, 48 N. W. 608.

Applicable to legal proceedings generally.

§ 93. Statutes of limitation, though in terms applicable only to "actions" are to be applied as a rule to all proceedings that are analogous in their nature to actions, so as to make the right sought to be enforced, and not a form of procedure, the test as to whether or not the statute applies. Upon this principle they are held to apply to all claims which may be the subject of actions, however presented; also that they furnish a rule for cases analogous in their subject matter, but for which a remedy unknown to the common law has been provided.

County of Redwood v. Winona & St. Peter Land Co. 40 Minn. 512, 526, 41 N. W. 465, 42 N. W. 473.

Applicable to claims before probate court.

§ 94. "No claim or demand shall be allowed that is barred by the statute of limitation nor shall any offset that is barred by the statute of limitation be allowed."

[G. S. 1894 § 4513; Probate Code § 106] See O'Mulcahey v. Gragg, 45 Minn. 112, 47 N. W. 543; State v. Probate Court, 40 Minn. 296, 41 N. W. 1033; Hill v. Nichols, 47 Minn. 382, 50 N. W. 367; Berkey v. St. Paul Nat. Bank, 54 Minn. 448, 56 N. W. 53; Mowry v. McQueen, 80 Minn. 385, 83 N. W. 348.

Digitized by Google

§ 95. The allowance of a claim by the probate court stops the running of the statute and has all the effect of a judgment if not set aside on appeal.

McCord v. Knowlton, 79 Minn. 299, 82 N. W. 589 and cases cited.

Limitation by contract.

§ 96. The parties to a contract may, by the terms of the contract, limit the time within which an action may be brought thereon.

Willoughby v. St. Paul German Ins. Co. 68 Minn. 373, 71 N. W. 272. See In re St. Paul German Ins. Co. 58 Minn. 163, 59 N. W. 996.

Conflict of laws.

§ 97. The statute of limitations of this state governs all actions brought in our courts regardless of the place where the cause of action accrued,[1] except that in an action against a person by one not a citizen of this state, or a citizen who has not had the cause of action ever since it accrued, the defendant may avail himself of the law of limitations of the state or country in which the cause of action arose if it be more favorable to him than our own.[2] Our courts do not take judicial notice of the statute of limitations of a sister state or foreign country. A party seeking to obtain advantage of such a statute must plead and prove it as a fact.[3]

[1] Fletcher v. Spaulding, 9 Minn. 64 Gil. 54; Hoyt v. McNeil, 13 Minn. 390 Gil. 362; Bigelow v. Ames, 18 Minn. 527 Gil. 471.

[2] See §§ 126, 127.

[3] Hoyt v. McNeil, 13 Minn. 390 Gil. 362; Way v. Colyer, 54 Minn. 14, 55 N. W. 744.

ACTIONS BY STATE

The statute.

§ 98. "The limitations prescribed in this chapter for the commencement of actions shall apply to the same actions when brought in the name of the state, or in the name of any officer, or otherwise, for the benefit of the state, in the same manner as to actions brought by citizens."

[G. S. 1894 § 5142]

Construction of statute.

§ 99. The legislature having adopted the policy of making the statutes of limitations applicable to the state they are to be given as liberal a construction against the state as against citizens.[1] They are applicable to proceedings for the collection of taxes.[2] They are also applicable to actions brought by municipal corporations whether suing in a sovereign or proprietary capacity.[3]

[1] County of Redwood v. Winona & St. Peter Land Co. 40 Minn. 512, 41 N. W. 465, 42 N. W. 473; City of St. Paul v. Chicago etc. Ry. Co. 45 Minn. 387, 48 N. W. 17. See County of Brown v. Winona & St. Peter Land Co. 38 Minn. 397, 37 N. W. 949.

[2] See § 197.

[3] City of St. Paul v. Chicago etc. Ry. Co. 45 Minn. 387, 48 N. W. 17. See § 218.

Digitized by Google

WHEN ACTION ACCRUES

General statement.

§ 100. The statute of limitations commences to run against a cause of action from the time it accrues, or from the time when the holder thereof has the right to apply to the court for relief, and to commence proceedings to enforce his rights.[1] An action can be maintained on a promise to pay a sum of money "on demand" or "when requested" immediately and without any previous demand.[2] Where it appears from a contract that it was the intention of the parties thereto that the money or claim which is the subject matter thereof was to be paid upon a demand in fact, the statute of limitations does not begin to run until an actual demand for payment is made.[3] When a right depends upon some condition or contingency, the cause of action accrues and the statute runs upon the fulfilment of the condition or the happening of the contingency.[4] But where the condition precedent to bringing suit is not a part of the right or cause of action, but merely a part of or one step in the remedy it does not delay the running of the statute.[5] The necessity of taking an account to ascertain how much the vendee must pay for a conveyance does not prevent the running of the statute against a cause of action for specific performance.[6]

[1] Brown v. Brown, 28 Minn. 501, 11 N. W. 64; Pinch v. McCulloch, 72 Minn. 71, 74 N. W. 897; Ganser v. Ganser, 83 Minn. 199, 86 N. W. 18; Lumbermen's Ins. Co. v. City of St. Paul, 82 Minn. 494, 85 N. W. 163; Heinbokel v. Nat. Savings etc. Assoc. 58 Minn. 340, 59 N. W. 1050; In re Hess' Estate, 57 Minn. 282, 59 N. W. 193; Lambert v. Slingerland, 25 Minn. 457; Ayer v. Stewart, 14 Minn. 97 Gil. 68; Thornton v. Turner, 11 Minn. 336 Gil. 237.

[2] McArdle v. McArdle, 12 Minn. 98 Gil. 53; Brown v. Brown, 28 Minn. 501, 11 N. W. 64; Branch v. Dawson, 33 Minn. 399, 23 N. W. 552; Mitchell v. Easton, 37 Minn. 335, 33 N. W. 910.

[3] Brown v. Brown, 28 Minn. 501, 11 N. W. 64; Branch v. Dawson, 33 Minn. 399, 23 N. W. 552; Mitchell v. Easton, 37 Minn. 335, 33 N. W. 910; Easton v. Sorenson, 53 Minn. 309, 55 N. W. 128; Horton v. Seymour, 82 Minn. 535, 85 N. W. 551; Portner v. Wilfahrt, 85 Minn. 73, 88 N. W. 418.

[4] Johnson v. Gilfillan, 8 Minn. 395 Gil. 352.

[5] Litchfield v. McDonald, 35 Minn. 167, 28 N. W. 191; Easton v. Sorenson, 53 Minn. 309, 55 N. W. 128; Hantzch v. Massolt, 61 Minn. 361, 63 N. W. 1069; State v. Norton, 59 Minn. 424, 61 N. W. 458; Stillwater & St. Paul Ry. Co. v. City of Stillwater, 66 Minn. 176, 68 N. W. 836; McCollister v. Bishop, 78 Minn. 228, 80 N. W. 1118.

[6] Short v. Van Dyke, 50 Minn. 286, 52 N. W. 643.

Performance of condition precedent.

§ 101. Where there is a condition precedent to the accruing of a cause of action, and it is in the power of the plaintiff to perform

Digitized by Google

that condition, the statute of limitations, by analogy, applies and will commence to run as soon as the proper time to perform the condition arrives, and when performance is thereby barred it will prevent the cause of action from ever accruing.

State v. Norton, 59 Minn. 424, 61 N. W. 458; Lake Phalen Land & Improvement Co. v. Lindeke, 66 Minn. 209, 68 N. W. 974.

Cases.

§ 102. Action for surplus at foreclosure sale;[1] on account for goods sold and delivered;[2] for specific performance;[3] on a certificate of deposit in the ordinary form issued by a bank;[4] for an accounting and balance due in a partnership;[5] on the official bond of a constable;[6] for money collected by an agent and not accounted for;[7] on a general deposit in a bank;[8] on a loan of money payable whenever the party making the loan should demand it;[9] to enforce stockholder's liability;[10] against county for money paid at a void tax sale;[11] for breach of covenant of warranty in a deed;[12] on a guardian's bond;[13] action against city for amount held in trust by city for owner in condemnation proceedings;[14] on bond of assignee;[15] in relation to tax proceedings;[16] against a grantee in a deed on an assumption and agreement to pay a mortgage;[17] on an assessment in a mutual insurance company;[18] to abate a nuisance;[19] for services rendered by one party to another under an agreement that the former shall be compensated out of the estate of the latter at the time of his death;[20] to compel holders of bonus stock to pay for the same for the benefit of creditors;[21] against reversioners;[22] for installments of salary;[23] on interest coupons;[24] on a guarantee of land warrants;[25] by surety against principal for amount paid by surety on account of principal;[26] on the official bond of an executor where the statute authorized an action only upon leave of court;[27] on a Minnesota standard insurance policy;[28] on an insurance policy when there is an adjustment of the loss and a promise to pay.[29]

[1] Ayer v. Stewart, 14 Minn. 97 Gil. 68.
[2] Cousins v. St. Paul etc. Ry. Co. 43 Minn. 219, 45 N. W. 429.
[3] Lewis v. Prendergast, 39 Minn. 301, 39 N. W. 802; Short v. Van Dyke, 50 Minn. 286, 152 N. W. 643; Thompson v. Myrick, 20 Minn. 205 Gil. 184.
[4] Mitchell v. Easton, 37 Minn. 335, 33 N. W. 910.
[5] Broderick v. Beaupre, 40 Minn. 379, 42 N. W. 83; Thompson v. Crosby, 62 Minn. 324, 64 N. W. 823.
[6] Litchfield v. McDonald, 35 Minn. 167, 28 N. W. 191.
[7] P. P. Mast & Co. v. Easton, 33 Minn. 161, 22 N. W. 253.
[8] Branch v. Dawson, 33 Minn. 399, 23 N. W. 552; Mitchell v. Easton, 37 Minn. 335, 33 N. W. 910; Easton v. Sorenson, 53 Minn. 309, 55 N. W. 128.
[9] Brown v. Brown, 28 Minn. 501, 11 N. W. 64.
[10] Harper v. Carroll, 62 Minn. 152, 64 N. W. 145.
[11] Easton v. Sorenson, 53 Minn. 309, 55 N. W. 128.
[12] Wagner v. Finnegan, 65 Minn. 115, 67 N. W. 795.

Digitized by Google

[13] Hantzch v. Massolt, 61 Minn. 361, 63 N. W. 1069.
[14] Stillwater etc. Ry. Co. v. City of Stillwater, 66 Minn. 176, 68 N. W. 836.
[15] McCollister v. Bishop, 78 Minn. 228, 80 N. W. 1118.
[16] See cases under § 197.
[17] Pinch v. McCulloch, 72 Minn. 71, 74 N. W. 897.
[18] Langworthy v. Garding, 74 Minn. 325, 77 N. W. 207; Langworthy v. Washburn Flouring Mills Co. 77 Minn. 256, 79 N. W. 974.
[19] Mueller v. Fruen, 36 Minn. 273, 30 N. W. 886.
[20] In re Hess' Estate, 57 Minn. 282, 59 N. W. 193.
[21] Hospes v. N. W. Mfg. & Car Co. 48 Minn. 174, 50 N. W. 1117.
[22] Lindley v. Groff, 37 Minn. 338, 34 N. W. 26.
[23] Wood v. Cullen, 13 Minn. 394 Gil. 365.
[24] Cushman v. Board of County Com'rs, 19 Minn. 295 Gil. 252.
[25] Johnson v. Gilfillan, 8 Minn. 395 Gil. 352.
[26] Barnsback v. Reiner, 8 Minn. 59 Gil. 37.
[27] Ganser v. Ganser, 83 Minn. 199, 86 N. W. 18, overruling Wood v. Myrick, 16 Minn. 494 Gil. 447; Lanier v. Irvine, 24 Minn. 116.
[28] Rottier v. German Ins. Co. 84 Minn. 116, 86 N. W. 888.
[29] McCallum v. Nat. Credit Ins. Co. 84 Minn. 134, 86 N. W. 892.

WHEN ACTION IS COMMENCED

The statutes.

§ 103. "An action is commenced as to each defendant, when the summons is served on him,[1] or on a co-defendant who is a joint contractor, or otherwise united in interest with him;[2] and is deemed to be pending from the time of its commencement, until its final determination upon appeal, or until the time for an appeal has passed, and the judgment has been satisfied."[3]

[G. S. 1894 § 5143]

[1] Blackman v. Wheaton, 13 Minn. 326 Gil. 299; Steinmetz v. St. Paul Trust Co. 50 Minn. 445, 52 N. W. 915; Auerbach v. Maynard, 26 Minn. 421, 4 N. W. 816; Smith v. Hurd, 50 Minn. 503, 52 N. W. 922.
[2] Hooper v. Farwell, 3 Minn. 106 Gil. 58.
[3] Bartleson v. Thompson, 30 Minn. 161, 14 N. W. 795; Capehart v. Van Campen, 10 Minn. 158 Gil. 127; Lough v. Pitman, 25 Minn. 120.

§ 104. "An attempt to commence an action is deemed equivalent to the commencement thereof, within the meaning of this chapter when the summons is delivered with the intent that it shall be actually served, to the sheriff or other officer of the county in which the defendants, or one of them, usually or last resided;[1] or if a corporation is a defendant, to the sheriff or other officer of the county in which such corporation was established by law, or where its general business was transacted, or where it kept an office for the transaction of business; but such an attempt shall be followed by the first

Digitized by Google

publication of the summons;[2] or the service thereof, within sixty days."

[G. S. 1894 § 5144]

[1] Foot v. Ofstie, 70 Minn. 212, 73 N. W. 4; Steinmetz v. St. Paul Trust Co. 50 Minn. 445, 52 N. W. 915; Carlson v. Phinney, 56 Minn. 476, 58 N. W. 38; Blackman v. Wheaton, 13 Minn. 332 Gil. 304; Auerbach v. Maynard, 26 Minn. 421, 4 N. W. 816; State v. Kipp, 70 Minn. 286, 73 N. W. 164.

[2] Auerbach v. Maynard, 26 Minn. 421, 4 N. W. 816.

Construction of statutes.

§ 105. The service contemplated by the first section is a service in accordance with § 310. The mere mailing of a summons and its receipt do not constitute such service.[1] An action is not begun against a person by amendment until he is served with an order of the court or process.[2] Under these sections an action is not commenced for the purpose of stopping the running of the statute of limitations until service of summons has been effected or until service has been attempted and followed up by actual service within sixty days or the commencement of publication within that time.[3] If the summons is delivered with the intent that it shall be served and the illness of the defendant prevents service upon him, his death soon after such delivery excuses compliance with the provision requiring publication.[4] It is not indispensable that there should be a manual delivery of the summons to the sheriff. Leaving it on his desk or in a place designated by him for such purposes is sufficient.[5] As to each defendant in an action, the action is commenced and is pending only from the time of service of the summons on him, or of his appearance without service; and, where each may object that the action was not commenced within the time limited by statute, its commencement as to his objection is to be determined by the time of service on him, and not by the time of service on some other defendant.[6]

[1] Sherry v. Gilmore, 58 Wis. 324.

[2] See Erskine v. McIlrath, 60 Minn. 485, 62 N. W. 1130.

[3] Auerbach v. Maynard, 26 Minn. 421, 4 N. W. 816; Knowlton v. Watertown, 130 U. S. 327.

[4] Riley v. Riley, 141 N. Y. 409.

[5] Michigan Ins. Co. v. Edred, 130 U. S. 693.

[6] Smith v. Hurd, 50 Minn. 503, 52 N. W. 922.

§ 106. Unless the amendment introduces a new cause of action the statute of limitations is arrested by the service of the original pleading.[1] If the amendment introduces a new cause of action the pleading is to be construed as of its own date and the statute of limitations runs against it to the date of service.[2]

[1] Bruns v. Schreiber, 48 Minn. 366, 51 N. W. 120; Markell v. Ray, 75 Minn. 138, 77 N. W. 788; Case v. Blood, 71 Iowa, 632; McKeighen v. Hopkins, 19 Neb. 33.

[2] Schulze v. Fox, 53 Md. 37; Atkinson v. Amador etc. Co. 53 Cal. 102; Hester v. Mullen, 107 N. C. 724; Hills v. Ludwig, 46

Digitized by Google

Ohio St. 374; Monticello v. Grant, 104 Ind. 168. See Boen v. Evans, 72 Minn. 169, 75 N. W. 116.

§ 107. The commencement of an action to sequester the property of a corporation by a creditor, and his exhibiting his claim against it, tolls the statute both as to the corporation and its stockholders.

London etc. Co. v. St. Paul etc. Co. 84 Minn. 144, 86 N. W. 872; Potts v. St. Paul etc. Assoc. 84 Minn. 217, 87 N. W. 604.

§ 108. The exceptions to the general rule specified in the statute clearly show that none else were intended.[1] The language of the statute must prevail and no reasons based on apparent inconvenience or hardship can justify a departure from it.[2] The courts have no dispensing power in favor of parties who do not discover their rights until their remedy is gone.[3]

[1] Cock v. Van Etten, 12 Minn. 522 Gil. 431.

[2] Amy v. Watertown, 130 U. S. 324.

[3] Cock v. Van Etten, 12 Minn. 522 Gil. 431; P. P. Mast & Co. v. Easton, 33 Minn. 161, 22 N. W. 253.

DEATH OF PARTY

The statutes.

§ 109. "If a person entitled to bring an action dies before the expiration of the time limited for the commencement thereof, and the cause of action survives, an action may be commenced by his personal representatives after the expiration of that time, and within one year from his death. If a person against whom an action may be brought, dies before the expiration of the time limited for the commencement thereof, and the cause of action survives, an action may be commenced against his representatives, after the expiration of that time, and within one year after the issuing of letters testamentary or of administration."

[G. S. 1894 § 5148]

§ 110. "The time which elapses between the death of a person and the granting of letters testamentary and of administration on his estate, not exceeding six months, and the period of six months after the granting of such letters, are not to be deemed any part of the time limited for the commencement of actions by executors or administrators."

[G. S. 1894 § 5149]

Construction of statutes.

§ 111. These two sections are to be construed together. The first states the general rule while the second states an exception thereto. The second section applies only to those cases where the person entitled to bring the action dies within the last year of the term of limitation.[1] These sections relate to causes of action matured and existing against a decedent at the time of his death, as to which the statute has commenced to run before his death and as to which the statute might operate as a bar before an action

Digitized by Google

could be brought, unless provisions were made for extending the time within which an action may be brought until the appointment of an administrator. They operate to lengthen, not to shorten, the time within which action may be brought.[2] An action to foreclose a mortgage does not fall within the second section.[3] An action for death by wrongful act does not fall under the first section.[4]

[1] Wood v. Bragg, 75 Minn. 527, 78 N. W. 93. See St. Paul Trust Co. v. Sargent, 44 Minn. 449, 47 N. W. 51.

[2] Wilkinson v. Estate of Winne, 15 Minn. 159 Gil. 123.

[3] Hill v. Townley, 45 Minn. 167, 47 N. W. 653. See, Rogers v. Benton, 39 Minn. 39, 38 N. W. 765.

[4] Rugland v. Anderson, 30 Minn. 386, 15 N. W. 676.

ABSENCE FROM THE STATE

The statute.

§ 112. "If, when the cause of action accrues against a person, he is out of the state, the action may be commenced within the times herein limited after his return to the state; and if, after the cause of action accrues, he departs from and resides out of the state, the time of his absence is not part of the time limited for the commencement of the action."

[G. S. 1894 § 5145]

Not applicable to actions of ejectment.

§ 113. The exceptions in this statute do not apply to an action for the recovery of real property but only to those actions where the time begins to run when the cause of action against the defendant arises. In the case of adverse possession the time begins to run at the time of the desseisin, and not at the time when the particular defendant might have been sued, and continues to run while the disseisin continues. And as the desseisor, or his successor in the adverse holding, may continue the adverse possession by his tenants or agents, against whom the owner may have his action to recover possession, the absence from the state of such disseisor or his successor does not interrupt the running of the statute.

City of St. Paul v. Chicago etc. Ry. Co. 45 Minn. 387, 48 N. W. 17; Ramsey v. Glenny, 45 Minn. 401, 48 N. W. 322.

Applicable to judgments.

§ 114. The statute is applicable to an action on a domestic judgment.

Newlove v. Pennock, 123 Mich. 260, 82 N. W. 54.

Not applicable to actions to foreclose or redeem.

§ 115. This statute is not now applicable to an action for the foreclosure of a mortgage.[1] Formerly the rule was otherwise.[2] Nor is the statute applicable to an action to redeem from a mortgage.[3]

[1] Hill v. Townley, 45 Minn. 167, 47 N. W. 653. See § 183.

[2] Whalley v. Eldridge, 24 Minn. 358, Rogers v. Benton, 39 Minn.

Digitized by Google

39, 38 N. W. 765; Foster v. Johnson, 44 Minn. 290, 46 N. W. 356; Carson v. Cochran, 52 Minn. 67, 53 N. W. 1130.

[3] Parsons v. Noggle, 23 Minn. 328; Bradley v. Norris, 63 Minn. 156, 65 N. W. 357 and cases cited; Id. 67 Minn. 48, 69 N. W. 624; Backus v. Burke, 63 Minn. 272, 65 N. W. 459.

Not applicable to foreign corporations with officers here.

§ 116. The mere theoretical domicil of a corporation in another state, by reason of its having been created there, does not bring it within the operation of this statute if it has officers or agents in this state upon whom process may be served.

City of St. Paul v. Chicago etc. Ry. Co. 45 Minn. 387, 48 N. W. 17; Travelers' Ins. Co. v. Fricke, 99 Wis. 367, 78 N. W. 407.

Absence from state when cause accrues.

§ 117. If, when the cause of action accrues against a person, he is out of the state, the action may be commenced within the time herein limited after his return to the state.[1] It is the general rule that the statute does not begin to run in favor of the party to be charged until he comes within the jurisdiction.[2]

[1] Gill v. Bradley, 21 Minn. 15; Duke v. Balme, 16 Minn. 306 Gil. 270; Town v. Washburn, 14 Minn. 268 Gil. 199; Wilkinson v. Estate of Winne, 15 Minn. 159 Gil. 123.

[2] Hoyt v. McNeil, 13 Minn. 390 Gil. 362; Fletcher v. Spaulding, 9 Minn. 64 Gil. 54; O'Mulcahey v. Gragg, 45 Minn. 112, 47 N. W. 543; Smith v. Glover, 44 Minn. 260, 46 N. W. 406; May v. Colyer, 54 Minn. 14, 55 N. W. 744; McConnell v. Spicker, (S. D.) 87 N. W. 574.

Departure from state.

§ 118. If, after the cause of action accrues the debtor departs from and resides out of the state his new residence out of the state must, in order to toll the statute, be not merely temporary and occasional but of such character and with such intent, as to constitute a new domicil.[1] The statute applies to non-residents and citizens alike.[2]

[1] Venable v. Paulding, 19 Minn. 488 Gil. 422; Duke v. Balme, 16 Minn. 306 Gil. 270; Kerwin v. Sabin, 50 Minn. 320, 52 N. W. 642, 17 L. R. A. 225; Hallett v. Bassett, 100 Mass. 169.

See, Lawson v. Adlard, 46 Minn. 243, 48 N. W. 1019; Keller v. Carr, 40 Minn. 428, 42 N. W. 292; Missouri etc. Trust Co. v. Norris, 61 Minn. 256, 63 N. W. 634.

[2] Carpenter v. Wells, 21 Barb. (N. Y.) 593; Mayer v. Friedman, 7 Hun 218, affirmed, 69 N. Y. 608. See Jordan v. Secombe, 33 Minn. 220, 22 N. W. 383; McConnell v. Spicker, (S. D.) 87 N. W. 574.

Residence and domicil.

§ 119. Residence and domicil are not synonymous. Residence is an act; domicil is an act coupled with an intent. A man may have a residence in one state or country, and his domicil in another,

Digitized by Google

and he may be a non-resident of the state of his domicil, in the sense that his place of actual residence is not there.

Keller v. Carr, 40 Minn. 428, 42 N. W. 292; Lawson v. Adlard, 46 Minn. 243, 48 N. W. 1019; Missouri etc. Trust Co. v. Norris, 61 Minn. 256, 63 N. W. 634.

§ 120. No one word is more synonymous with the word domicil than our word home. Where a person lives is to be taken prima facie to be his domicil unless other facts establish the contrary. If a person takes up a fixed, present residence out of the state he loses his domicil here though he has an intention of returning at some future indefinite time. Domicil never depends on a bald intent. A domicil of choice is more easily changed than a domicil of origin. A domicil once acquired remains until a new one is acquired. The place where a married man keeps his family is generally to be deemed his domicil.

Venable v. Paulding, 19 Minn. 488 Gil. 422.

§ 121. It is for the husband, as head of the family, to determine and fix the domicil of the family, including that of the wife. As a general rule the domicil of the husband is the domicil of the wife.[1] When a divorce has been granted to the wife, and unrestricted custody of the minor child of the marriage given to her in the judgment, her domicil establishes that of the child.[2] The legal guardian of a child may fix the domicil of the child and it is the general rule that the domicil of the guardian is the domicil of the child.[3] The domicil of the mother is the domicil of the child when the husband has deserted the family.[4]

[1] Williams v. Moody, 35 Minn. 280, 28 N. W. 510; Fox v. Hicks, 81 Minn. 197, 83 N. W. 538; Muus v. Muus, 29 Minn. 115, 12 N. W. 343; Anderson v. Watt, 138 U. S. 694.

[2] Fox v. Hicks, 81 Minn. 197, 83 N. W. 538.

[3] Townsend v. Kendall, 4 Minn. 412 Gil. 315; Fox v. Hicks, 81 Minn. 197, 83 N. W. 538.

[4] Fox v. Hicks, 81 Minn. 197, 83 N. W. 538.

Return to state.

§ 122. The return must be open and notorious and under such circumstances that the creditor could, with reasonable diligence, find the debtor and serve him with process.

Engel v. Fischer, 102 N. Y. 400.

Burden of proof.

§ 123. It is the general rule that the party claiming the benefit of the statute must prove the facts essential to bring him within it.[1] Where a person lives is presumed to be his domicil unless the facts in evidence establish the contrary.[2]

[1] Duke v. Balme, 16 Minn. 306 Gil. 270.

[2] Venable v. Paulding, 19 Minn. 488 Gil. 422; Anderson v. Watt, 138 U. S. 694.

Digitized by Google

Question for jury.

§ 124. Whether a person has acquired a new domicil out of the state is a question for the jury, except where only one reasonable inference can be drawn from the evidence.

Venable v. Paulding, 19 Minn. 488 Gil. 422; Kerwin v. Sabin, 50 Minn. 320, 52 N. W. 642.

ACTION ON CAUSE OF ACTION ACCRUING OUT OF STATE

The statute.

§ 125. "When a cause of action has arisen in a state or territory out of this state, or in a foreign country, and, by the laws thereof, an action thereon cannot there be maintained by reason of the lapse of time, an action thereon cannot be maintained in this state, except in favor of a citizen thereof, who has had the cause of action from the time it accrued."

[G. S. 1894 § 5146]

Construction of statute.

§ 126. All statutes of limitations, in prescribing the periods, have reference, for the beginning of such periods, to the time when the opportunity to commence the action arises. This opportunity arises, in respect to causes of action accruing in foreign states, upon the concurrence of two things, namely, the existence of facts constituting a cause of action suable in the courts of that state and the presence in it of the defendant in such cause of action. Where the cause of action did not arise in this state, nor accrue to a citizen of this state, and it has come under the operation of the limitation law of another state, territory or country, and continued under its operation till it became a bar, it is to be recognized as a bar in this state.

Luce v. Clarke, 49 Minn. 356, 51 N. W. 1162.

See, O'Mulcahey v. Gragg, 45 Minn. 112, 47 N. W. 543; Smith v. Glover, 44 Minn. 260, 46 N. W. 406; Bigelow v. Ames, 18 Minn. 527 Gil. 471.

§ 127. The time, place, and manner of commencing an action pertain to the remedy, and he who elects to prosecute his action in this state must abide by our laws on such subjects. The effect of this statute is simply to allow a citizen of Minnesota to plead the statute of limitations of a foreign state or country when it is more favorable to him than our own, and to allow the same citizen, when he is plaintiff in a foreign cause of action, which he has had from the time it accrued, the benefit of our own statute; or, in other words, it confers a privilege on a defendant when sued by a foreigner which it denies to him when sued upon the same demand by a domestic plaintiff. Our own statute of limitations is always open to such of our citizens as can bring themselves within it, and foreign statutes may also be taken advantage of against foreign plaintiffs when more favorable than our own. There is no good

Digitized by Google

reason why a foreigner who allows a claim against one of our citizens to become stale by his own laws, should come here and revive it. Nor can we see any good reason why our citizens should rest under greater obligations toward foreign creditors than are imposed upon them in regard to our own.

Fletcher v. Spaulding, 9 Minn. 64 Gil. 54.

PERIOD OF DISABILITY EXCLUDED

The statute.

§ 128. "If a person entitled to bring an action mentioned in this chapter, except for a penalty or forfeiture, is, at the time the cause of action accrued, either,

(1) Within the age of twenty one years;[1] or,

(2) Insane;[2] or,

(3) Imprisoned on a criminal charge, or in execution under the sentence of a criminal court for a term less than his natural life. The time of such disability is not a part of the time limited for the commencement of the action, except that the period within which the action must be brought, cannot be extended more than five years by any such disability, except infancy, nor can it be so extended, in any case, longer than one year after the disability ceases."

[G. S. 1894 § 5147]

[1] Backus v. Burke, 63 Minn. 272, 65 N. W. 459. See Minnesota Debenture Co. v. Dean, 85 Minn. 473, 89 N. W. 848.

[2] Kelley v. Gallup, 67 Minn. 169, 69 N. W. 812.

Construction of statute.

§ 129. The disability which, by virtue of this statute, will arrest the running of the statute of limitations, must exist at the time the cause of action accrued. If the statute once begins to run against a party, it continues to run until the bar is complete. No subsequent disability, not even insanity, will impede it.

Kelley v. Gallup, 67 Minn. 169, 69 N. W. 812; Black v. Ross, 110 Iowa 112, 81 N. W. 229.

Infancy.

§ 130. The statute of limitations does not run against an infant although he has a guardian who might bring an action. The fact that a guardian or the infant himself by next friend brings an action before the disability is removed does not operate as a waiver of the saving clause in favor of the disability. The fact that others who are of full age are jointly interested in the claim is immaterial.[1] In case of adverse possession of land, where the statute of limitations begins to run against the ancestor, it will continue to run against the heir although he is under the disability of infancy when the right accrues to him.[2] The running of the statute is in no case affected by the fact that the defendant is an infant.[3]

[1] Keating v. Michigan Central Ry. Co. 94 Wis. 219.

[2] Swearingen v. Robertson, 39 Wis. 462.

[3] Petelon v. His Creditors, 51 La. Ann. 1660.

Digitized by Google

Insanity.

§ 131. The word insane as here used is not to be confined to persons "wholly without understanding" but includes any person who is non compos or "of unsound mind" as that phrase is used in the statute of wills.[1] The insanity of an infant defendant does not affect the running of the statute.[2]

[1] Burnham v. Mitchell, 34 Wis. 117.

[2] Baird v. Reynolds, 99 N. C. 473; Grady v. Wilson, 115 N. C. 344.

PERIOD OF WAR EXCLUDED

The statute.

§ 132. "When a person is an alien, subject or citizen of a country at war with the United States, the time of the continuance of the war is not a part of the period limited for the commencement of the action."

[G. S. 1894 § 5150] See Amy v. Watertown, 130 U. S. 320.

PERIOD COVERED BY INJUNCTION EXCLUDED

The statute.

§ 133. "When the commencement of an action is stayed by injunction, or statutory prohibition, the time of the continuance of the injunction or prohibition is not part of the time limited for the commencement of the action."

[G. S. 1894 § 5151] See upon the subject generally: Albright v. Albright, 70 Wis. 528; Van Wagonen v. Terplenning, 122 N. Y. 222; Fincke v. Funke, 25 Hun (N. Y.) 616; Mead v. Jenkins, 95 N. Y. 31.

Application of statute.

§ 134. It is generally held that bankruptcy proceedings suspend the running of the statute.[1] Where by any form of proceedings, the property of a debtor is taken possession of by the court, to be administered for the benefit of all the creditors and to be distributed among them in payment for their debts, the statute does not run against any debts which were not barred by the statute at the time possession of the property was taken by the court.[2] The statute has no application to a limitation prescribed by contract.[3] The plaintiff being prohibited by the city charter from bringing suit until thirty days from the presentation of his claim it was held that the running of the statute was suspended for that period.[4] It is not necessary that the injunction should be actually served. It is sufficient if the creditor had notice of it.[5]

[1] Davidson v. Fisher, 41 Minn. 363, 43 N. W. 79; In re St. Paul German Ins. Co. 58 Minn. 163, 59 N. W. 996; Von Sachs v. Kretz, 10 Hun 95, 72 N. Y. 548; Hoff v. Funkenstein, 54 Cal. 233; Rosenthal v. Plumb, 25 Hun (N. Y.) 336.

[2] Ludington v. Thompson, 4 App. Div. (N. Y.) 117; In re St. Paul German Ins. Co. 58 Minn. 163, 59 N. W. 996.

Digitized by Google

[3] Wilkinson v. First National Fire Ins. Co. 72 N. Y. 499.
[4] Brehm v. Mayor, 104 N. Y. 186. See Clowes v. Mayor, 47 Hun (N. Y.) 539.
[5] Berrier v. Wright, 26 Barb. (N. Y.) 208; McQueen v. Babcock, 41 Barb. (N. Y.) 337; Sands v. Campbell, 31 N. Y. 345; Hubbell v. Medbury, 53 N. Y. 98.

TIME OF DISABILITY

The statute.

§ 135. "No person can avail himself of a disability, unless it existed at the time his right of action accrued."

[G. S. 1894 § 5152] See Kelley v. Gallup, 67 Minn. 169, 69 N. W. 812; Black v. Ross, 110 Iowa 112, 81 N. W. 229; Hogan v. Kurtz, 94 U. S. 773; McDonald v. Hovey, 110 U. S. 619.

TWO OR MORE CO-EXISTING DISABILITIES

The statute.

§ 136. "When two or more disabilities co-exist at the time the right of action accrues, the limitation does not attach until they are all removed."

[G. S. 1894 § 5153] See Hogan v. Kurtz, 94 U. S. 773; Sims v. Everhardt, 102 U. S. 300.

Tacking.

§ 137. Cumulative disabilities are not allowed. A disability arising subsequent to the accrual of the cause of action cannot be tacked to one existing at that time.

Demarest v. Wynkoop, 3 Johns. (N. Y.) 129; Mercer v. Selden, 1 How. (U. S.) 51; Davis v. Coblens, 174 U. S. 719.

NEW ACTION AFTER REVERSAL ON APPEAL

The statute.

§ 138. "If any action is commenced within the time prescribed therefor, and judgment given therein for the plaintiff, and the same is arrested or reversed on error or appeal, the plaintiff may commence a new action within one year after such reversal or arrest. That all the provisions of this title as to the time of the commencement of civil actions shall apply to municipal and all other corporations with like power and effect as the same applies to natural persons."

[G. S. 1894 § 5155] See St. Paul & Duluth Ry. Co. v. City of Duluth, 73 Minn. 270, 76 N. W. 35.

Digitized by Google

PART PAYMENT

General rule.

§ 139. It is the general rule that a part payment of a subsisting debt sets the statute of limitations running afresh as to the balance.[1] But to have such effect the payment must be a voluntary one, made as part of a larger indebtedness, and under such circumstances as will warrant the court or jury in finding an implied promise to pay the balance.[2] The natural inference to be drawn from a part payment is that the debtor recognizes the debt as a subsisting obligation. The circumstances of the payment must be such as not to negative such inference.[3] This is the meaning of the rule that the payment must be made "under such circumstances as will warrant the court or jury in finding an implied promise to pay the balance" or, as it is sometimes expressed, "under such circumstances as reasonably, and by fair implication, leads to the inference that the debtor intended to renew his promise of payment." A voluntary payment in part of a larger indebtedness, without reservation, qualification, protest or other act negativing the inference that the debtor regarded the balance as a subsisting obligation, justifies the court or jury in finding an implied promise to pay the balance.[4] In an early case [5] in this state it was held that "there is no doubt that a part payment, without words or acts to indicate its character, would not be construed as carrying with it an acknowledgment that more was due and would be paid; that is, it would not be evidence from which a jury would be warranted in inferring a new promise." This language is very misleading if not positively erroneous. In a later case [6] it was said "that a careful reading of the opinion of the court in Brisbin v. Farmer will make it evident that the words "part payment are used as the equivalent of the words 'payment of a part,' and that the meaning of the court is that the payment of a part of a larger subsisting debt, as a part thereof, if unaccompanied by facts or circumstances of a contrary or inconsistent tendency, may be evidence from which a new promise can properly be inferred, or, as it may be otherwise stated, evidence of a fact which interrupts the running of the statute of limitations." "In order to take a case out of the statute of limitations by a part payment it must appear, in the first place, that the payment was made on account of a debt; secondly, it must appear that the payment was made on account of the debt for which the action is brought. But the case must go further, for it is necessary, in the third place, to show that the payment was made as part payment of a greater debt; because the principle upon which a part payment takes a case out of the statute is that it admits a greater debt to be due at the time of the part payment. Unless it amounts to an admission that more is due, it cannot operate as an admission of any still existing debt." [7]

[1] Fisk v. Stewart, 24 Minn. 97; Clarkin v. Brown, 80 Minn. 361, 83 N. W. 351; Downer v. Read, 17 Minn. 493 Gil. 470; Gordon v. Ven, 55 Minn. 105, 56 N. W. 581.

[2] Erpelding v. Ludwig, 39 Minn. 518, 40 N. W. 829. Brisbin

Digitized by Google

v. Farmer, 16 Minn. 215 Gil. 187; Chadwick v. Cornish, 26 Minn. 28, 1 N. W. 55; Clarkin v. Brown, 80 Minn. 361, 83 N. W. 351.

[3] Shepherd v. Thompson, 122 U. S. 231; Brisbin v. Farmer, 16 Minn. 215 Gil. 187; Chadwick v. Cornish, 26 Minn. 28, 1 N. W. 55; Smith v. St. Paul German Fire Ins. Co. 56 Minn. 202, 57 N. W. 475.

[4] Oevermann v. Loebertmann, 68 Minn. 162, 70 N. W. 1084; Clarkin v. Brown, 80 Minn. 361, 83 N. W. 351; Wolford v. Cook, 71 Minn. 77, 73 N. W. 706; Downer v. Read, 17 Minn. 493 Gil. 470; Young v. Perkins, 29 Minn. 173, 12 N. W. 515.

[5] Brisbin v. Farmer, 16 Minn. 215 Gil. 187. Followed in Chadwick v. Cornish, 26 Minn. 28, 1 N. W. 55; Smith v. St. Paul German Fire Ins. Co. 56 Minn. 202, 57 N. W. 475.

[6] Young v. Perkins, 29 Minn. 173, 12 N. W. 515. See, also, Oevermann v. Loebertmann, 68 Minn. 162, 70 N. W. 1084.

[7] Baron Parke in Tippets v. Heane, 1 C. M. & R. 252.

Theory of rule.

§ 140. The rule that the partial payment of a debt takes it out of the operation of the statute of limitations is founded upon the theory that a payment of a part of a subsisting debt is acknowledgment that the debt exists, from which the law implies a new promise to pay the balance.[1] It must appear that the debtor intended to recognize the obligation of an entire debt of which he has paid a part so as to imply a promise. Part payment is only evidence of a promise or a fact from which a promise may be implied. It is the new promise or contract, upheld by the original consideration, which must be relied on to support an action otherwise barred by lapse of time, though the declaration in form pursues the old contract or cause of action.[2] It matters not whether the payment was made before or after the running of the statute. There must be a new promise, express or implied, to keep a debt alive as well as to revive it.[3] This doctrine of the necessity of a promise, express or implied, was no doubt originally adopted to meet the requirements of common law pleading. A promise was essential to the action of assumpsit by which the obligation was generally enforced. The doctrine survives to confuse the whole subject. There is no longer any reason for holding a fictitious promise essential. "Instead of saying that there must be a new promise to remove the bar of the statute it is more correct to say that the evidence must be such that the law can imply a new promise where the form of action is such as to render a promise material."[4] We have no forms of action in this state and the fiction of a promise should be discarded. The real basis of the rule is the acknowledgment of the debt as a subsisting obligation—the acknowledgment of a balance due. This the law regards as a new obligation upon which the statute begins to run independently of the prior obligation. A partial payment revives the liability because it is deemed a recognition of it and an assumption anew of the balance.[5] While the law encourages prompt-

Digitized by Google

itude in the prosecution of remedies, yet, as the statute of limitations never pays a debt, although it may bar the remedy, it gives effect to such affirmative acts of the debtor as tend to recognize or pay an honest indebtedness.[6]

[1] Wolford v. Cook, 71 Minn. 77, 73 N. W. 706; Erpelding v. Ludwig, 39 Minn. 518, 40 N. W. 829.
[2] Willoughby v. Irish, 35 Minn. 63, 27 N. W. 379.
[3] Id.
[4] 1 Smith, Leading Cases (8th Ed.) 1007.
[5] Hewlett v. Schenck, 82 N. C. 234.
[6] Oevermann v. Loebertmann, 68 Minn. 162, 70 N. W. 1084.

Part payment not conclusive.

§ 141. Part payment is not of itself conclusive evidence to take a case out of the statute. The circumstances that attend such a payment may wholly disprove a promise to pay more. A payment in full settlement and satisfaction does not operate to take a cause of action out of the operation of the statute.

Conway v. Wharton, 13 Minn. 158 Gil. 145; Brisbin v. Farmer, 16 Minn. 215 Gil. 187.

By whom made—joint and several debtors.

§ 142. In order to prevent the running of the statute a partial payment must have been made by the debtor himself, or for him by his authority, or subsequently ratified if made in his name without his authority.[1] It is the law of this state that a partial payment by one of several joint and several debtors is inoperative to prevent the running of the statute as to the others.[2] A partial payment of a partnership debt, made by one partner after a dissolution of the firm will prevent the running of the statute as to the other partners, in favor of a creditor who has had dealings with the partnership and has had no notice of its dissolution.[3] Where one of two joint and several debtors makes a payment in his own behalf, the mere fact that the other debtor, after knowledge of such payment, verbally promises to pay the balance, will not constitute a ratification of the payments as having been made for him or in his behalf.[4]

[1] Pfenninger v. Kokesch, 68 Minn. 81, 70 N. W. 867; Wolford v. Cook, 71 Minn. 77, 73 N. W. 706; Clarkin v. Brown, 80 Minn. 361, 83 N. W. 351.
[2] Willoughby v. Irish, 35 Minn. 63, 27 N. W. 379; Davison v. Sherburne, 57 Minn. 355, 59 N. W. 316; Pfenninger v. Kokesch, 68 Minn. 81, 70 N. W. 867. See Whitaker v. Rice, 9 Minn. 13 Gil. 1.
[3] Davison v. Sherburne, 57 Minn. 355, 59 N. W. 316.
[4] Pfenninger v. Kokesch, 68 Minn. 81, 70 N. W. 867.

§ 143. A partial payment made by a trustee or assignee of an insolvent debtor does not interrupt the running of the statute.

Smith v. St. Paul German Fire Ins. Co. 56 Minn. 202, 57 N. W. 475.

Digitized by Google

Must clearly apply to debt in action.

§ 144. It must unequivocally appear that the payment was made on the specific debt involved in the action.[1] But it will be presumed to have made on the debt proved by the creditor unless another is shown to exist by his evidence or that of the debtor.[2]

[1] Oevermann v. Loebertmann, 68 Minn. 162, 70 N. W. 1084.

[2] Whitcomb v. Whiting, 1 Smith, Leading Cases, 1016, 991. See Whitney v. Reese, 11 Minn. 138 Gil. 87.

Part payment need not be in money.

§ 145. It is not necessary, for the purpose of interrupting the statute, that the part payment should be in actual money. A payment in goods may be sufficient for that purpose. So, the indorsement and delivery by the debtor of the note of a third party as collateral security for his indebtedness to another, the proceeds when collected to be applied on the debt, may operate as a payment sufficient to take it out of the statute. But if collateral securities which were given contemporaneously with the original obligation are subsequently realized upon and the proceeds applied to the part payment of the debt the debtor's passive acquiescence in such application does not interrupt the running of the statute. If a debtor voluntarily, and in the absence of any circumstances repelling the inference of an implied promise to pay the whole debt, transfers to his creditor new and additional collateral securities for the payment of his debt, the proceeds of which, when realized on, to be applied towards its payment, it will constitute a "part payment," which will interrupt the running of the statute, as of the date of the transfer of the securities.

Wolford v. Cook, 71 Minn. 77, 73 N. W. 706.

§ 146. The entry of a credit on an account, for an amount which the debtor claims to have paid on it at some former time, does not amount to a part payment on the date of the credit which will prevent the statute from running.

Erpelding v. Ludwig, 39 Minn. 518, 40 N. W. 829.

Time of part payment.

§ 147. A distinction is sometimes made, in the degree of proof required, between a part payment made before the running of the statute and one made after it has run.

See Clarkin v. Brown, 80 Minn. 361, 83 N. W. 351, § 154.

ACKNOWLEDGMENT OF DEBT—NEW PROMISE

The statute.

§ 148. "No acknowledgment or promise is sufficient evidence of a new or continuing contract by which to take the case out of the operation of this chapter [statute of limitations], unless the same is contained in some writing, signed by the party to be charged thereby; but this section shall not alter the effect of any payment of principal or interest."

Digitized by Google

[G. S. 1894 § 5154] Statute cited: Pfenninger v. Kokesch, 68 Minn. 81, 70 N. W. 867; McManaman v. Hinchley, 82 Minn. 296, 84 N. W. 1018.

General statement.

§ 149. There must be either an express promise, or an acknowledgment expressed in such words, and attended by such circumstances, as give to it the meaning, and therefore the force and effect, of a new promise. In the case of an acknowledgment or implied promise, there should be a direct recognition of the indebtedness sued on, from which a willingness to pay the same may reasonably be implied. If there be no express promise, but a promise is to be raised by implication of law from the acknowledgment of the party, such acknowledgment ought to contain an unqualified and direct admission of a previous subsisting debt which the party is liable and willing to pay. If there be accompanying circumstances which repel the presumption of a promise or intention to pay, if the expression be equivocal, vague and indeterminate, leading to no certain conclusion, but at best to probable inferences which may affect different minds in different ways they ought not to go to the jury as evidence of a new promise to revive the cause of action.[1] The willingness to pay need not be express but is implied from the unqualified and unconditional acknowledgment of the debt. The acknowledgment must be an admission, not that the debt was just originally but that it continues due at the time of the acknowledgment.[2] The statute of limitations does not operate to raise a presumption of payment, but is a statute of repose; hence, to revive a legal obligation once terminated by the effect of the statute, requires something more than a mere acknowledgment that a past debt is still unpaid.[3] The acknowledgment must be on the one hand broad enough to include the specific debt in question, and on the other sufficiently precise and definite in its terms to show that this debt was the subject matter of the acknowledgment. It ought clearly to appear in all cases that it relates to the identical debt which is sought to be recovered on the strength of it; and where there are more debts than one due from the defendant to the plaintiff, it must appear to which it applies.[4]

[1] Whitney v. Reese, 11 Minn. 138 Gil. 87; Smith v. Moulton, 12 Minn. 352 Gil. 229; McNab v. Stewart, 12 Minn. 407 Gil. 291; Brisbin v. Farmer, 16 Minn. 215 Gil. 187; Willoughby v. Irish, 35 Minn. 63, 27 N. W. 379; Denny v. Marrett, 29 Minn. 361, 13 N. W. 148; Russell & Co. v. Davis, 51 Minn. 482, 53 N. W. 766; Drake v. Sigafoos, 39 Minn. 367, 40 N. W. 257.

[2] Russell & Co. v. Davis, 51 Minn. 482, 53 N. W. 766.

[3] Denny v. Marrett, 29 Minn. 361, 13 N. W. 148; Willoughby v. Irish, 35 Minn. 63, 27 N. W. 379.

[4] Whitney v. Reese, 11 Minn. 138 Gil. 87.

Acknowledgment cannot be withdrawn.

§ 150. An acknowledgment taking a debt out of the statute cannot be withdrawn so as to restore the bar.

Sanborn v. School District, 12 Minn. 17 Gil. 1.

Digitized by Google

Acknowledgment of corporation.

§ 151. When the action of a corporation, as, for example, a school district, constitutes in substance an acknowledgment or promise sufficient to take a debt out of the statute and such action is made a matter of record the record is a writing which satisfies the statute.

Sanborn v. School District, 12 Minn. 17 Gil. 1.

Conditional promise.

§ 152. A conditional promise to pay a debt will not take it out of the statute unless the condition is performed.

McNab v. Stewart, 12 Minn. 407 Gil. 291.

Parol evidence inadmissible.

§ 153. The written acknowledgment or promise must itself describe or furnish the means of identifying the debt or debts to which it refers and cannot be supplemented by parol evidence.

Russell & Co. v. Davis, 51 Minn. 482, 53 N. W. 766.

Time of acknowledgment.

§ 154. It is immaterial whether the acknowledgment was made before or after the running of the statute and no higher degree of proof is required in the latter case than in the former.

1 Smith, Leading Cases (8th Ed.) 991; Drake v. Sigafoos, 39 Minn. 367, 40 N. W. 257.

Account stated.

§ 155. An account stated, which is not supported by evidence of some writing signed by the party to be charged, will not prevent the running of the statute against previously existing liabilities included therein. An action on an account stated may, of course, be established by oral promises or acknowledgments; but such proof will not operate to take the case out of the general rule of limitation. The stating of the account does not, either with an express oral promise or an implied promise to pay it, fix a new period from which the statute starts to run.

Erpelding v. Ludwig, 39 Minn. 518, 40 N. W. 829.

§ 156. To make an indorsement upon a promissory note of a partial payment thereon evidence to prevent the bar of the statute of limitations, it must appear by evidence dehors the indorsement that it was made at a time when it was against the interest of the holder of the note to make it.

Young v. Perkins, 29 Minn. 173, 12 N. W. 515; Willoughby v. Irish, 35 Minn. 63, 27 N. W. 379; Erpelding v. Ludwig, 39 Minn. 518, 40 N. W. 829; Smith v. St. Paul German Fire Ins. Co., 56 Minn. 202, 57 N. W. 475; Drake v. Sigafoos, 39 Minn. 367, 40 N. W. 257.

Digitized by Google

ACTIONS ON CONTRACTS AND OTHER OBLIGATIONS

The statute.

§ 157. The statute provides that an action upon a contract or other obligation, express or implied, shall be commenced within six years after the cause of action accrues.

See G. S. 1894 § 5136.

§ 158. The following actions have been held to come within this provision of the statute: an action on the implied contract of a ferry company to carry safely;[1] an action for an accounting between partners;[2] an action to compel specific performance of a contract for the sale of real property;[3] an action by a mortgagor against a mortgagee to recover a surplus at a sale under a power;[4] an action on an account for goods sold and delivered at different dates;[5] an action to foreclose a mortgage, so far as the right to a deficiency judgment is concerned;[6] an action for an accounting;[7] an action on a bond to secure distribution of estate of decedent;[8] an action on the official bond of a constable;[9] an action against a municipality for damages set apart for the owner in condemnation proceedings;[10] an action to enforce an implied trust;[11] an action for the recovery of part payments on a contract for the sale of land;[12] an action on a guardian's bond;[13] an action on a promissory note;[14] an action on installments of salary;[15] an action to secure refundment of money paid at a void tax sale.[16]

[1] Blakeley v. Le Duc, 22 Minn. 476.
[2] McClung v. Capehart, 24 Minn. 17. See Thompson v. Crosby, 62 Minn. 324, 64 N. W. 823.
[3] Lewis v. Prendergast, 39 Minn. 301, 39 N. W. 802.
[4] Ayer v. Stewart, 14 Minn. 97 Gil. 68.
[5] Cousins v. St. Paul etc. Ry. Co., 43 Minn. 219, 45 N. W. 429.
[6] Slingerland v. Sherer, 46 Minn. 422, 49 N. W. 237.
[7] Thompson v. Crosby, 62 Minn. 324, 64 N. W. 823; Muus v. Muus, 29 Minn. 115, 12 N. W. 343.
[8] Olson v. Fish, 75 Minn. 228, 77 N. W. 818.
[9] Litchfield v. McDonald, 35 Minn. 167, 28 N. W. 191.
[10] Stillwater etc. Ry. Co. v. City of Stillwater, 66 Minn. 176, 68 N. W. 836.
[11] Id. But see Burk v. Western Land Assoc. 40 Minn. 506, 42 N. W. 479.
[12] Jorgenson v. Jorgenson, 81 Minn. 428, 84 N. W. 221.
[13] Brandes v. Carpenter, 68 Minn. 388, 71 N. W. 402.
[14] Fletcher v. Spaulding, 9 Minn. 64 Gil. 54.
[15] Wood v. Cullen, 13 Minn. 394 Gil. 365.
[16] State v. Olson, 58 Minn. 1, 59 N. W. 634.

Digitized by Google

ACTIONS FOR FRAUD

The statute.

§ 159. The statute [1] provides that an action for relief on the ground of fraud shall be commenced within six years after the cause of action accrues, the cause of action in such case not to be deemed to have accrued, until the discovery by the aggrieved party of the facts constituting the fraud.

[1] G. S. 1894 § 5136.

Applicable to both legal and equitable actions.

§ 160. The statute is applicable alike to legal and equitable actions. Form is not controlling.

Humphrey v. Carpenter, 39 Minn. 115, 39 N. W. 67; Cock v. Van Etten, 12 Minn. 522 Gil. 431; Lewis v. Welch, 47 Minn. 193, 48 N. W. 608. See Bausman v. Kelley, 38 Minn. 197, 36 N. W. 197 (an action to remove a cloud on the ground of fraud).

Statute runs from discovery of fraud.

§ 161. The statute begins to run only from the discovery of the fraud or from the time it ought to have been discovered. Actual discovery is not always necessary. The means of knowledge are equivalent to actual knowledge, that is, a knowledge of facts which would have put an ordinarily prudent man upon inquiry which, if followed up, would have resulted in a discovery of the fraud, is equivalent to actual discovery.

Cock v. Van Etten, 12 Minn. 522 Gil. 431; Board of County Comrs. v. Smith, 22 Minn. 97; Berkey v. Judd, 22 Minn. 287; Humphrey v. Carpenter, 39 Minn. 115, 39 N. W. 67; Lewis v. Welch, 47 Minn. 193, 48 N. W. 608; Morrill v. Little Falls Mfg. Co. 53 Minn. 371, 55 N. W. 547; Duxbury v. Boice, 70 Minn. 113, 72 N. W. 838; First Nat. Bank v. Strait, 71 Minn. 69, 73 N. W. 645; Id. 75 Minn. 396, 78 N. W. 101.

§ 162. Constructive notice of the record of a deed in the register's office is insufficient to set the statute running.

Berkey v. Judd, 22 Minn. 287; Duxbury v. Boice, 70 Minn. 113, 72 N. W. 838.

Burden of proof as to discovery of fraud.

§ 163. When an action for relief on the ground of fraud is not commenced until more than six years after the commission of the acts constituting the fraud, the burden is on the plaintiff to allege and prove that he did not discover the facts constituting the fraud until within six years before the commencement of the action. This is analogous to the old equity rule, and is bottomed on common sense and sound principle. The question is what constitutes a "discovery" within the meaning of the statute? To ascertain what constitutes "a discovery of the facts constituting the fraud," reference must be had to the principles of equity in which this provision had its origin, and which the legislature must be presumed to have had in mind when they enacted the statute. In granting relief on the ground of

Digitized by Google

fraud the foundation principle of courts of equity was that the party defrauded is not affected by the lapse of time so long as he remains, without any fault of his own, in ignorance of the fraud that has been committed. But equity aided the diligent, and not the negligent. It was opposed to stale claims, and would not permit a party to prolong, by his own laches, the time during which he might apply for relief. Hence, in actions in equity, the rule was that the means of knowledge were equivalent to actual knowledge; that is, that a knowledge of facts which would have put an ordinarily prudent man upon inquiry which, if followed up, would have resulted in a discovery of the fraud, was equivalent to actual discovery. Hence, in equity, where there was no statute of limitations, but merely an application of the doctrine of laches, the burden was on the plaintiff not merely to prove that he did not, in fact, discover the fraud until within a reasonable time before he filed his bill, but also to show by the facts and circumstances connected with the fraud and its discovery that his failure to discover it sooner was consistent with reasonable diligence on his part and not the result of his own negligence. The rule under our statute is the same.

Duxbury v. Boice, 70 Minn. 113, 72 N. W. 838. See also, Humphrey v. Carpenter, 39 Minn. 115, 39 N. W. 67; Morrill v. Little, 53 Minn. 371, 55 N. W. 547; First Nat. Bank v. Strait, 71 Minn. 69, 73 N. W. 645; Id. 75 Minn. 396, 78 N. W. 101.

Actions within this section.

§ 164. The following actions come within this statute: an action by a county against its treasurer for fraudulent conversion of county funds;[1] an action by a principal against an agent for the fraudulent conversion of funds of the principal;[2] an action by stockholders to have a deed of the corporation set aside for fraud;[3] an action by heirs to charge an administrator as trustee;[4] an action to set aside a deed obtained by fraud, although recovery of possession of the land is also sought.[5]

[1] Board of County Comrs. v. Smith, 22 Minn. 97.
[2] Cock v. Van Etten, 12 Minn. 522 Gil. 431.
[3] Morrill v. Little Falls Mfg. Co. 53 Minn. 371, 55 N. W. 547.
[4] Lewis v. Welch, 47 Minn. 193, 48 N. W. 608.
[5] McMillan v. Cheeney, 30 Minn. 519, 16 N. W. 404; Brasie v. Minneapolis Brewing Co. 92 N. W. 340.

ACTIONS FOR TORT GENERALLY

The statutes.

§ 165. The statute [1] provides that the following actions ex delicto shall be commenced within six years after the cause of action accrues:

(1) An action for trespass upon real property.

(2) An action for taking, detaining, and injuring personal property, including actions for the specific recovery thereof.

(3) An action for criminal conversation, or for any other injury to

UNIV. OF MICH. LAW LIBRARY.

Digitized by Google

the person or rights of another, not arising on obligation, and not hereinafter enumerated.[2]

(4) An action for relief on the ground of fraud.[3]

[1] G. S. 1894 § 5136.

[2] Brown v. Village of Heron Lake, 67 Minn. 146, 69 N. W. 710; Bryant v. American Surety Co. 69 Minn. 30, 71 N. W. 826; Ott v. Great Northern Ry. Co. 70 Minn. 50, 72 N. W. 833; Ackerman v. Chicago etc. Ry. Co. 70 Minn. 35, 72 N. W. 1134.

[3] See § 159 et seq.

§ 166. An action for libel, slander, assault, battery, false imprisonment or other tort resulting in personal injury, must be commenced within two years after the cause of action accrues.

[Laws 1895 ch. 30]

§ 167. An action against a city, village or borough, for personal injury or loss resulting from negligence must be commenced within one year after the happening of such injury or loss.

[Laws 1897 ch. 248]

Cases.

§ 168. An action for negligence is subject to the six year limitation except when brought against a municipality;[1] an action for malicious prosecution is subject to the two year limitation.[2]

[1] Brown v. Village of Heron Lake, 67 Minn. 146, 69 N. W. 710; Ott v. Great Northern Ry. Co. 70 Minn. 50, 72 N. W. 833; Bryant v. American Surety Co. 69 Minn. 30, 71 N. W. 826; Ackerman v. Chicago etc. Ry. Co. 70 Minn. 35, 72 N. W. 1134.

[2] Bryant v. American Surety Co. 69 Minn. 30, 71 N. W. 826.

ACTIONS ON MUTUAL ACCOUNTS

The statute.

§ 169. "In an action brought to recover a balance due upon a mutual, open and current account, when there have been reciprocal demands between the parties, the cause of action is deemed to have accrued from the time of the last item proved in the account on either side."

[G. S. 1894 § 5139]

Construction of statute.

§ 170. The rule that items within six years draw after them other items beyond that period is by all the cases strictly confined to mutual accounts, or accounts between two parties, which show a reciprocity of dealing. There must be a mutual, or, as it is otherwise expressed, an alternate course of dealing. Mutual accounts are made up of matters of setoff. There must be a mutual credit founded on a subsisting debt on the other side, or an express or implied agreement for a setoff of mutual debts. It is not an essential element of a mutual account that each party should have an independent cause of action against the other for his side of the account. The phrase in the statute respecting "reciprocal demands" adds nothing to its force.

Digitized by Google

In ordinary cases of mutual dealings no obligation is created in regard to each particular item, but only for the balance. And it is the constantly varying balance which is the debt. The theory upon which the statute is based is that the credits are mutual and that the account is permitted to run with the view of ultimate adjustment by a settlement and payment of the balance.

Green v. Disbrow, 79 N. Y. 1; Gunn v. Gunn, 74 Ga. 555; Parker v. Schwartz, 136 Mass. 30; Porter v. Chicago etc. Ry. Co. 99 Iowa, 351; Stewart's Appeal, 105 Pa. St. 307. See Leyde v. Martin, 16 Minn. 38 Gil. 16; Taylor v. Parker, 17 Minn. 469 Gil. 447.

When statute begins to run.

§ 171. In case of a mutual and open account current the statute of limitations begins to run at the time of the last item on either side of the account and in such a case a plaintiff may recover the whole balance due to him upon such account if he proves any item upon his own side within the period of limitation, although there has been no item upon the defendant's side of the account within that time.

Day v. Mayo, 154 Mass. 472.

§ 172. When an open, running, mutual account becomes an account stated it passes within the operation of the statute of limitations so that all claim on account of previous items of the account will be barred in six years thereafter, although the balance itself may be carried forward into a new account.

Inhabitants of Belcherton v. Bridgman, 118 Mass. 486.

Cases.

§ 173. An account showing on one side items for goods sold and delivered at different dates and payments made by the purchaser on the other side does not come within the statute for the credit is all on one side and there is nothing to offset.[1] If credit is given for an article of personal property delivered by the debtor to his creditor at a valuation agreed upon the account is within the statute.[2] The existence of an indebtedness by A. to B. and an extension of credit to B. by A. by reason thereof constitutes a mutual account.[3] Where one tenant in common receives rents and profits on the one side and on the other pays taxes and other common expenses for which he has a personal claim against his co-tenants the account is within the statute.[4] The statute does not apply to an item of indebtedness which was not entered until after the death of the party sought to be charged and after the statutory period had run thereon.[5] An account including items for services and materials furnished defendant by the plaintiff and for materials furnished by defendant to plaintiff is within the statute.[6]

[1] Cousins v. St. Paul etc. Ry. Co. 43 Minn. 219, 45 N. W. 429; Parker v. Schwartz, 136 Mass. 30.

[2] Taylor v. Parker, 17 Minn. 469 Gil. 447; Norton v. Larco, 30 Cal. 126; Chambers v. Marks, 25 Pa. St. 296; Green v. Disbrow, 79 N. Y. 1.

Digitized by Google

[3] Reid v. Wilson (Ga. Dec. 1899) 34 S. E. 608.
[4] Robinson v. Robinson, 173 Mass. 233.
[5] In re Huger, 100 Fed. 865.
[6] Hannan v. Engelmann, 49 Wis. 278.

ACTIONS ON RUNNING ACCOUNTS NOT MUTUAL

General statement.

§ 174. In the case of an ordinary open running account, as distinguished from an open, running, mutual account, the statute runs on each item from its own date, in the absence of any part payment.[1] A part payment or acknowledgment of such an account takes all the items out of the statute, up to that time.[2] When such an account becomes a stated account the statute begins to run afresh if the accounting is in writing and signed by the party sought to be charged.[3]

[1] Cousins v. St. Paul etc. Ry. Co. 43 Minn. 219, 45 N. W. 429.
[2] Clarkin v. Brown, 80 Minn. 361, 83 N. W. 351; Day v. Mayo, 154 Mass. 472; Gordon v. Ven, 55 Minn. 105, 56 N. W. 581.
[3] Erpelding v. Ludwig, 39 Minn. 518, 40 N. W. 829; Chace v. Trafford, 116 Mass. 529.

What part of account.

§ 175. It is competent for the parties to agree that the amount of an order for the payment of money, given by a third party to plaintiff on defendant, and accepted by the latter, should be made a part of an open current account between them, and charged thereon to defendant; and, this being done, any payment which would take the balance of the account out of the statute of limitations would also take the item of the order out of the statute.

Gordon v. Ven, 55 Minn. 105, 56 N. W. 581.

ACTIONS UPON AN ACCOUNT STATED

General rule.

§ 176. An action on an account stated must be brought within six years from the time the cause of action accrues. When the statement of the account is in writing, signed by the party sought to be charged, the statute begins to run from the time of the settlement. If the statement is not in writing the statute runs from the dates of the various previously existing liabilities included therein.[1] The statute does not begin to run against a cause of action on an account stated from the date of the last item of the debit account therein but only from the date when the account became an account stated.[2]

[1] Erpelding v. Ludwig, 39 Minn. 518, 40 N. W. 829; Chace v. Trafford, 116 Mass. 529.
[2] King v. Davis, 168 Mass. 133.

Changing account stated to mutual account.

§ 177. A creditor cannot, for the purpose of avoiding the statute of limitations, change the character of an account from an account

Digitized by Google

stated to an open, running, mutual account by connecting it with items arising subsequent to the statement of the account.

Porter v. Chicago etc. Ry. Co. 99 Iowa, 351; Ross v. Fickling, 25 Wash. L. R. 806, 11 App. D. C. 442.

ACTIONS TO ENFORCE TRUSTS

The statute.

§ 178. The statute [1] provides that an action to enforce a trust or compel an accounting, where the trustee has neglected to discharge his trust, or has repudiated the trust relation or has fully performed the same, shall be commenced within six years after the cause of action accrues.

[1] G. S. 1894 § 5136.

§ 179. This statute does not change the previous rule of equity that actions to enforce an express and continuing trust, or to compel an accounting, do not accrue until the trustee has neglected to discharge the trust, or has repudiated his trust, or has fully performed the same. It simply recognizes the equity rule, and fixes definitely the time within which such actions must be brought after they accrue. This statute, like the equity rule which it follows, applies only to express, technical, and continuing trusts. It has no application to cases of implied trusts and those which the law forces on a party. In such cases the statute of limitations runs from the time the act was done by which the party became chargeable as trustee by implication; that is from the time when the cestui que trust could have enforced his right by action. If the statute was not permitted to operate where an implied trust exists, the exceptions would be endless, as in fact every case of deposit or bailment, in certain sense, creates a trust, and the instances in which an implied trust may be raised are almost innumerable.

Stillwater & St. Paul Ry. Co. v. City of Stillwater, 66 Minn. 176, 68 N. W. 836; Gibson v. Gibson, (Wis.) 84 N. W. 22. See Burk v. Western Land Assoc. 40 Minn. 506, 42 N. W. 479 (an action to enforce an implied trust improperly held to come within this section).

§ 180. The mere fact that a contract creates a relation in the nature of a trust, or that the action to enforce the obligations growing out of such contract is of an equitable nature, does not bring the action within this section of the statute.

McClung v. Capehart, 24 Minn. 17.

§ 181. In the case of express trusts, unless repudiated, the statute does not run. The equitable doctrine of diligence applies. Where there is fraud of which the plaintiff is ignorant, or a trust is shown to have been entered on and kept on foot, or acknowledged and acted on, so that a denial of it would work a fraud, the statute will not be set in motion until notice of the facts constituting the fraud or a denial of the trust.

Randall v. Constans, 33 Minn. 329, 34 N. W. 272; Smith v. Glover,

Digitized by Google

44 Minn. 260, 46 N. W. 406; Donahue v. Quackenbush, 62 Minn. 132, 64 N. W. 141; Thompson v. Crosby, 62 Minn. 324, 64 N. W. 823; Wilson v. Welles, 79 Minn. 53, 81 N. W. 549; Lamberton v. Youmans, 84 Minn. 109, 86 N. W. 894.

§ 182. Express trusts are created by contracts and agreements which directly and expressly point out the persons, property and purposes of the trust. Implied trusts are those which the law implies from the language of the contract and the evident intent and purpose of the parties.

Wilson v. Welles, 79 Minn. 53, 81 N. W. 549.

ACTIONS TO FORECLOSE OR REDEEM MORTGAGES

The statute.

§ 183. "Every action to foreclose a mortgage heretofore or hereafter made upon real estate shall be commenced within fifteen years after the maturity of the whole of the debt secured by said mortgage, and said fifteen years shall not be enlarged or extended by reason of any non-residence nor by reason of any payment or payments made or applied upon the debt secured by such mortgage after the maturity of such debt."

[Laws 1901 ch. 11]

Not applicable to debt.

§ 184. This statute does not apply to the debt for which the mortgage stands as security. Thus, an action to foreclose a mortgage is governed by the six year limitation so far as it is an action for the recovery of a personal judgment.[1] And a mortgage may be foreclosed by action after an action on the debt is barred.[2]

[1] Slingerland v. Sherer, 46 Minn. 422, 49 N. W. 237.

[2] Ozmun v. Reynolds, 11 Minn. 459 Gil. 341; Conner v. Howe, 35 Minn. 518, 29 N. W. 314. See Bradley v. Norris, 63 Minn. 156, 65 N. W. 357.

Foreclosure by advertisement.

§ 185. This section of the statute is not applicable to a foreclosure by advertisement under a power.[1] A mortgage "may be foreclosed by advertisement within fifteen years after the maturing of such mortgage or the debt secured thereby."[2]

[1] Golcher v. Brisbin, 20 Minn. 453 Gil. 407.

[2] G. S. 1894 § 6028; Kenaston v. Lorig, 81 Minn. 454, 84 N. W. 323 (whether a partial payment which prevents the running of the statute against the debt will prevent the statute running against the right to foreclose by advertisement is an open question in this state).

Partial payment of debt.

§ 186. Under the existing statute a partial payment which prevents the statute of limitations running against the debt will not prevent the statute from running against the remedy on the mortgage security.[1] It was formerly held otherwise.[2]

Digitized by Google

[1] See § 183.

[2] Carson v. Cochran, 52 Minn. 67, 53 N. W. 1130; Austin v. Barnum, 52 Minn. 136, 53 N. W. 1132; Kenaston v. Lorig, 81 Minn. 454, 84 N. W. 323; Fisk v. Stewart, 24 Minn. 97; McManaman v. Hinchley, 82 Minn. 296, 84 N. W. 1018.

§ 187. When a mortgage is given to secure several separate notes the payment of one of the notes as it falls due does not toll the statute as to the other notes or the mortgage.

McManaman v. Hinchley, 82 Minn. 296, 84 N. W. 1018.

Non-residence now immaterial.

§ 188. The running of the statute is not now affected by the non-residence of the defendant.[1] Formerly the rule was otherwise.[2]

[1] Hill v. Townley, 45 Minn. 167, 47 N. W. 653. See § 183.

[2] Whalley v. Eldridge, 24 Minn. 358; Rogers v. Benton, 39 Minn. 39, 38 N. W. 765; Foster v. Johnson, 44 Minn. 290, 46 N. W. 356; Carson v. Cochran, 52 Minn. 67, 53 N. W. 1130.

Claim for taxes paid.

§ 189. By statute the mortgagee may recover, in an action to foreclose, the amount of all taxes on the land which he has paid prior to the sale. But if the mortgage is barred the claim for taxes is also barred.

Hill v. Townley, 45 Minn. 167, 47 N. W. 653. See, also, Gorman v. Nat. Life Ins. Co. 62 Minn. 327, 64 N. W. 906; Wyatt v. Quimby, 65 Minn. 537, 68 N. W. 109; Dunnell, Minn. Pl. § 1627.

Action to redeem from mortgagee or purchaser in possession.

§ 190. The time within which a mortgagor may bring an action to redeem from the mortgagee or purchaser in possession begins to run from the time the mortgagee or purchaser goes into possession. The limitation on such actions, adopted by analogy, is the time within which an action to foreclose may be brought.

Bradley v. Norris, 63 Minn. 156, 65 N. W. 357 and cases cited; Id. 67 Minn. 48, 69 N. W. 624; Backus v. Burke, 63 Minn. 272, 65 N. W. 459.

ACTIONS AGAINST SURETIES ON BONDS OF COUNTY OFFICIALS

The statute.

§ 191. "Actions against a surety or sureties, upon any official bond of any auditor, register of deeds, clerk of the district court, court commissioner or county attorney shall be commenced within six years from the date of the expiration of the term of office of the principal in such bond, for which such bond was given."

[Laws 1901 ch. 357]

Digitized by Google

ACTIONS AGAINST HEIRS, DEVISEES AND LEGATEES

The statute.

§ 192. The statute provides that no action shall be maintained against heirs, devisees or legatees to charge them for the debts of the decedent, unless commenced within one year from the time the claim is allowed or established.[1] It is as yet undetermined in what court or in which manner this section contemplates that the claim shall be "allowed or established." But it has been held that an action to charge the distributees of the estate of a deceased stockholder with his stockholder's liability, to the extent of the estate received by him, is not barred in one year after the corporation goes into insolvency.[2] The statute is not set in motion in favor of an heir, devisee or legatee by the allowance and establishment of a claim or account against a guardian upon whose bond his decedent was a surety.[3]

[1] G. S. 1894 § 5927.

[2] Markell v. Ray, 75 Minn. 138, 77 N. W. 788. See Olson v. Fish, 75 Minn. 228, 77 N. W. 818.

[3] Holden v. Turrell, (Minn.) 90 N. W. 395.

ACTIONS FOR THE RECOVERY OF LANDS SOLD BY EXECUTORS, ADMINISTRATORS AND GUARDIANS

The statute.

§ 193. "No action for the recovery of any real estate sold by an executor or administrator, under this chapter [probate code], shall be maintained by any heir or other person claiming under the deceased, unless it is commenced within five years next after the sale; and no action for any estate so sold by a guardian shall be maintained by the ward, or by any person claiming under him, unless commenced within five years next after the termination of the guardianship; except that minors and others under legal disability to sue at the time when the right of action first accrues, may commence such action at any time within five years after the removal of such disability."

[G. S. 1894 § 4611] Similar statutes are to be found in Wis. Mich. Mass. Cal. and Ind. For an analogous statute relating to foreclosure sales see § 2172.

Application of statute.

§ 194. To enable a purchaser at such a sale to avail himself of this statute it is not necessary that he should prove the sale valid.[1] The statute, at least as to sales by a guardian, is not confined to actions of ejectment, pure and simple.[2] It is not applicable to the case of a party in possession defending a title derived from a ward against the affirmative attack of one relying on a guardian's sale.[3] An earlier statute contained an exception in favor of non-residents.[4] The statute only applies to cases in which the suit brings in controversy the validity of such sale. If the plaintiff's title is such that the probate

Digitized by Google

sale is immaterial to it the statute has no application. The claim of a widow to a homestead right does not bring in question the validity of an administrator's sale of the same land to pay debts of the intestate since the sale must be deemed made subject to the homestead right.[5] After the five years have run the court itself cannot revise or correct its former proceedings so as to divest the title acquired by the sale.[6] The statute is constitutional.[7] Lands devised in trust subject to the payment of debts were sold by the executor for the purpose of paying debts and the purchaser continued in possession, claiming under the executor's deed, from 1866 to 1891. The cestui que trust came of age in 1882 but failed to bring any action for the lands within five years thereafter. He was held barred by the statute.[8] It is probably not necessary that the purchaser should be in possession in order to avail himself of the statute, but the question is apparently an open one in this state.

[1] Spencer v. Sheehan, 19 Minn. 338 Gil. 292; Toll v. Wright, 37 Mich. 93; Jones v. Billstein, 28 Wis. 221; Egan v. Grece, 79 Mich. 629; Dexter v. Cranston, 41 Mich. 451; Harlan v. Peck, 33 Cal. 515; Good v. Norley, 28 Iowa, 216; Ganahl v. Soher, 68 Cal. 95; Mohr v. Manierre, 101 U. S. 417; Fisher v. Bush (Ind.) 32 N. E. 925; Smith v. Swenson, 37 Minn. 1, 32 N. W. 784; Sanborn v. Cooper, 31 Minn. 307, 17 N. W. 856.

[2] Brown v. Fischer, 77 Minn. 1, 79 N. W. 494.

[3] Dawson v. Helmes, 30 Minn. 107, 14 N. W. 462.

[4] Jordan v. Secombe, 33 Minn. 220, 22 N. W. 383.

[5] Showers v. Robinson, 43 Mich. 502.

[6] Betts v. Sholton, 27 Wis. 667; Estate of O'Neil, 90 Wis. 480.

[7] Streeter v. Wilkinson, 24 Minn. 288; Rice v. Dickerman, 47 Minn. 527, 50 N. W. 698.

[8] Turner v. Scheiber, 89 Wis. 1.

ACTIONS UPON A LIABILITY CREATED BY STATUTE

The statute.

§ 195. The statute [1] provides that an action upon a liability created by statute, other than those upon a penalty or forfeiture, shall be commenced within six years after the cause of action accrues.

[1] G. S. 1894 § 5136.

§ 196. "We may mention, as probably falling within this section, the double liability of stockholders for the debts of corporations; the statutory liability of railroad corporations for damages resulting from a neglect to fence their tracks; the right given by statute to recover money lost in gambling, to recover back usurious interest paid, if no special limitation be prescribed in the statute giving such right; actions to recover for death caused by negligence; and proceedings under our tax law to recover judgment for taxes against real estate."

Merchants' Nat. Bank v. N. W. Mfg. & Car Co. 48 Minn. 349, 51 N. W. 117. See Harper v. Carroll, 62 Minn. 152, 64 N. W.

Digitized by Google

145 (action to enforce stockholder's liability); Stillwater etc. Ry. Co. v. City of Stillwater, 66 Minn. 176, 68 N. W. 836 (action against municipality for damages set apart in condemnation proceedings).

§ 197. Proceedings under the tax laws to obtain judgment against land for taxes due thereon come within this section of the statute.[1] But the statute does not commence to run against such proceedings until the expiration of the time allowed for the filing of the delinquent list with the clerk of the district court;[2] and where such proceedings are judicially determined to be void the right to institute new proceedings cannot be barred by the lapse of time between the institution of the original proceedings and the judicial determination of their invalidity.[3] Proceedings to enforce a tax judgment must be instituted within ten years of its rendition.[4]

[1] County of Redwood v. Winona & St. Peter Land Co. 40 Minn. 512, 41 N. W. 465, 42 N. W. 473; Mower County v. Crane, 51 Minn. 201, 53 N. W. 629; Pine County v. Lambert, 57 Minn. 203, 58 N. W. 990; State v. Norton, 59 Minn. 424, 61 N. W. 458; State v. Sage, 75 Minn. 448, 78 N. W. 14.

[2] State v. Sage, 75 Minn. 448, 78 N. W. 14.

[3] State v. Kipp, 70 Minn. 286, 73 N. W. 164. See State v. Bellin, 79 Minn. 131, 81 N. W. 763.

[4] See § 207.

§ 198. An action under G. S. 1894 § 1610 for the refundment of money paid at a void tax sale undoubtedly comes under this section of the statute. The statute begins to run on the day of the entry of judgment against the purchaser adjudging the sale void.[1] But the holder of a tax title is under no obligation to bring an action at any time to test the validity of his title, in order to have the benefit of the statute.[2]

[1] Easton v. Sorenson, 53 Minn. 309, 55 N. W. 128; State v. Norton, 59 Minn. 424, 61 N. W. 458.

[2] State v. Murphy, 81 Minn. 254, 83 N. W. 991. Overruling State v. Norton, 59 Minn. 424, 61 N. W. 458. See § 199.

ACTIONS INVOLVING TAX TITLES

No distinctive rules.

§ 199. There are now no distinctive rules as to the time within which an action must be brought to test the validity of a tax title.[1] The general statutes apply. The holder of a tax title is under no obligation at any time to bring an action to determine the validity of his title, no judgment being necessary to confirm his title.[2] Formerly there were general statutes limiting the time within which an action might be brought to test a tax title and special statutes of limitation applying to particular forfeited sales. To determine what statute of limitations applies to a given sale the statute in force in the year of the sale must be consulted.[3]

[1] Jaggard, Taxation, ch. 18 §§ 172–173.

Digitized by Google

[2] State v. Murphy, 81 Minn. 254, 83 N. W. 991. See cases cited § 83.

[3] Baker v. Kelley, 11 Minn. 480 Gil. 358 (Laws 1862 ch. 4 § 7—owner cannot be compelled to bring an action to test an outstanding tax title); Hill v. Lund, 13 Minn. 451 Gil. 419 (Laws 1862 ch. 4 § 7 and Laws 1864 ch. 5 § 7); O'Connor v. Finnegan, 60 Minn. 455 (Sp. Laws 1864 ch. 18 § 8 repealed by Laws 1887 ch. 127); Sheehy v. Hinds, 27 Minn. 259, 6 N. W. 781 (G. S. 1866 ch. 11 § 154—tax deed void on face); Sherburne v. Rippe, 35 Minn. 540, 29 N. W. 322 (G. S. 1866 ch. 11 § 154); Bower v. O'Donnall, 29 Minn. 135, 12 N. W. 352 (Laws 1875 ch. 5 § 30); O'Mulcahy v. Florer, 27 Minn. 449, 8 N. W. 166 (limitation in tax law of 1878 not applicable to tax sales under law of 1875); Knudson v. Curley, 30 Minn. 433, 15 N. W. 873 (Laws 1881 ch. 135); Feller v. Clark, 36 Minn. 338, 31 N. W. 175 (Laws 1881 ch. 135—a tax judgment authorizing a sale is necessary to set the statute running); Whitney v. Wegler, 54 Minn. 235, 55 N. W. 927 (the limitation of Laws 1881 ch. 135 § 7 was intended to operate as confirming the tax sale, with certain exceptions, and the right acquired under it—as such it was constitutional, and the repeal of Laws 1887 ch. 127 § 1 cannot affect it—to set the time running there must be a sale in fact and a valid judgment authorizing it); Gaston v. Merriam, 33 Minn. 271, 22 N. W. 614 (history of various tax laws); Sanborn v. Cooper, 31 Minn. 307, 17 N. W. 856 (sale under general tax law of 1874 as amended by Laws 1875 ch. 5 § 30—must be valid judgment to set statute running); Kipp v. Johnson, 31 Minn. 360, 17 N. W. 957 (sale under G. S. 1866 ch. 11 § 154 as amended by Laws 1869 ch. 23); Security Investment Co. v. Buckler, 72 Minn. 251, 75 N. W. 107 (the provisions of G. S. 1878 ch. 11 § 85, to the effect that an action in which the validity of a tax sale is called in question must be brought within three years from the date of the sale, were repealed by Laws 1887 ch. 60, 127, at least in so far as they applied to actions to set aside and cancel a tax sale, or to test the validity of the tax sale and tax judgment and such action may be brought at any time); London & N. W. American Mortgage Co. v. Gibson, 77 Minn. 394, 80 N. W. 205 (construction of special limitation in St. Paul charter); Henningsen v. City of Stillwater, 81 Minn. 215, 83 N. W. 983 (construction of special limitation in Stillwater charter—preceding case followed); Burdick v. Bingham, 38 Minn. 482, 38 N. W. 489 (Laws 1881 ch. 135—sale advertised but no public sale made—subsequent private unauthorized sale by auditor—statute of limitations held not applicable); Lambert v. Slingerland, 25 Minn. 457 (the limitation of G. S. 1866 ch. 11 § 154 began to run from the time of a sale and not from the time of a forfeiture to the state—this section was repealed by Laws 1874 ch. 1 § 168); Farnham v. Jones, 32 Minn. 7, 19 N. W. 83 (sale under Laws 1881 ch. 135—must be valid sale and judgment to set statute running); Smith v. Kipp, 49 Minn. 119, 51 N. W. 656 (void sale does not set statute running).

Digitized by Google

ACTIONS FOR DEATH BY WRONGFUL ACT

Two year limitation.

§ 200. The statute provides that the action must be brought "within two years after the act or omission by which the death was caused." [1] The period intervening the death and the appointment of a personal representative cannot be excluded in computing the time within which an action may be brought.[2] The minority of the deceased person does not extend the limitation.[3] The complaint may be amended after the running of the statute by adding to the causes of the injury [4] or alleging the existence of beneficiaries.[5] If the injured person does not die within the two years no action lies.[6]

[1] G. S. 1894 § 5913 as amended by Laws 1897 ch. 261.
[2] Rugland v. Anderson, 30 Minn. 386, 15 N. W. 676.
[3] Murphy v. Chicago etc. Ry. Co. 80 Iowa 26.
[4] Texas etc. Ry. Co. v. Cox, 145 U. S. 593.
[5] Haynie v. Chicago etc. Ry. Co. 9 Ill. App. 105; Huntingdon etc. Ry. Co. v. Decker, 84 Pa. St. 419.
[6] Louisville etc. Ry. Co. v. Clarke, 152 U. S. 230.

ACTIONS FOR UNLAWFUL DETAINER

Three year limitation.

§ 201. An action against a tenant for restitution under the unlawful detainer act may be brought any time during the continuance of the lease and within three years after its termination.

Brown v. Brackett, 26 Minn. 292, 3 N. W. 705; Suchaneck v. Smith, 45 Minn. 26, 47 N. W. 397; Alworth v. Gordon, 81 Minn. 445, 84 N. W. 454.

ACTIONS TO FORECLOSE MECHANICS' LIENS

One year limitation.

§ 202. The statute provides that "every such action to enforce any such lien shall be commenced within one year from the time of furnishing the last item of labor, skill, material or machinery for which such lien is had." [1] It is sufficient if the action is commenced within one year. It may be prosecuted to judgment after the running of the statute.[2] The fact that the action is not commenced within one year after the date of the plaintiff's last item will not prevent a recovery by a lien-claiming defendant, whose answer is filed within a year after the date of his last item.[3] Where a lien claimant, made a defendant in an action to foreclose a mechanic's lien, does not appear in it for the purpose of asserting his lien within the statutory time, his right to enforce it is barred. That the action is brought in time to save the plaintiff's lien will not help such a defendant.[4]

[1] G. S. 1894 § 6238; Steinmetz v. St. Paul Trust Co. 50 Minn. 445, 52 N. W. 915; Malmgren v. Phinney, 50 Minn. 457, 52 N. W.

Digitized by Google

915; Smith v. Hurd, 50 Minn. 503, 52 N. W. 922; Nystrom v. London & N. W. American Mortgage Co. 47 Minn. 31, 49 N. W. 394; Flenniken v. Liscoe, 64 Minn. 269, 66 N. W. 979; Falconer v. Cochran, 68 Minn. 405, 71 N. W. 386.

[2] North Star Iron Works Co. v. Strong, 33 Minn. 1, 21 N. W. 740.

[3] Sandberg v. Palm, 53 Minn. 252, 54 N. W. 1109.

[4] Burns v. Phinney, 53 Minn. 431, 55 N. W. 540; Smith v. Hurd, 50 Minn. 503, 52 N. W. 922; Falconer v. Cochran, 68 Minn. 405, 71 N. W. 386.

ACTIONS TO DETERMINE ADVERSE CLAIMS

No special rule.

§ 203. There is no special rule of limitation governing this class of cases. If the land is vacant there is no limitation whatever except where the equitable doctrine of laches can be applied. The defendant may plead and have determined an equitable title in himself, as against a legal title relied on by the plaintiff, and, as to such equitable title, the equitable rule as to laches would apply. But where only strictly legal rights are in controversy, no neglect in asserting the right, short of the time prescribed by the statute of limitations, will bar the appropriate legal remedy. If the holder of the legal title seeks equitable relief, unreasonable delay in asserting his right may, under the equitable rule as to laches, bar his claim to such equitable relief is less time than would, under the statute of limitations, bar his legal remedy.[1] The defendant may, of course, set up title by adverse possession.[2] The defendant waives the statute of limitations by asserting title in himself and asking for an affirmative judgment.[3]

[1] Morris v. McClary, 43 Minn. 346, 46 N. W. 238. See Burke v. Backus, 51 Minn. 174, 53 N. W. 458.

[2] City of St. Paul v. Chicago etc. Ry. Co. 45 Minn. 387, 48 N. W. 17.

[3] London & N. W. American Mortgage Co. v. Gibson, 77 Minn. 394, 80 N. W. 205.

ACTIONS ON JUDGMENTS

The statute.

§ 204. The statute provides that an action upon a judgment or decree of a court of the United States, or of any state or territory of the United States shall be commenced within ten years after the cause of action accrues. Provided, however, that no such action shall be maintained in any case where the cause of action accrued more than ten years prior to the commencement of the action in which such judgment was rendered and the judgment debtor against whom the same has been obtained has for more than ten years prior to the commencement of the action upon such judgment been continuously a resident of this state.

[Laws 1899 ch. 123] As to effect of absence from state see § 114.

Digitized by Google

§ 205. A judgment constitutes, of itself, a cause of action, and, like other causes of action a suit may be brought upon it within the time limited by statute, and such suit may proceed to trial and judgment even after the expiration of the ten years limited for commencing actions on judgments.

Dole v. Wilson, 39 Minn. 330, 40 N. W. 161; Sandwich Mfg. Co. v. Earl, 56 Minn. 390, 57 N. W. 938.

§ 206. A judgment is a debt which may be taken out of the statute by an acknowledgment and new promise although the lien of the judgment on real property and the right to issue execution on it may have ceased by reason of the lapse of ten years from its rendition.

D. M. Osborne & Co. v. Heuer, 62 Minn. 507, 64 N. W. 1151. See Newell v. Dart, 28 Minn, 248, 9 N. W. 732.

§ 207. The statute runs against a judgment for taxes.

Pine County v. Lambert, 57 Minn. 203, 58 N. W. 990; County of Redwood v. Winona etc. Co. 40 Minn. 512, 41 N. W. 465, 42 N. W. 473; Kipp v. Elwell, 65 Minn. 525, 68 N. W. 105; State v. Bellin, 79 Minn. 131, 81 N. W. 763; Cool v. Kelly, 78 Minn. 102, 80 N. W. 861; State v. Ward, 79 Minn. 362, 82 N. W. 686.

§ 208. Equity will regard the statutory limitation upon the life and enforceability of a judgment, and will not interfere to enforce its satisfaction by means of its peculiar remedies, thus avoiding the effect of the statutory limitation, if by the plaintiff's own neglect the judgment has been suffered to remain unsatisfied until it has ceased to exist as a legal obligation.

Newell v. Dart, 28 Minn. 248, 9 N. W. 732; Dole v. Wilson, 39 Minn. 330, 40 N. W. 161.

ACTIONS FOR A STATUTORY FORFEITURE OR PENALTY

The statutes.

§ 209. An action upon a statute for a penalty or forfeiture, where the action is given to the party aggrieved, or to such party and the state must be commenced within three years after the cause of action accrues.[1] An action upon a statute for a forfeiture or penalty to the state alone must be brought within two years.[2] "Every action upon a statute for a penalty given, in whole or in part, to the person who prosecutes for the same, shall be commenced by said party within one year after the commission of the offence; and if the action is not commenced within one year by a private party, it may be commenced within two years thereafter on behalf of the state, by the attorney general, or the county attorney of the county where the offence was committed."[3]

[1] G. S. 1894 § 5137. See Nat. New Haven Bank v. N. W. Guaranty Loan Co. 61 Minn. 375, 63 N. W. 1079; Rice v. Madelia Farmers Warehouse Co. 78 Minn. 124, 80 N. W. 853.

[2] G. S. 1894 § 5138. [3] G. S. 1894 § 5140.

Digitized by Google

ACTIONS AGAINST A SHERIFF, CORONER, OR CONSTABLE

The statute.

§ 210. The statute [1] provides that "an action against a sheriff, coroner, or constable, upon a liability by the doing of an act in his official capacity, and in virtue of his office, or by the omission of an official duty, including the non-payment of money collected upon an execution," shall be commenced within three years after the cause of action accrues.

[1] G. S. 1894 § 5137.

Cases.

§ 211. The mere failure of a sheriff, receiving money on a redemption of real estate made through him, to pay the same to the party entitled thereto before any demand is made upon him for it, is not the omission of an official duty within the meaning of the statute.[1] An action on the official bond of such an officer probably does not fall under this section of the statute.[2] A sheriff who seizes under process in his hands, the property of one who is not named therein does so in virtue of his office, and the party injured must bring his action within three years.[3] An action by a claimant of property sold on execution to recover on a bond executed by the judgment creditor to indemnify the sheriff and any claimant of the property does not come under this section.[4] The statute does not apply to an action by a county against a sheriff to recover money paid on fraudulent vouchers for board of fictitious prisoners,[5] nor to recover purchase money paid on a sale set aside for irregularity.[6] A deputy sheriff may invoke the statute.[7]

[1] Hall v. Swenson, 65 Minn. 391, 67 N. W. 1024.
[2] See Litchfield v. McDonald, 35 Minn. 167, 28 N. W. 191.
[3] Bishop v. McGillis, 80 Wis. 575; Dennison v. Plumb, 18 Barb. (N. Y.) 89.
[4] Whitney v. Gammon, 103 Iowa 363, 72 N. W. 551. See also, Bishop v. McGillis, 82 Wis. 120.
[5] Supervisors v. Waller, 4 Hun (N. Y.) 87.
[6] Bowe v. O'Brien, 5 Daly (N. Y.) 474.
[7] Cumming v. Brown, 43 N. Y. 514.

ACTION ON STANDARD FIRE POLICY

Two year limitation.

§ 212. The provision in the Minnesota standard policy that no suit to recover for loss under the policy shall be sustained unless commenced within two years from the time the loss occurred as a limitation applies to and runs from the time of the fire or actual destruction of the property and not from the time when the cause of action accrues—sixty days after the loss statement is rendered by the insured.

Digitized by Google

Rottier v. German Ins. Co. 84 Minn. 116, 86 N. W. 888. See McCallum v. Nat. Credit Ins. Co. 84 Minn. 134, 86 N. W. 892.

MISCELLANEOUS ACTIONS

Various statutory limitations.

§ 213. An action for damages occasioned by the erection and maintenance of a mill-dam, must be brought within two years;[1] an action to recover land used as a public highway, six years;[2] an action to attack vacation of street or alley, five years;[3] an action against a boat or vessel, one year;[4] an action to recover excessive costs and interest on foreclosure, one year;[5] an action to set aside a foreclosure sale under a power for certain irregularities, five years;[6] an action against a municipality for negligence, one year;[7] an action to enforce a lien on logs, three or four months;[8] an action on a bond given by a contractor on a public work, one year;[9] an action against a surety on an official bond, four years;[10] an action by an employe of a railroad contractor, sixty days after service of notice;[11] an action against a master on the indenture, two years;[12] an action to set aside a title depending on a will irregularly probated, ten years;[13] an action against aliens and corporations for the forfeiture of lands, three years;[14] an action against a county for the value of lands lost by a tax sale, six years.[15]

[1] G. S. 1894 § 2369; Thornton v. Turner, 11 Minn. 336 Gil. 237; Dorman v. Ames, 12 Minn. 451 Gil. 347; Cook v. Kendall, 13 Minn. 324 Gil. 297; Thornton v. Webb, 13 Minn. 498 Gil. 457; Hempsted v. Cargill, 46 Minn. 118, 48 N. W. 558; Barrows v. Fox, 39 Minn. 61, 38 N. W. 777; Thornton v. Smith, 11 Minn. 15 Gil. 1.

[2] G. S. 1894 § 1832; Bice v. Town of Walcott, 64 Minn. 459, 67 N. W. 360; Miller v. Town of Corinna, 42 Minn. 391, 44 N. W. 127; Marchand v. Town of Maple Grove, 48 Minn. 271, 51 N. W. 606; Elfelt v. Stillwater Street Ry. Co. 53 Minn. 68, 55 N. W. 116; Klenk v. Town of Walnut Grove, 51 Minn. 381, 53 N. W. 703; State v. Waholz, 28 Minn. 114, 9 N. W. 578; Ziebarth v. Nye, 42 Minn. 541, 44 N. W. 1027; State v. Woll, 51 Minn. 386, 53 N. W. 759; Hall v. City of St. Paul, 56 Minn. 428, 57 N. W. 928; Rogers v. Town of Aitkin, 77 Minn. 539, 80 N. W. 539; Village of Benson v. St. Paul etc. Ry. Co. 62 Minn. 198, 64 N. W. 393.

[3] G. S. 1894 § 1111. See Laws 1893 ch. 207.

[4] G. S. 1894 § 6107; The Menominie, 36 Fed. 197.

[5] G. S. 1894 § 6052; Brown v. Baker, 65 Minn. 133, 67 N. W. 793.

[6] See § 2172.

[7] Laws 1897 ch. 248.

[8] G. S. 1894 §§ 2435, 2452, 2466. See Laws 1899 ch. 342.

[9] Laws 1895 ch. 354. [10] Laws 1895 ch. 126.

[11] G. S. 1894 § 2766. [12] G. S. 1894 § 4761.

[13] G. S. 1894 § 4739. [14] Laws 1897 ch. 112. [15] G. S. 1894 § 1597.

Digitized by Google

LACHES

General statement.

§ 214. Our statutes of limitations apply to many actions of an equitable nature and in such cases they cannot be abridged or extended by a court of equity.[1] In the absence of statutory regulation a court of equity applies the doctrine of laches and refuses to grant equitable relief to a party who has failed to exercise reasonable diligence in the assertion of his rights. Nothing can call a court of equity into activity but conscience, good faith and reasonable diligence.[2] The doctrine of laches is based upon grounds of public policy which require, for the peace of society, the discouragement of stale demands.[4] Its application depends upon the facts of the particular case.[5] It is only applicable to equitable rights and remedies. If a party is relying on legal rights or is seeking legal remedies he can only be barred by the statute of limitations.[6] An essential element in a case to constitute laches is that the party whose delay is in question shall have been blamable therefor in the contemplation of equity, that he ought to have moved before, if he desired the peculiar and discretionary relief which courts of equity afford. There must, therefore have been knowledge, actual or imputable, of the facts, which should have prompted a choice either to diligently seek equitable relief or thereafter to be content with such remedies as a court of law might afford; or, if there was actual ignorance, that must have been without just excuse.[7] One cannot invoke the doctrine of laches unless he has been actually prejudiced by the delay.[8] The doctrine cannot be invoked for the first time on appeal.[9] Laches will not be imputed to one in the peaceable possession of land under an equitable title, for delay in resorting to a court of equity for protection against the legal title.[10] The doctrines of estoppel, laches and acquiescence are allied.[11] Whether the right to equitable relief has been lost by laches depends upon a variety of considerations of which the mere lapse of time is only one.[12] The doctrine of laches is applied more cautiously against the public than against private persons.[13]

[1] See § 92.

[2] Ayer v. Stewart, 14 Minn. 97 Gil. 68; Taylor v. Whitney, 56 Minn. 386, 57 N. W. 937; Gildersleeve v. N. W. etc. Co. 161 U. S. 578. See Parsons v. Noggle, 23 Minn. 328; Dickerson v. Hayes, 26 Minn. 100, 1 N. W. 834.

[3] Sullivan v. Portland etc. Ry. Co. 94 U. S. 806.

[4] Taylor v. Whitney, 56 Minn. 386, 57 N. W. 937; St. Paul etc. Ry. Co. v. Eckel, 82 Minn. 278, 84 N. W. 1008; Coleman v. Akers, 92 N. W. 408.

[5] Id.; Galliher v. Cadwell, 145 U. S. 371.

[6] Morris v. McClary, 43 Minn. 346, 46 N. W. 238; Burke v. Backus, 51 Minn. 174, 53 N. W. 458; O'Mulcahey v. Gragg, 45 Minn. 112, 47 N. W. 543.

[7] Bausman v. Kelley, 38 Minn. 197, 36 N. W. 333; Myrick v. Edmundson, 2 Minn. 259 Gil. 221; Lewis v. Welch, 47 Minn. 193, 48 N. W. 608;

[8] State v. Murphy, 81 Minn. 254, 83 N. W. 991; Burke v. Backus, 51 Minn. 174, 53 N. W. 458.

Digitized by Google

[9] Burke v. Backus, 51 Minn. 174, 53 N. W. 458.
[10] Hayes v. Carroll, 74 Minn. 134, 76 N. W. 1017.
[11] See Barton v. Pioneer Savings & Loan Co. 69 Minn. 85, 71 N. W. 906.
[12] Burke v. Backus, 51 Minn. 174, 53 N. W. 458. See Taylor v. Whitney, 56 Minn. 386, 57 N. W. 937.
[13] Bice v. Town of Walcott, 64 Minn. 459, 67 N. W. 360.

Cases.

§ 215. Ayer v. Stewart, 14 Minn. 97 Gil. 68 (action to recover surplus at foreclosure sale); McDermid v. McGregor, 21 Minn. 111 (specific performance); Nelson v. Munch, 28 Minn. 314, 9 N. W. 863 (subrogation); Dutton v. McReynolds, 31 Minn. 66, 16 N. W. 468 (action to set aside judgment); Austin v. Wacks, 30 Minn. 335, 15 N. W. 409 (specific performance); Plummer v. Whitney, 33 Minn. 427, 23 N. W. 841 (action to set aside execution sale); Abbott v. Peck, 35 Minn. 499, 29 N. W. 194 (action to set aside foreclosure sale); Morrill v. Madden, 35 Minn. 493, 29 N. W. 193 (action for fraudulent representations of judgment debtor preventing execution); Holterhoff v. Mead, 36 Minn. 42, 29 N. W. 675 (action between cotenants); Bausman v. Kelley, 38 Minn. 197, 36 N. W. 333 (action to remove a cloud); Northrup v. Stevens, 39 Minn. 105, 38 N. W. 810 (specific performance); Dole v. Wilson, 39 Minn. 330, 40 N. W. 161 (action to enforce judgment barred by statute of limitations); State v. Probate Court, 40 Minn. 296, 41 N. W. 1033 (application for license to sell real estate of decedent); O'Mulcahey v. Gragg, 45 Minn. 112, 47 N. W. 543; Hill v. Nichols, 47 Minn. 382, 50 N. W. 367; Berkey v. St. Paul Nat. Bank, 54 Minn. 448, 56 N. W. 53 (Id.); Marcotte v. Hartman, 46 Minn. 202, 48 N. W. 767 (action to set aside foreclosure); Holingren v. Piete, 50 Minn. 27, 52 N. W. 266 (cancellation of vendor's contract); Burke v. Backus, 51 Minn. 174, 53 N. W. 458 (action to determine adverse claims); Taylor v. Whitney, 56 Minn. 386, 57 N. W. 937 (action for damages for non-performance of contract to purchase real estate); Dunn v. State Bank, 59 Minn. 221, 61 N. W. 27 (action for cancellation of fraudulent stock); Cameron v. Chicago etc. Ry. Co. 60 Minn. 100, 61 N. W. 814 (action to determine adverse claims); Bice v. Town of Walcott, 64 Minn. 459, 67 N. W. 360 (action to restrain town from continuing a highway); Barton v. Pioneer Savings & Loan Assoc. 69 Minn. 85, 71 N. W. 906 (action for conversion of stock by an association); McQueen v. Burhans, 77 Minn. 382, 80 N. W. 201 (action by vendors of real property to rescind sale); Brandes v. Carpenter, 68 Minn. 388, 71 N. W. 402 (action against surety on guardian's bond); Gill v. Bradley, 21 Minn. 15 (specific performance); Langworthy v. Washburn Flouring Mills Co. 77 Minn. 256, 79 N. W. 974 (action to recover assessment in mutual insurance company); Hanson v. Swenson, 77 Minn. 70, 79 N. W. 598 (action by ward against guardian); Gilbert v. Hewetson, 79 Minn. 326, 82 N. W. 655 (action to enforce a constructive trust); Sanborn v. Eads, 38 Minn. 211, 36 N. W. 338 (action to remove a cloud); Hunt v. O'Leary, 84 Minn. 200, 87 N.

Digitized by Google

W. 611 (action to determine adverse claims); Lovejoy v. Stewart, 23 Minn. 94 (specific performance); Dickerson v. Hayes, 26 Minn. 100, 1 N. W. 834 (action to redeem from foreclosure); Colby v. Colby, 59 Minn. 432, 61 N. W. 460 (action to set aside judgment for divorce); Sargeant v. Bigelow, 24 Minn. 370 (action to open default); Myrick v. Edmundson, 2 Minn. 259 Gil. 221 (action to restrain sheriff from paying redemption money to judgment creditor); Thompson v. Myrick, 20 Minn. 205 Gil. 184 (specific performance); Lovejoy v. Stewart, 23 Minn. 94 (Id.); Simpson v. Atkinson, 39 Minn. 238, 39 N. W. 323 (Id.).

ADVERSE POSSESSION

The statute.

§ 216. "No action for the recovery of real property or for the recovery of the possession thereof shall be maintained unless it appears that the plaintiff, his ancestor, predecessor, or grantor was seized or possessed of the premises in question, within fifteen years before the commencement of the action."

[G. S. 1894 § 5134]

§ 217. The term "seized" in the statute is not used in contradistinction to "possessed," so as to admit of an interpretation that the legal title or ownership only would be sufficient to prevent the statute running as against the true owner, though a stranger be in the actual occupancy, pedis possessione, of the land in dispute. The title of the owner of a freehold estate is described by the terms "seisin" or "seisin in fee"; yet, in a proper legal sense, the holder of the legal title is not seized until he is fully invested with the possession, actual or constructive. When there is no adverse possession, the title draws to it the possession. There can be but one actual seisin, and this necessarily includes possession; and hence an actual possession in hostility to the true owner works a disseisin, and, if the disseisor is suffered to remain continuously in possession for the statutory period, the remedy of the former is extinguished.

Seymour Sabin & Co. v. Carli, 31 Minn. 81, 16 N. W. 495. See for definition of seisin, Allen v. Allen, 48 Minn. 462, 51 N. W. 473.

Public streets excepted.

§ 218. "No occupant of any public street, highway, alleys, public square or levee or any part or portion thereof within this state shall acquire any title to any such street, highway, alleys, public square or levee, or any part or portion thereof, by reason of such occupancy. Provided, that the provisions of this act shall not affect pending actions."

[Laws 1899 ch. 65] This statute overrules several cases. See City of St. Paul v. Chicago etc. Ry. Co. 45 Minn. 387, 48 N. W. 17; Village of Wayzata v. Great Northern Ry. Co. 46 Minn. 505, 49 N. W. 205; Village of Glencoe v. Wadsworth, 48 Minn. 402, 51 N. W. 377; St. Paul etc. Ry. Co. v. Village of Hinckley, 53 Minn 398, 55 N. W. 560; St. Paul etc. Ry. Co.

Digitized by Google

v. City of Duluth, 73 Minn. 270, 76 N. W. 35; Bice v. Town of Walcott, 64 Minn. 459, 67 N. W. 360; City of Hastings v. Gillitt, 85 Minn. 331, 88 N. W. 987 (rights acquired prior to statute unaffected thereby).

Registered land excepted.

§ 219. "No title to registered land in derogation of that of the registered owner shall be acquired by prescription or adverse possession."

[Laws 1901 ch. 237 § 34]

Policy and theory of statute.

§ 220. The object of the statute is to quiet titles and end disputes. It is the policy of the law that parties should assert their claims to the possession of land and rectify their boundaries within the statutory period.[1] The highest considerations of public policy demand that our real property should be occupied and made productive and the taxes promptly paid to the end that all governmental functions be maintained and the country made prosperous. The statutes upon the subject of adverse possession are properly called "statutes of repose" and are intended to prevent litigation, and to quiet the titles to land which has remained unoccupied by the actual owner for a long period of time. The statute, which the actual owner is presumed to know, is a continual warning to him; and if, through his negligence or selfishness, he allows others to occupy, use, and improve his land for a long period of time, he must be deemed to have acquiesced in the possession of his premises by his adversary.[2] The doctrine of adverse possession proceeds upon the theory of the acquiescence of the true owner in the disseisin for the statutory period.[3] The adverse possessor "must keep his flag flying," yet it is no less essential that the actual owner should keep his own banner unfurled.[4]

[1] Seymour Sabin & Co. v. Carli, 31 Minn. 81, 16 N. W. 495.

[2] Dean v. Goddard, 55 Minn. 290, 56 N. W. 1060.

[3] Wood v. Springer, 45 Minn. 299, 48 N. W. 711; Bausman v. Kelley, 38 Minn. 197, 36 N. W. 333; Dean v. Goddard, 55 Minn. 290, 56 N. W. 1060.

[4] Dean v. Goddard, 55 Minn. 290, 56 N. W. 1060.

Essentials of adverse possession.

§ 221. To be adverse possession must be actual, open, continuous, hostile, exclusive and accompanied by an intention to claim adversely.

Sherin v. Brackett, 36 Minn. 152, 30 N. W. 152; Dean v. Goddard, 55 Minn. 290, 56 N. W. 1060; McRoberts v. McArthur, 62 Minn. 310, 64 N. W. 903; Washburn v. Cutter, 17 Minn. 361 Gil. 335; Costello v. Edson, 44 Minn. 135, 46 N. W. 299; Brown v. Kohout, 61 Minn. 113, 63 N. W. 248; Butler v. Drake, 62 Minn. 229, 64 N. W. 559; Todd v. Weed, 84 Minn. 4, 86 N. W. 4.

Possession must be hostile and under claim of right.

§ 222. The possession must be hostile to the title of the true owner and under a claim of right. Claim of right means claim of exclu-

Digitized by Google

sive ownership. The claimant must have intended to occupy the land as owner in fee against the world. It is of course not necessary that he should have known of other claims. He may think that there are no other claimants. The only question is, did he hold the land with the intent of exercising exclusive dominion over it? Hostility, in this connection, does not mean ill-will or conscious opposition to a particular claim, but merely the assertion of exclusive ownership.

Washburn v. Cutter, 17 Minn. 361 Gil. 335; Village of Wayzata v. Great Northern Ry. Co. 46 Minn. 505, 49 N. W. 205; St. Paul & Duluth Ry. Co. v. Village of Hinckley, 53 Minn. 398, 55 N. W. 560; Dean v. Goddard, 55 Minn. 290, 56 N. W. 1060; Sage v. Rudnick, 67 Minn. 362, 69 N. W. 1096; Brown v. Morgan, 44 Minn. 432, 46 N. W. 913; Seymour Sabin & Co. v. Carli, 31 Minn. 81, 16 N. W. 495; Lowry v. Tilleny, 31 Minn. 500, 18 N. W. 452; Carpenter v. Coles, 75 Minn. 9, 77 N. W. 424; Cool v. Kelly, 78 Minn. 102, 80 N. W. 861; Swan v. Munch, 65 Minn. 500, 67 N. W. 1022; Todd v. Weed, 84 Minn. 4, 86 N. W. 756; McGovern v. McGovern, 84 Minn. 143, 86 N. W. 1102; Collins v. Colleran, (Minn.) 90 N. W. 364.

§ 223. There must be an actual entry upon the land, and ouster of the owner with intention to claim the possession as his own, by the adverse claimant, and this claim of possession must be, not the assertion of a previously-existing right to the land, but the assuming of a right to the land from that time, and a subsequent holding with assertion of right. This intention to claim and possess the land is one of the qualities indispensable to constitute a disseisin as distinguished from a trespass.

Washburn v. Cutter, 17 Minn. 361 Gil. 335; Village of Glencoe v. Wadsworth, 48 Minn. 402, 51 N. W. 377; Carpenter v. Coles, 75 Minn. 9, 77 N. W. 424.

§ 224. Mere possession by a trespasser, even though continuous and however long continued, is not enough to constitute adverse possession. The holding must be hostile to the lawful title, with intent to claim and hold the land as against that title.[1] But adverse possession is always a trespass.[2]

[1] Village of Wayzata v. Great Northern Ry. Co. 46 Minn. 505, 49 W. 205.

[2] Costello v. Edson, 44 Minn. 135, 46 N. W. 299.

§ 225. The intent to claim adversely may be inferred from the nature of the occupancy. Oral declarations of a claim are not necessary. Continued acts of ownership, occupying, using, and controlling the property as owner, constitute the usual and natural modes of asserting a claim of title.

Village of Glencoe v. Wadsworth, 48 Minn. 402, 51 N. W. 377; Dean v. Goddard, 55 Minn. 290, 56 N. W. 1060; Brown v. Kohout, 61 Minn. 113, 63 N. W. 248; Swan v. Munch, 65 Minn. 500, 67 N. W. 1022; Wheeler v. Gorman, 80 Minn. 462, 83 N. W. 442; Cool v. Kelly, 78 Minn. 102, 80 N. W. 861; Sey-

Digitized by Google

mour, Sabin & Co. v. Carli, 31 Minn. 81, 16 N. W. 495; Costello v. Edson, 44 Minn. 135, 46 N. W. 299; Todd v. Weed, 84 Minn. 4, 86 N. W. 756.

§ 226. A recognition of the title of the owner by the disseisor breaks the continuity of claim as well as the continuity of possession and in such case he must begin de novo if he wishes to claim the benefit of the statute of limitations.[1] But after the statute has run in favor of a disseisor, no acknowledgment of the former owner's title, except by deed sufficient to pass title to land, will divest the title acquired by adverse possession.[2]

[1] City of St. Paul v. Chicago etc. Ry. Co. 63 Minn. 330, 63 N. W. 267, 65 N. W. 649, 68 N. W. 458.

[2] Sage v. Rudnick, 67 Minn. 362, 69 N. W. 1096.

§ 227. One in adverse possession of land may purchase the title of one person against whom he is holding adversely, without abandoning his adverse holding as to the title of another person.

City of St. Paul v. Chicago etc. Ry. Co. 45 Minn. 387, 48 N. W. 17.

§ 228. A finding that a possession was adverse is a finding that it was hostile. The greater includes the less. If it was adverse it was hostile. It is tautology to say that adverse possession must be hostile.

Dean v. Goddard, 55 Minn. 290, 56 N. W. 1060.

Mistake as to boundary lines.

§ 229. Where one of two adjoining owners takes and holds actual possession of land beyond the boundary of his own lot or tract, under a claim of title thereto as being a part of his own land, though under a mistake as to the location of the boundary line, such possession, for the purposes of the statute, is to be deemed adverse to the true owner and a disseisin; and if the disseisor or his grantee is suffered to remain continuously in possession for the statutory period, the remedy of the former is extinguished.[1] The rule is otherwise where parties are permitted to inclose, by consent, lands adjoining their own, or, for temporary convenience, to extend fences or improvements beyond boundary lines. In such cases possession is taken in amity, and in recognition of the owner's title, and the occupancy, not being adverse in its inception, does not become so until notice or an assertion of an adverse claim.[2]

[1] Seymour, Sabin & Co. v. Carli, 31 Minn. 81, 16 N. W. 495; Brown v. Morgan, 44 Minn. 432, 46 N. W. 913; Ramsey v. Glenny, 45 Minn. 401, 48 N. W. 322; Butler v. Drake, 62 Minn. 229, 64 N. W. 559; Bice v. Town of Walcott, 64 Minn. 459, 67 N. W. 360; Diers v. Ward, 92 N. W. 402.

[2] Seymour, Sabin & Co. v. Carli, 31 Minn. 81, 16 N. W. 495.

Permissive possession—licensee.

§ 230. It is a well-settled principle of law that the statute of limitations does not run in favor of an occupant of land in possession by the license or consent of the owner. To make such pos-

Digitized by Google

session adverse there must be some open assertion of hostile title and knowledge thereof brought home to the owner of the land.

Backus v. Burke, 63 Minn. 272, 65 N. W. 459; Cameron v. Chicago etc. Ry. Co. 60 Minn. 100, 61 N. W. 814; O'Boyle v. McHugh, 66 Minn. 390, 69 N. W. 37.

As between tenants in common.

§ 232. The entry and possession of one tenant in common is regarded in law as the entry and possession of all the cotenants and not as a disseisin. Such possession is not adverse until there is an ouster. To constitute an ouster between cotenants there must be overt and unequivocal acts of exclusive ownership or a clear and explicit assertion of adverse right brought home to the knowledge of the other cotenants.[1] It is not necessary to show such knowledge by direct and positive evidence, but it is sufficient, if the contrary is not shown, if the circumstances are such as to raise a strong probability of actual knowledge.[2]

[1] Lindley v. Groff, 37 Minn. 338, 34 N. W. 26; Lowry v. Tilleny, 31 Minn. 500, 18 N. W. 452; Cameron v. Chicago etc. Ry. Co. 60 Minn. 100, 61 N. W. 814; Berthold v. Fox, 13 Minn. 501 Gil. 462; Holmes v. Williams, 16 Minn. 164 Gil. 146; Ricker v. Butler, 45 Minn. 545, 48 N. W. 407; Hanson v. Ingwaldson, 77 Minn. 533, 80 N. W. 702; Blomberg v. Montgomery, 69 Minn. 149, 72 N. W. 56.

[2] Knowles v. Brown, 69 Iowa, 11; Clymer v. Dawkins, 3 How. (U. S.) 674.

§ 233. Exclusive possession and reception and retention of the rents and profits for a long series of years justify the jury in finding an ouster.

Lowry v. Tilleny, 31 Minn. 500, 18 N. W. 452; Burns v. Byrne, 45 Iowa 285; Cummings v. Wyman, 10 Mass. 464; Abrams v. Rhoner, 44 Hun (N. Y.) 507; Henning v. Warner, 109 N. C. 406; Robidoux v. Casseligi, 10 Mo. App. 516; Bolton v. Hamilton, 2 W. & S. (Pa.) 294.

§ 234. Where one tenant in common attempts to convey by warranty deed the whole estate in fee, and his grantee records his deed, and by virtue thereof enters upon the estate, and claims and holds exclusive possession of the whole thereof, the possession and claim are adverse to the title and possession of his co-tenant, and amount to a disseisin.

Hanson v. Ingwaldson, 77 Minn. 533, 80 N. W. 702; Ricker v. Butler, 45 Minn. 545, 48 N. W. 407

As between mortgagor and mortgagee.

§ 235. A mortgagor, or the grantee of a mortgagor, or a subsequent incumbrancer, in possession of the mortgaged premises, does not hold adversely to the mortgagee and cannot, by virtue of such possession, avoid the mortgage under the statute of limitations unless there has been an unequivocal repudiation of the mortgage brought home to the knowledge of the mortgagee.[1] The posses-

Digitized by Google

sion of the mortgagor after foreclosure is presumed amicable and in subordination to the title of the purchaser until the contrary appears.[2] Where, after a default in a mortgage, the mortgagee in apparent good faith makes a void foreclosure and, after the year to redeem, the purchaser at the foreclosure sale takes possession under color of the foreclosure proceedings, he is a mortgagee in possession, and entitled to all the rights of such a mortgagee, whether he took possession with or without the consent, either express or implied, of the mortgagor. The statute of limitations commences to run in favor of such a purchaser from the time he so takes possession.[3]

[1] Hodgdon v. Heidman, 66 Iowa 645; Grether v. Clark, 75 Iowa 383.

[2] Lowry v. Tilleny, 31 Minn. 500, 18 N. W. 452; Neilson v. Grignon, 85 Wis. 550.

[3] Backus v. Burke, 63 Minn. 272, 65 N. W. 459.

As between life tenant and remainder-man.

§ 236. The possession of a life tenant is never deemed to be adverse to the remainder-man, for the latter has no right of entry.

Hanson v. Ingwaldson, 77 Minn. 533, 80 N. W. 702; Lindley v. Groff, 37 Minn. 338, 34 N. W. 338.

As between railroad and homesteader.

§ 237. One who enters land under the homestead laws within a congressional grant to a railroad may acquire title against the railroad by adverse possession.

Northern Pacific Ry. Co. v. Townsend, 84 Minn. 152, 86 N. W. 1007.

As between husband and wife.

§ 238. Adverse possession cannot exist between husband and wife so long as coverture continues.

Santa Barbara First Nat. Bank v. Guerra, 61 Cal. 109; Hendricks v. Rasson, 53 Mich. 575; Vandevoort v. Gould, 36 N. Y. 639. See Blomberg v. Montgomery, 69 Minn. 149, 72 N. W. 56.

As between parent and child.

§ 239. As between parties sustaining parental and filial relations, the possession of the land of the one by the other is presumed to be permissive, and not adverse. To make such possession adverse, there must be some open assertion of hostile title, other than mere possession, and knowledge thereof brought home to the owner of the land.

O'Boyle v. McHugh, 66 Minn. 390, 69 N. W. 37. See McGovern v. McGovern, 84 Minn. 143, 86 N. W. 1102 (as between widow and heirs); Collins v. Colleran, (Minn.) 90 N. W. 364.

As between vendor and vendee.

§ 240. The continued possession of the vendor after the execution of a deed is not necessarily hostile to the vendee or one claiming under him, but it may be made so by unequivocal acts of the vendor brought home to the knowledge of the vendee.[1] The possession of

Digitized by Google

a vendee under an executory contract of purchase is not adverse to the vendor so long as the purchase money is not paid or until the vendee is entitled to demand a deed,[2] although it may be adverse as to third parties.[3] The vendee bears somewhat the relation of a tenant of the vendor and is estopped from denying his title [4] and this estoppel applies to parties holding under the vendee.[5] After payment of the purchase money and the performance of all the conditions on his part the vendee holds adversely to the vendor.[6]

[1] McCormick v. Herndon, 86 Wis. 449; Woolworth v. Root, 40 Fed. 723; Ingles v. Ingles, 150 Pa. St. 397; Hoyt v. Jones, 31 Wis. 389; Garabaldi v. Shuttuck, 79 Cal. 511.

[2] Madson v. Madson, 80 Minn. 501, 83 N. W. 396; Dean v. Goddard, 55 Minn. 290, 56 N. W. 1060; Furlong v. Garrett, 44 Wis. 111; Hannibal etc. Ry. Co. v. Miller, 115 Mo. 158; Brown v. King, 5 Met. (Mass.) 173; Clouse v. Elliott, 71 Ind. 302; In re Department of Parks, 73 N. Y. 560.

[3] Dean v. Goddard, 55 Minn. 290, 56 N. W. 1060.

[4] Mitchell v. Chisholm, 57 Minn. 148, 58 N. W. 873; Thompson v. Ellenz, 58 Minn. 301, 59 N. W. 1023.

[5] Anderson v. McCormick, 18 Or. 301; Potts v. Coleman, 67 Ala. 221.

[6] Simpson v. Sneclode, 83 Wis. 201.

§ 241. A mistake in a deed, whereby a portion of the premises intended to be conveyed have been omitted in the description, does not prevent the grantee from acquiring title by prescription to the land so intended to be conveyed.

Vandall v. St. Martin, 42 Minn. 163, 44 N. W. 163.

As between landlord and tenant.

§ 242. "Whenever any person enters into the possession of any lands or tenements in this state under or pursuant to a lawful lease thereof, he shall not be permitted while so in possession to dispute or deny the title of his landlord in any action brought by such landlord, or any one claiming under or through him, to recover possession of any such lands or tenements. But such estoppel shall not apply to any lessee who at and prior to the time of accepting any such lease, is already in possession of the leased lands or tenements under any claim or title adverse or hostile to that of such lessor."

[Laws 1899, ch. 13] See St. Anthony etc. Co. v. Morrison, 12 Minn. 249 Gil. 162; Morrison v. Bassett, 26 Minn. 235, 2 N. W. 851; Sage v. Halverson, 72 Minn. 294, 75 N. W. 229; Clary v. O'Shea, 72 Minn. 105, 75 N. W. 115; Tilleny v. Knoblauch, 73 Minn. 108, 75 N. W. 1039; Cameron v. Chicago etc. Ry. Co. 60 Minn. 100, 61 N. W. 814; Ramsey v. Glenny, 45 Minn. 401, 48 N. W. 322.

The possession must be actual.

§ 243. The owner of lands is presumptively in possession and the acts of a wrong-doer infringing upon the rights of the owner are to be construed strictly against the invader. "Clear proof of actual adverse possession will be required to place the wrong-doer in a posi-

Digitized by Google

tion to avail himself, in defence of his possession, of the limitation barring the right of the owner to recover. To determine whether particular acts or a course of conduct constitute adverse possession which, if continued, will bar the title of the original owner, regard must be had to the nature or quality of the acts, and to the situation of the property, as well as to the theory upon which the doctrine of adverse possession rests. The owner becomes barred of his right by reason of his acquiescence in the hostile possession of another under a claim of right, maintained for the statutory period, and of which he has notice, or which is maintained under such circumstances that he is presumed to have notice. Hence the possession must be actual, for otherwise there is no disseisin, and the real owner remains in possession, actually or constructively. It must be continuous, for upon its cessation or interruption the possession, in contemplation of law, is again in the holder of the legal title. It must be hostile to the real owner, and with intention to claim the land adversely to him; and this must be manifest from the nature or circumstances of the possession, so that the owner may be informed of it, and that he shall not be misled into acquiescence in what he might reasonably suppose to be a mere trespass, when he would not have acquiesced in the assertion of a right adverse to his title. The possession of land may consist in, and be shown by, a great variety of acts, but the law prescribes no particular manner in which possession shall be maintained or made manifest, to constitute what we comprehensively term 'adverse possession.' It may be under various circumstances, by inclosure, by cultivation, by the erection of buildings, or by other improvements, or by any visible, open use clearly indicating an actual appropriation of the land to the permanent and exclusive dominion and benefit of the invader; such a use as is calculated to inform the real owner of the fact of occupancy, and that it is adverse or hostile to his own title."

Costello v. Edson, 44 Minn. 135, 46 N. W. 299. Cited in Ricker v. Butler, 45 Minn. 545, 48 N. W. 407; Lambert v. Stees, 47 Minn. 141, 49 N. W. 662; Wheeler v. Gorman, 80 Minn. 462, 83 N. W. 442.

§ 244. "The doctrine proceeds upon the theory of the acquiescence of the true owner in his disseisin for the full statutory period; hence, the possession which affects him is what appears on the ground itself. It must be such as would operate as unambiguous and unequivocal notice to him that some one is in possession in hostility to his title under claim of right; and, while much will depend on the nature and situation of the property and the uses to which it is adapted, yet in all cases it must be a possession which is accompanied with the real and effectual enjoyment of the property, —the possession which follows the subjection of the property to the will and dominion of the claimant to the exclusion of others. The acts must be such as indicate that a permanent occupation and appropriation of the premises is intended, as distinguished from a casual trespass for some temporary purpose. And, inasmuch as it is only the possession which appears on the ground which affects

Digitized by Google

the true owner, it follows that, while such acts as paying taxes or surveying lines may characterize a possession, if it exists, as hostile, yet they do not themselves constitute the possession which the law requires to toll the right of the true owner."

Wood v. Spencer, 45 Minn. 299, 48 N. W. 711. Cited in Brown v. Kohout, 61 Minn. 113, 63 N. W. 248.

§ 245. Possessory acts, to constitute adverse possession, must necessarily depend upon the character of the property, its location, and the purposes for which it is ordinarily fitted or adapted.[1] So much depends on the situation and nature of the property, the uses to which it can be applied, or to which the owner or claimant may choose to apply it, that it is impossible to lay down any precise rule adapted to all cases.[2]

[1] Dean v. Goddard, 55 Minn. 290, 56 Minn. 1060; Costello v. Edson, 44 Minn. 135, 46 N. W. 299; Murphy v. Doyle, 37 Minn. 113, 33 N. W. 220; Wheeler v. Gorman, 80 Minn. 462, 83 N. W. 442; Wood v. Springer, 45 Minn. 299, 48 N. W. 711; Ricker v. Butler, 45 Minn. 546, 48 N. W. 407; Backus v. Burke, 63 Minn. 272, 65 N. W. 459; Sage v. Morosick, 69 Minn. 167, 71 N. W. 930; Butler v. Drake, 62 Minn. 229, 64 N. W. 559.

[2] Washburn v. Cutter, 17 Minn. 361 Gil. 335; Murphy v. Doyle, 37 Minn. 113, 33 N. W. 220; Sage v. Morosick, 69 Minn. 167, 71 N. W. 930.

§ 246. The possessory acts must be such as to indicate and serve as notice of an intention to appropriate the land itself and not the mere products of it, to the dominion and use of the party entering.

Lambert v. Stees, 47 Minn. 141, 49 N. W. 662; Costello v. Edson, 44 Minn. 135, 46 N. W. 299; Bazille v. Murray, 40 Minn. 48, 41 N. W. 238; Wood v. Springer, 45 Minn. 299, 48 N. W. 711; Sage v. Larson, 69 Minn. 122, 71 N. W. 923; Wheeler v. Gorman, 80 Minn. 462, 83 N. W. 442.

§ 247. Actual residence on the land is not always necessary to constitute adverse possession.[1] "If the land is not susceptible of any permanent useful improvement, actual occupancy, cultivation, or residence may not be necessary in order to constitute adverse possession. But if the land will admit of such improvement, the possessory acts must be such as to show permanent possession for the purpose of such improvement; for instance, actual occupancy and cultivation or enclosure; and this, whether the adverse possession is relied on to raise the bar of the statute of limitations or to bar an action of trespass or trover."[2] But it is not ordinarily necessary that a farm should be fenced.[3]

[1] Dean v. Goddard, 55 Minn. 290, 56 N. W. 1060; Costello v. Edson, 44 Minn. 135, 46 N. W. 299; Washburn v. Cutter, 17 Minn. 361 Gil. 335; Wheeler v. Gorman, 80 Minn. 462, 83 N. W. 442; Murphy v. Doyle, 37 Minn. 113, 33 N. W. 220; Sage v. Morosick, 69 Minn. 167, 71 N. W. 930.

[2] Washburn v. Cutter, 17 Minn. 361 Gil. 335.

[3] Sage v. Morosick, 69 Minn. 167, 71 N. W. 930.

Digitized by Google

§ 248. In the case of a farm, if the possession is open and notorious, comporting with the ordinary management of farms, it is not necessary that the whole farm be either improved or inclosed, at least where the unimproved part, as woodland, is subservient to one connected with that which is improved; and, for the same reason, the rule requiring actual and visible occupancy will be more strictly construed in an old and populous country, where land is usually improved and inclosed, than in a new country recently settled, in which the land is only partially improved.

Murphy v. Doyle, 37 Minn. 113, 33 N. W. 220.

§ 249. It is necessary to constitute adverse possession that there be at all times some person in an action against whom the real owner may recover the possession of the land.

City of St. Paul v. Chicago etc. Ry. Co. 45 Minn. 387, 48 N. W. 17.

§ 250. When there is no adverse possession the title draws to it the possession; that is, the owner is constructively in possession.

Seymour, Sabin & Co. v. Carli, 31 Minn. 81, 16 N. W. 495; Washburn v. Cutter, 17 Minn. 361, 17 N. W. 335; Bradley v. Norris, 63 Minn. 156, 65 N. W. 357.

The possession must be open.

§ 251. The possession must be open or notorious, that is, it must be such as would naturally charge the true owner with knowledge of the adverse holding. It is perhaps better to say that the possession must be visible.[1] The indications of adverse possession must be so tangible and obvious that the true owner could not be deceived as to the hostile dominion if he should visit the land.[2] Secret possession will not do, as publicity and notoriety are necessary as evidence of notice and to put those claiming an adverse interest upon inquiry.[3] To hold otherwise would be to establish a principle by which every proprietor of vacant lands might be disseised without his knowledge or even the possibility of protecting himself.[4] But notoriety is only important where the adverse character of the possession is to be brought home to the owner by presumption. Of course where it is shown that he had actual knowledge that the possession was under claim of title, and therefore adverse, openness and notoriety are unimportant; for no other person has any legal interest in the question or right to be informed by notoriety or otherwise.[5] The divesture of title by adverse possession rests upon the presumption of notice to the true owner of an open and hostile possession.[6]

[1] Bazille v. Murray, 40 Minn. 48, 41 N. W. 238; Lambert v. Stees, 47 Minn. 141, 49 N. W. 662; Costello v. Edson, 44 Minn. 135, 46 N. W. 299.

[2] Pike v. Robertson, 79 Mo. 618.

[3] Armstrong v. Morrill, 14 Wall. (U. S.) 145.

[4] Dawson v. Watkins, 2 Rob. (Va.) 259.

[5] Clark v. Gilbert, 39 Conn. 94; Brown v. Cockerell, 33 Ala. 47; Key v. Jennings, 66 Mo. 367; Allen v. Mansfield, 108 Mo. 343.

[6] Bausman v. Kelley, 38 Minn. 197, 36 N. W. 333.

Digitized by Google

The possession must be exclusive.

§ 252. The possession must be exclusive not only as to the true owner but as to all persons.

Dean v. Goddard, 55 Minn. 290, 56 N. W. 1060.

The possession must be continuous.

§ 253. In order that adverse possession may ripen into title it must be continuous for the statutory period, for, upon its cessation or interruption, the possession, in contemplation of law, is again in the person who holds the legal title; and upon any resumption of the adverse possession a new time is thereby fixed for the running of the statute, the intruder not being permitted to tack a former adverse possession.

City of St. Paul v. Chicago etc. Ry. Co. 63 Minn. 330, 63 N. W. 267, 65 N. W. 649, 68 N. W. 458; Costello v. Edson, 44 Minn. 135, 46 N. W. 299; Sherin v. Brackett, 36 Minn. 152, 30 N. W. 551; Ricker v. Butler, 45 Minn. 545, 48 N. W. 407; Morris v. McClary, 43 Minn. 346, 46 N. W. 238; City of St. Paul v. Chicago etc. Ry. Co. 45 Minn. 387, 48 N. W. 17; Witt v. St. Paul etc. Ry. Co. 38 Minn. 122, 35 N. W. 862; Ramsey v. Glenny, 45 Minn. 401, 48 N. W. 322; Dean v. Goddard, 55 Minn. 290, 56 N. W. 1060; Vandall v. St. Martin, 42 Minn. 163, 44 N. W. 525; Bloomberg v. Montgomery, 69 Minn. 149, 72 N. W. 56; Sage v. Rudnick, 67 Minn. 362, 69 N. W. 1096; Swan v. Munch, 65 Minn. 500, 67 N. W. 1022; Hall v. Connecticut etc Ins. Co. 76 Minn. 401, 79 N. W. 497.

§ 254. The possession of a tenant is the possession of his landlord for the purposes of the statute.

Sherin v. Brackett, 36 Minn. 152, 30 N. W. 551; Ramsey v. Glenny, 45 Minn. 401, 48 N. W. 322; City of St. Paul v. Chicago etc. Ry. Co. 45 Minn. 387, 48 N. W. 17.

§ 255. The continuity of adverse possession is not broken by the party in possession taking written conveyances of the premises from other parties claiming an interest therein, as this may give him color of title, and perhaps define the boundaries of the premises claimed.

Dean v. Goddard, 55 Minn. 290, 56 N. W. 1060.

§ 256. After the statutory period has run any interruption in the possession is immaterial.

Dean v. Goddard, 55 Minn. 290, 56 N. W. 1060. See Sage v. Rudnick, 67 Minn. 362, 69 N. W. 1096.

Tacking.

§ 257. Successive disseisins cannot be tacked together for the purpose of constituting a continuous adverse possession unless there is privity between the successive disseisors.[1] Privity exists between two successive disseisors when one takes under the other, as by descent, will, grant, or voluntary transfer of possession.[2] Such continuity and connection may be effected by any conveyance or understanding which has for its object a transfer of the rights of the possessor or of his possession, when accompanied by an actual transfer

Digitized by Google

of possession.[3] No conveyance or assignment in writing is necessary.[4]

[1] Sherin v. Brackett, 36 Minn. 152, 30 N. W. 551; Witt v. St. St. Paul etc. Ry. Co. 38 Minn. 122, 35 N. W. 862; Ramsey v. Glenny, 45 Minn. 401, 48 N. W. 322.

[2] Sherin v. Brackett, 36 Minn. 152, 30 N. W. 551; Vandall v. St. Martin, 42 Minn. 163, 44 N. W. 163; Ramsey v. Glenny, 45 Minn. 401, 48 N. W. 322; Ricker v. Butler, 45 Minn. 545, 48 N. W. 407; Barber v. Robinson, 78 Minn. 193, 80 N. W. 968; City of St. Paul v. Chicago etc. Ry. Co. 45 Minn. 387, 48 N. W. 17; McGovern v. McGovern, 84 Minn. 143, 86 N. W. 1102.

[3] Vandall v. St. Martin, 42 Minn. 163, 44 N. W. 525; Ramsey v. Glenny, 45 Minn. 387, 48 N. W. 17; City of St. Paul v. Chicago etc. Ry. Co. 45 Minn. 387, 48 N. W. 17.

[4] Hall v. Connecticut etc. Ins. Co. 76 Minn. 401, 79 N. W. 497.

Color of title.

§ 258. All that is necessary to render possession of lands adverse, so as to set the statute of limitations in motion, is that the disseisor enter and take possession with the intention of holding the lands for himself to the exclusion of all others. It is not necessary that he should enter under color of title or under a claim that he has a legal right to enter.[1] A tortious entry upon and possession of land without color or pretence of paper title, but under a claim of right thereto, in opposition to and inconsistent with the title of the true owner, may ripen into title by adverse possession.[2] But the disseisor must enter with "claim of right." "Color of title" and "claim of right" are not synonymous.[3] A person is properly said to have color of title to lands when he has an apparent though not real title to the same, founded upon a deed which purports to convey them to him.[4] It is not necessary that the deed be valid or recorded.[5] "Claim of right," "claim of title," "claim of ownership," when used in this connection, mean nothing more than the intention of the disseisor to appropriate and use the land as his own to the exclusion of all others.[6]

[1] Carpenter v. Coles, 75 Minn. 9, 77 N. W. 9; Cool v. Kelly, 78 Minn. 102, 80 N. W. 861.

[2] Village of Glencoe v. Wadsworth, 48 Minn. 402, 51 N. W. 377; Swan v. Munch, 65 Minn. 500, 67 N. W. 1022; Carpenter v. Coles, 75 Minn. 9, 77 N. W. 9.

[3] Carpenter v. Coles, 75 Minn. 9, 77 N. W. 9; Hamilton v. Wright, 30 Iowa, 480.

[4] Seigneuret v. Fahey, 27 Minn. 60, 6 N. W. 403. See further as to what constitutes color of title: O'Mulcahy v. Florer, 27 Minn. 449, 8 N. W. 166; Wheeler v. Merriman, 30 Minn. 372, 15 N. W. 665; McLellan v. Omodt, 37 Minn. 157, 33 N. W. 326; Hall v. Torrens, 32 Minn. 527, 21 N. W. 717.

[5] Miesen v. Canfield, 64 Minn. 513, 67 N. W. 632; Murphy v. Doyle, 37 Minn. 113, 33 N. W. 220; Costello v. Edson, 44 Minn. 135, 46 N. W. 299.

[6] Carpenter v. Coles, 75 Minn. 9, 77 N. W. 9.

Digitized by Google

§ 259. Color of title, in connection with adverse possession, is only important in determining the extent of the possession.[1] Where the disseisor entered without color of title there must be an actual occupancy—a pedis possessio—to constitute adverse possession and the adverse possession in such a case is only co-extensive with such occupancy. An actual possession of a part of a tract does not, in the absence of color of title, give constructive possession of the whole.[2] On the other hand, "where the occupant enters under a claim of title founded upon a deed or other written muniment of title, and has been in the continuous actual occupancy of some part of the premises for the statutory period, he will be deemed to have been in possession of the entire premises described in the deed not in the adverse possession of any one else, although uninclosed and unimproved, provided the premises consist of a single tract of proper size, to be managed and used as one body according to the usual manner of business. Otherwise expressed, an entry under a deed containing specific metes and bounds will give constructive possession of the whole tract described in the deed not in any adverse possession, although not all inclosed or improved. He is presumed to have intended his entry to be coextensive with the description in his deed, although his improvements are only on a part of the tract. Such a person occupies a different position from a mere naked trespasser or intruder, whose possession will be only co-extensive with his actual occupancy. And any instrument, however defective or ineffectual to convey title in fact, and even if void on its face, will be sufficient to bring a case within this rule if by sufficient description it purports to convey title. Whether valid or void on its face, it characterizes the entry of the occupant by showing the nature and extent of his claim."[3] "But the adverse possession of one distinct piece of land will not draw to it the constructive possession of another vacant and distinct piece owned by another person, although the adverse occupant holds a paper title by an instrument wherein the described boundaries are co-extensive with both pieces of land."[4] One who enters without color of title cannot extend his possession merely by obtaining color of title subsequent to his entry.[5]

[1] Washburn v. Cutter, 17 Minn. 361 Gil. 335; Carpenter v. Coles, 75 Minn. 9, 77 N. W. 424; City of St. Paul v. Chicago etc. Ry. Co. 45 Minn. 387, 48 N. W. 17.

[2] Coleman v. Northern Pacific Ry. Co. 36 Minn. 525, 32 N. W. 859; Brown v. Kohout, 61 Minn. 113, 63 N. W. 248; Sage v. Larson, 69 Minn. 122, 71 N. W. 923; Barber v. Robinson, 78 Minn. 193, 80 N. W. 968; Cool v. Kelly, 78 Minn. 102, 80 N. W. 861.

[3] Miesen v. Canfield, 64 Minn. 513, 67 N. W. 632. See also, Murphy v. Doyle, 37 Minn. 113, 33 N. W. 220; Morris v. McClary, 43 Minn. 346, 46 N. W. 238; Barber v. Robinson, 78 Minn. 193, 80 N. W. 968; Id. 82 Minn. 112, 84 N. W. 732; City of St. Paul v. Chicago etc. Ry. Co. 45 Minn. 387, 48 N. W. 17.

[4] McRoberts v. McArthur, 62 Minn. 310, 64 N. W. 903; Morris v. McClary, 43 Minn. 346, 46 N. W. 238.

[5] Barber v. Robinson, 78 Minn. 193, 80 N. W. 968.

Digitized by Google

Nature of title acquired by adverse possession.

§ 260. A title acquired by adverse possession is a title in fee simple and is as perfect as a title by deed. Its legal effect is not only to bar the remedy of the owner of the paper title but to divest his estate and vest it in the party holding adversely for the statutory period of limitation. Adverse possession ripens into a perfect title. This title the adverse possessor can transfer by conveyance and when he does so he is conveying his own title and not a piece of land the title to which is in some other person who is simply barred by the statute from recovering it by action.[1] The holder of a title by adverse possession may bring an action in the nature of ejectment against the holder of the paper title by whom he has been dispossessed.[2]

[1] **Dean v. Goddard, 55 Minn. 290**, 56 N. W. 1060; Seymour, Sabin & Co. v. Carli, 31 Minn. 81, 16 N. W. 495; Brown v. Morgan, 44 Minn. 432, 46 N. W. 913; Sage v. Rudnick, 67 Minn. 362, 69 N. W. 1096; Jellison v. Halloran, 44 Minn. 199, 46 N. W. 332; Flynn v. Lemieux, 46 Minn. 458, 49 N. W. 238; Kipp v. Johnson, 31 Minn. 360, 17 N. W. 957.

[2] Sherin v. Brackett, 36 Minn. 152, 30 N. W. 551; Langford v. Pappe, 56 Cal. 73; Barnes v. Light, 116 N. Y. 34.

Easements.

§ 261. When there has been a continuous use of an easement for fifteen years, unexplained, it will be presumed to have been under a claim of right and adverse, and will be sufficient to establish a right by prescription and authorize the presumption of a grant, unless contradicted or explained. Where the claimant needs the use of the easement only from time to time and so uses it, there is a sufficiently continuous use to be adverse, although it is not constant.

Swan v. Munch, 65 Minn. 500, 67 N. W. 1022; Mueller v. Fruen, 36 Minn. 273, 30 N. W. 886; Schulenberg v. Zimmerman, (Minn.) 90 N. W. 156.

Nuisance.

§ 262. Whether it is possible to acquire a prescriptive right to maintain a nuisance is unsettled in this state.

See Eastman v. St. Anthony etc. Co. 12 Minn. 137 Gil. 77; Cook v. Kendall, 13 Minn. 324 Gil. 297; Thornton v. Webb, 13 Minn. 498 Gil. 457; Matthews v. Stillwater etc. Co. 63 Minn. 493, 65 N. W. 947.

Facts held sufficient to constitute adverse possession.

§ 263. Building a house on the property of another through mistake as to the boundary line;[1] clearing, grubbing and fencing a portion of a farm, putting in crops, tapping trees, cutting grass and draining land—no buildings being built on the farm, the claimant living near by;[2] cutting trees on a lot, grubbing and burning the brush, digging out the stumps of trees, leaving tools on the land from year to year, camping on the land at intervals, paying taxes and finally building a house;[3] extensive ditching of the land and using

Digitized by Google

it as a hay farm for which it was alone adapted;[4] building a warehouse on an alley in a village;[5] living on the land and cropping it annually although no fences were built around it;[6] building a fence around land and using it as a pasture;[7] cutting wood, pasturing cattle, cutting hay, fencing a portion and living at intervals and for a short time in a shanty, the land being bottom land along the Mississippi;[8] piling lumber on a city lot, building a barn and shed, keeping and stabling horses, paying taxes;[9] setting out trees along a boundary line;[10] enclosing tract by brush fence, cutting hay and pasturing cattle.[11]

[1] Seymour, Sabin & Co. v. Carli, 31 Minn. 81, 16 N. W. 495.
[2] Murphy v. Doyle, 37 Minn. 113, 33 N. W. 220.
[3] Costello v. Edson, 44 Minn. 135, 46 N. W. 299.
[4] Ricker v. Butler, 45 Minn. 545, 48 N. W. 407.
[5] Village of Glencoe v. Wadsworth, 48 Minn. 402, 51 N. W. 377.
[6] Sage v. Morosick, 69 Minn. 167, 71 N. W. 930.
[7] Barber v. Robinson, 78 Minn. 193, 80 N. W. 968.
[8] Wheeler v. Gorman, 80 Minn. 462, 83 N. W. 442.
[9] Dean v. Goddard, 55 Minn. 290, 56 N. W. 1060.
[10] Butler v. Drake, 62 Minn. 229, 64 N. W. 559.
[11] Wood v. Spring, 45 Minn. 299, 48 N. W. 711.

Facts held insufficient to constitute adverse possession.

§ 264. Cutting timber without actual occupancy or cultivation or inclosure where the land is capable of such improvement;[1] cutting natural hay on and letting cattle run over and feed upon wild and uninclosed land adjoining land actually occupied by the trespasser;[2] camping in a tent on vacant and unoccupied land and cooking, preparing food and sleeping on it for a few days or a week and watching it for several weeks for the purpose of keeping off trespassers and asserting title to the land but doing and intending to do nothing else to improve the land or subject it to any proper use.[3]

[1] Washburn v. Cutter, 17 Minn. 361 Gil. 335.
[2] Bazille v. Murray, 40 Minn. 48, 41 N. W. 238; Lambert v. Stees, 47 Minn. 141, 49 N. W. 662; Sage v. Larson, 69 Minn. 122, 71 N. W. 923. But see, Ricker v. Butler, 45 Minn. 545, 48 N. W. 407; Sage v. Morosick, 69 Minn. 167, 71 N. W. 930.
[3] Musser-Sauntry etc. Co. v. Tozer, 56 Minn. 443, 57 N. W. 1072.

Evidence.

§ 265. The deed under which the disseisor entered is admissible to show the nature and extent of his claim although void on its face.[1] The fact of payment or non-payment of taxes is always admissible.[2] An acknowledgment by the disseisor of the record or paper title, as by accepting a lease from the owner of it, is in the nature of an admission that he had no title and is competent evidence tending to prove that his possession was not adverse.[3] Declarations of a prior deceased disseisor characterizing his possession are admissible in favor of a party claiming under him.[4] Conduct and admissions subsequent to the expiration of the statutory period are competent evidence to explain and characterize the antecedent possession.[5]

Digitized by Google

[1] Washburn v. Cutter, 17 Minn. 361 Gil. 335; Murphy v. Doyle, 37 Minn. 113, 33 N. W. 113; Ricker v. Butler, 45 Minn. 545, 48 N. W. 407.

[2] Murphy v. Doyle, 37 Minn. 113, 33 N. W. 113; Sage v. Morosick, 69 Minn. 167, 71 N. W. 930; Costello v. Edson, 44 Minn. 135, 46 N. W. 299; Wheeler v. Gorman, 80 Minn. 462, 83 N. W. 462; Dean v. Goddard, 55 Minn. 290, 56 N. W. 1060; Todd v. Weed, 84 Minn. 4, 86 N. W. 756.

[3] Sage v. Rudnick, 67 Minn. 362, 69 N. W. 1096; Todd v. Weed, 84 Minn. 4, 86 N. W. 756.

[4] Brown v. Kohout, 61 Minn. 113, 63 N. W. 248.

[5] Todd v. Weed, 84 Minn. 4, 86 N. W. 756.

Question for jury.

§ 266. Except where only one reasonable inference can be drawn from the evidence the question of adverse possession is for the jury under instructions from the court as to what facts will constitute an ouster and adverse possession.

Village of Glencoe v. Wadsworth, 48 Minn. 402, 51 N. W. 377; Washburn v. Cutter, 17 Minn. 361 Gil. 335; Brown v. Kohout, 61 Minn. 113, 63 N. W. 248; Sage v. Morosick, 69 Minn. 167, 71 N. W. 930; Butler v. Drake, 62 Minn. 229, 64 N. W. 559; Todd v. Weed, 84 Minn. 4, 86 N. W. 756.

Burden of proof.

§ 267. The burden of proving the essential facts which create title by prescription rests upon him who asserts it.

St. Paul & Duluth Ry. Co. v. City of Duluth, 73 Minn. 270, 76 N. W. 35; St. Paul & Duluth Ry. Co. v. Village of Hinckley, 53 Minn. 398, 55 N. W. 560; Brown v. Kohout, 61 Minn. 113, 63 N. W. 248; Bazille v. Murray, 40 Minn. 48, 41 N. W. 238.

Degree of proof required.

§ 268. The evidence to establish a title by prescription must be direct, clear and convincing. Every presumption is to be indulged against the disseisor.

Washburn v. Cutter, 17 Minn. 361 Gil. 335; St. Paul & Duluth Ry. Co. v. City of Duluth, 73 Minn. 270, 76 N. W. 35; Costello v. Edson, 44 Minn. 135, 46 N. W. 299.

Digitized by Google

CHAPTER III

PLACE OF TRIAL

I VENUE

Definition.

§ 269. Venue, in our practice act, is used synonymously with place of trial.[1] The term is also employed to designate the marginal notation, in our pleadings and other judicial papers, of the county and state where the action is brought or the proceedings had. The old common law rules of venue have lost most of their significance in this state.[2]

[1] Hinchman v. Butler, 7 How. Pr. (N. Y.) 462.

[2] Little v. Chicago etc. Ry. Co. 65 Minn. 48, 67 N. W. 846. See Dunnell, Minn. Pl. § 340.

Not jurisdictional.

§ 270. The district courts of this state constitute, in a sense, one court[1] and the fact that an action is brought or tried in the wrong county is not jurisdictional.[2]

[1] See § 1.

[2] Tullis v. Brawley, 3 Minn. 277 Gil. 191; Merrill v. Shaw, 5 Minn. 148 Gil. 113; Nininger v. Board of County Com'rs, 10 Minn. 133 Gil. 106; Gill v. Bradley, 21 Minn. 15; In re Barnard, 30 Minn. 512, 16 N. W. 403; Kipp v. Cook, 46 Minn. 535, 49 N. W. 257; In re Ellis' Estate, 55 Minn. 401, 56 N. W. 1056; Smith v. Barr, 76 Minn. 513, 79 N. W. 507 overruling Kretzschmar v. Meehan, 74 Minn. 211, 77 N. W. 41.

Distinction between local and transitory actions.

§ 271. At common law an action is transitory where the transaction on which it is based might have taken place anywhere; it is local where such transaction could only have occurred in a particular place. This test is not decisive under our law. In prescribing the place of trial our statutes determine what actions are to be considered local and what transitory so far as actions arising in this state are concerned. Speaking generally, all actions concerning real property are local and all other actions transitory. But it has been held in this state, contrary to the general rule, that an action to recover damages to real property is transitory. Personal actions on contracts concerning real property are deemed transitory.[1] Actions for a personal tort are transitory.[2] The modern tendency is to treat all actions as transitory which are not clearly and wholly local. Inasmuch as the general rule is that actions must be brought and tried where the parties reside, and that they must be brought and tried where the subject-matter is situated is the exception to the rule, it has frequently been held that, to

Digitized by Google

bring a case within the exception, the subject-matter must be wholly local; that is, exclusively within the exception.[3] It is settled law that title to real property cannot be tried ex directo in transitory actions, but an action is not rendered local simply because the title to real property is incidentally involved.[4] The distinction between transitory and local actions is important in determining whether the courts of this state have jurisdiction over a cause of action arising in another state and it is also important in determining the county in which an action should be brought in this state, the cause of action arising here. The two questions are very different. The former question goes to the jurisdiction of the court, while the latter does not.[5]

[1] Little v. Chicago etc. Ry. Co. 65 Minn. 48, 67 N. W. 846.

[2] Myers v. Chicago etc. Ry. Co. 69 Minn. 476, 72 N. W. 694; Herrick v. Minneapolis etc. Ry. Co. 31 Minn. 11, 16 N. W. 413; Nicholas v. Burlington etc. Ry. Co. 78 Minn. 43, 80 N. W. 776.

[3] Smith v. Barr, 76 Minn. 513, 79 N. W. 507. See State v. District Court, 85 Minn. 283, 88 N. W. 755.

[4] Washburn v. Cutter, 17 Minn. 361 Gil. 335; Downs v. Finnegan, 58 Minn. 112, 59 N. W. 981; State v. District Court, 85 Minn. 283, 88 N. W. 755.

[5] See Little v. Chicago etc. Ry. Co. 65 Minn. 48, 67 N. W. 846.

Venue as to foreign corporations.

§ 272. A foreign corporation, although it has complied with all the provisions and conditions of the statute as to its right to do business in this state, may be sued in any county in the state which the plaintiff designates in his complaint.

Olson v. Osborne, 30 Minn. 444, 15 N. W. 876; Eickhoff v. Fidelity & Casualty Co. 74 Minn. 139, 76 N. W. 1030.

Venue as to domestic corporations.

§ 273. The statute provides that, for the purposes of venue, a corporation shall be deemed to reside in any county where it has an office, agent, or place of business.[1] That is, the residence of a domestic corporation, for the purposes of an action against it, is not confined to the place where its principal office or place of business is located; it resides wherever it has an established office, agent or place of business.[2]

[1] G. S. 1894 § 5185.

[2] Schoch v. Winona etc. Ry. Co. 55 Minn. 479, 57 N. W. 208. See State v. District Court, 77 Minn. 302, 79 N. W. 960.

Venue determined by situs of property—statute.

§ 274. "Actions for the following causes shall be tried in the county in which the subject of the action or some part thereof, is situated, subject to the power of the court to change the place of trial as hereinafter provided:

(1) For the recovery of real property, or of an estate or interest therein, or for the determination in any form of such right or interest, and for injuries to real property.[1] If the county designated

Digitized by Google

in the complaint is not the proper county, the court therein shall have no jurisdiction of said action.[2]

(2) For the partition of real property.

(3) For the foreclosure of a mortgage of real property.

(4) For the recovery of personal property detained for any cause." [3]

[G. S. 1894 §§ 5182, 5183] See Laws 1899 ch. 111 for rule when land lies in two counties.

[1] Little v. Chicago etc. Ry. Co. 65 Minn. 48, 67 N. W. 846; Kommer v. Harrington, 83 Minn. 114, 85 N. W. 939; State v. District Court, 85 Minn. 283, 88 N. W. 755.

[2] Rollins v. Rice, 60 Minn. 358, 62 N. W. 325; Kretzschmar v. Meehan, 74 Minn. 211, 77 N. W. 41; Smith v. Barr, 76 Minn. 513, 79 N. W. 513.

[3] See § 276 (3); Leonard v. Maginnis, 34 Minn. 506, 26 N. W. 733; Hinds v. Backus, 45 Minn. 170, 47 N. W. 655.

Venue determined by place where cause arose.

§ 275. "Actions for the following causes shall be tried in the county where the cause or some part thereof arose, subject to the power of the court to change the place of trial as provided by law:

(1) For the recovery of a penalty or forfeiture imposed by statute,[1] except that where it is imposed for an offence committed on a lake, river, or other stream of water situated in two or more counties, the action may be brought in any county bordering on such lake, river or stream.

(2) Against a public officer, or person specially appointed to execute his duties, for an act done by him in virtue of his office, or against a person who, by his command or in his aid, does anything touching the duties of such officer." [2]

[G. S. 1894 § 5184]

[1] Flowers v. Bartlett, 66 Minn. 213, 68 N. W. 976.

[2] Leonard v. Maginnis, 34 Minn. 506, 26 N. W. 733; Hinds v. Backus, 45 Minn. 170, 47 N. W. 655; Tullis v. Brawley, 3 Minn. 277 Gil. 191.

Venue determined by residence of defendant.

§ 276. "In all other cases, except when the state of Minnesota is plaintiff, the action shall be tried in the county in which the defendants, or any of them, shall reside at the commencement of the action; [1] or if none of the parties shall reside or be found in the state, or the defendant be a foreign corporation, the same may be tried in any county which the plaintiff shall designate in his complaint, subject, however, to the power of the court to change the place of trial, in the cases provided by law.[2] Provided, that in an action for the claim and delivery of personal property wrongfully taken, the action may be brought and maintained in the county where the wrongful taking occurred, or where the plaintiff resides.[3] A corporation [4] shall be deemed to reside in any county where it has an office, agent, or place of business, within the meaning of this section." [5]

Digitized by Google

[G. S. 1894 § 5185 as amended by Laws 1895 ch. 28]

[1] McNamara v. Eustis, 46 Minn. 311, 48 N. W. 1123; Collins v. Bowen, 45 Minn. 186, 47 N. W. 719; State v. District Court, 85 Minn. 283, 88 N. W. 755; Hurning v. Hurning, 80 Minn. 373, 83 N. W. 342 (action for divorce).

[2] Olson v. Osborne, 30 Minn. 444, 15 N. W. 876; Eickhoff v. Fidelity & Casualty Co. 74 Minn. 139, 76 N. W. 1030.

[3] Leonard v. Maginnis, 34 Minn. 506, 26 N. W. 733; Hinds v. Backus, 45 Minn. 170, 47 N. W. 655. See § 275 (2).

[4] That is, a domestic corporation.

[5] Schoch v. Winona etc. Ry. Co. 55 Minn. 479, 57 N. W. 208; State v. District Court, 77 Minn. 302, 79 N. W. 960.

Non-resident defendant—attachment.

§ 277. "If the defendant is a non-resident of this state, and the plaintiff proceeds against him, by attaching his property, such action may be brought in any county where the defendant has property liable to attachment."

[G. S. 1894 § 5186]

Action on recognizances.

§ 278. "All actions for the recovery of any penalty brought against a principal or surety in any recognizance entered into either by a party or a witness in any criminal prosecution in any of the courts in this state, shall be brought and tried in the county in which the action or proceeding in which such recognizance is taken is pending, unless the court shall for cause other than the place of residence of the defendants change the place of trial of said action to any other county as now provided by law."

[G. S. 1894 § 5187]

Miscellaneous cases.

§ 279. Actions for divorce must be brought "in the county where the parties, or either of them reside;" [1] against common carriers under the railroad and warehouse commission law, "in any county in the state through or into which the line of any common carrier so sued may extend;" [2] against a domestic corporation not having an officer in this state upon whom legal service of process can be made, "in any county where the cause of action or proceeding may arise or said corporation may have property;" [3] against revenue officers, "in the district court of the county in which the defendants or any of them resides or is found;" [4] against receiver, assignee or manager of property in custodia legis, in any county where they might have been brought against the person or corporation represented by such receiver, assignee or manager; [5] under the insolvency law of 1881, "in the county where the debtor, debtors, or any of them, resides, if a resident of this state; and if not a resident of this state, such action or proceeding may be brought in any county which the plaintiff shall designate in his complaint, or where such debtors, or any of them, has property subject to attachment or levy;" [6] on patent right notes, "in the county where the defendant resides, if a resident of this

Digitized by Google

state, at the time of the commencement of such action, and not elsewhere." [7]

[1] G. S. 1894 § 4790; Young v. Young, 18 Minn. 90 Gil. 72; Thelan v. Thelan, 75 Minn. 433, 78 N. W. 108; Hurning v. Hurning, 80 Minn. 373, 83 N. W. 342; Salzbrun v. Salzbrun, 81 Minn. 287, 83 N. W. 1088.

[2] G. S. 1894 § 394.

[3] G. S. 1894 § 5203; Town of Hinckley v. Kettle River Ry. Co. 70 Minn. 105, 72 N. W. 835; In re St. Paul etc. Ry. Co. 36 Minn. 85, 30 N. W. 432.

[4] G. S. 1894 § 359. [5] G. S. 1894 § 5175.

[6] G. S. 1894 § 4244. [7] G. S. 1894 § 8053.

II CHANGE OF VENUE

General statute.

§ 280. "If the county designated for that purpose in the complaint is not the proper county, the action may notwithstanding be tried therein, unless the defendant, before the time for answering expires, demands in writing that the trial be had in the proper county, which demand shall be accompanied by an affidavit of the defendant, his attorney, or agent, as to the actual residence of the defendant at the time of the commencement of the action; and upon filing due proof of the service of such demand and affidavit upon the attorney of plaintiff in the office of the clerk of the district court in the county in which such action is commenced, such action shall thereupon be transferred and the place of trial thereof changed to the county of which such defendant is a resident, without any other steps or proceedings whatever.[1] Where in any action there are several defendants residing in different counties, the action shall be tried in the county upon which a majority of such defendants shall unite in such demand.[2]

The court may change the place of trial in the following cases:

(1) When there is reason to believe that an impartial trial cannot be had in the county in which the action is then pending.[3]

(2) When the convenience of witnesses and the ends of justice would be promoted by the change.[4]

Provided, that when the defendant is, upon proper demand made, entitled to a change of the place of trial from the county in which the action against him was commenced to the county in which he resides, upon the ground that the county designated in the complaint is not the proper county, such action cannot for any of the reasons or upon any of the grounds specified in this section be retained for trial in the county where the same was commenced, but can only be tried therein upon removal thereto from the proper county upon the order of the district court in and for such proper county.[5]

(3) A change of venue may, in all civil cases, be made upon the consent in writing of the parties or their attorneys.[6] When the place of trial is changed, all other proceedings shall be had in the county to which the place of trial is changed, unless otherwise provided by

Digitized by Google

the consent of the parties in writing duly filed, or order of the court, and the papers shall be filed or transferred accordingly." [7]

[Laws 1895 ch. 28]

[1] See § 281.

[2] McNamara v. Eustis, 46 Minn. 311, 45 N. W. 1123; Suter v. Page, 64 Minn. 444, 67 N. W. 67; Chadbourne v. Reed, 83 Minn. 447, 86 N. W. 415; State v. District Court, 85 Minn. 283, 88 N. W. 755 (nominal parties not considered).

[3] See Simmons v. St. Paul etc. Ry. Co. 18 Minn. 184 Gil. 168.

[4] See § 282.

[5] See § 281.

[6] It is the practice, under this provision, to obtain an order of the court for the change, based on the written stipulation of the parties. When the stipulation and order are filed with the clerk it becomes his duty to transmit the files to the county designated in the order.

[7] See Nystrom v. Quinby, 68 Minn. 4, 70 N. W. 777.

When change a matter of right.

§ 281. If a defendant complies, or duly tenders compliance, with the provisions of this statute he has an absolute right to have the venue changed to the county of his alleged residence. The action cannot be retained in the county in which the venue was originally laid, for the purpose of traversing the allegations of the affidavit as to defendant's residence, or for the hearing of a motion to retain the case for the convenience of witnesses. If the plaintiff wishes to challenge the truth of the affidavit as to the defendant's residence, his remedy is to move the court in the county to which the venue is changed by the demand and affidavit to remand the case on the ground that the defendant is in fact a resident of the county in which the action was originally brought. If a defendant complies with this statute, and makes the demand and affidavit, and files them, with proof of service thereof, in the office of the clerk of the court, the place of trial is ipso facto changed, and the defendant has an absolute right to have the papers and files transferred to the district court of the proper county. No order of court is necessary.

Flowers v. Bartlett, 66 Minn. 213, 68 N. W. 976; State v. District Court, 77 Minn. 302, 79 N. W. 960; Potter v. Holmes, 72 Minn. 153, 75 N. W. 591; Hurning v. Hurning, 80 Minn. 373, 83 N. W. 342 (action for divorce); Chadbourne v. Reed, 83 Minn. 447, 86 N. W. 415; State v. District Court, 85 Minn. 283, 88 N. W. 755

Change for the convenience of witnesses.

§ 282. The matter of granting a change of venue rests almost wholly in the discretion of the trial court and its action will not be reversed on appeal except to remedy manifest injustice.[1] The discretion is to be exercised with reference to the facts of the particular case and is governed by no fixed general rules. The preponderance in the number of witnesses whose convenience would be promoted by a change is the principal consideration, but it is by no means

Digitized by Google

decisive.[2] It is proper for the court to take into consideration the nature of the action and the place where the cause of action and defence arose.[3] The relative speed with which a trial can be reached in the two counties is an important consideration.[4] It has been held proper to consider the financial condition of the parties and their state of health.[5]

[1] Wilson v. Richards, 28 Minn. 337, 9 N. W. 872; Walker v. Nettleton, 50 Minn. 305, 52 N. W. 864; Sims v. American Steel Barge Co. 56 Minn. 68, 57 N. W. 322.

[2] Clanton v. Ruffner, 78 Cal. 268; Jordan v. Garrison, 6 How. Pr. (N. Y.) 6; King v. Vanderbilt, 7 How. Pr. (N. Y.) 385.

[3] Rule 28, District Court; Jordan v. Garrison, 6 How. Pr. (N. Y.) 6.

[4] King v. Vanderbilt, 7 How. Prac. (N. Y.) 385; Tuthill v. Long Island Ry. Co. 75 Hun (N. Y.) 556.

[5] Tuthill v. Long Island Ry. Co. 75 Hun (N. Y.) 556.

§ 283. The affidavit for a change of venue on this ground should state the names and residences of the proposed witnesses;[1] the facts which they have promised to testify to;[2] and that defendant has been advised by his counsel that he cannot safely proceed to trial without them.[3] The affidavit should ordinarily be made by the defendant personally. If made by the attorney it should state why it could not be made by the defendant.[4] To resist an application properly made by a plaintiff to change the place of trial for the convenience of witnesses the defendant should present an affidavit of merits.[5]

[1] Olivier v. Cunningham, 51 Minn. 232, 53 N. W. 462.

[2] Thurfjell v. Witherbee, 24 N. Y. Supp. 278 (insufficient merely to state what the defendant expects to prove by them).

[3] Olivier v. Cunningham, 51 Minn. 232, 53 N. W. 462; People v. Hayes, 7 How. Pr. (N. Y.) 284.

[4] Id.

[5] Id.

§ 284. A change of venue for the convenience of witnesses may be made upon the application of a part only of the defendants who defend, but the others should be notified of the application, so that they may have an opportunity to be heard.

Wilson v. Richards, 28 Minn. 337, 9 N. W. 872.

Change for disqualification of judge—statute.

§ 285. "No judge of any of the courts of record of this state shall sit in any cause in which he is interested directly or indirectly, or in which he is or has been attorney or counsel for either party or any person interested in the determination of the action, or in which he would be excluded from sitting as a juror; provided, that he may hear and grant a motion for a change of venue in such cause, and it shall be the duty of such judge in judicial districts having only one judge, upon motion of any party desiring such change of venue, to order the same, upon a proper showing of such interest or disqualification, as in other cases of change of venue, and provided that the governor of the state previous to the day upon which

UNIV. OF MICH. LAW LIBRARY.

Digitized by Google

notice of said motion is given has not assigned another district judge to hear and determine this action."

[Laws 1901, ch. 16] See Ex parte Curtis, 3 Minn. 274 Gil. 188; Burke v. Mayall, 10 Minn. 287 Gil. 226; State v. District Court, 52 Minn. 283, 53 N. W. 1157; State v. Macdonald, 26 Minn. 445, 4 N. W. 1107; Sjoberg v. Nordin, 26 Minn. 501, 5 N. W. 677; Bryant v. Livermore, 20 Minn. 313 Gil. 271. For change on account of bias of judge see Laws 1895 ch. 306; State v. Gardiner, 92 N. W. —.

Change in action for wages—statute.

§ 286. "That in any action hereafter commenced or pending in any court of this state, for wages, or money due for manual labor, or for the enforcement of any lien for such wages, or money, when such action is brought in the county in which such labor was performed, no change of the place of the trial thereof shall be had, without the express consent of the plaintiff in writing duly filed with said court. Provided, this act shall not apply to change of venue from one justice of the peace to another, or from one municipal court to another, in the same county."

[G. S. 1894 § 5189]

Change on appeal from justice court—statute.

§ 287. "When an action has been instituted in any county in this state in any justice court of any county against any natural person not a resident of the county where the justice issuing the process resides, and said action shall be appealed to the district court of said county where said justice resides, the action may be transferred to the district court of the county where the defendant resides upon filing with the clerk of the district court of the county in which said action was begun, an affidavit of the defendant or his attorney, setting forth that the defendant (or when there is more than one defendant, a majority of the defendants) resided when the action was begun in some other county in this state, which affidavit shall be filed within ten days after the appeal has been allowed, the appellant shall, within twenty days after such affidavit is filed, make application to the court for an order transferring said action to the district court of the county named in said affidavit. If the appellant fails to make such application within said twenty days he shall lose his right to have the said action transferred, and the district court of the county where said action was brought shall have full jurisdiction as in other actions appealed from a justice court. Immediately upon such application being made, the court shall enter its order transferring the said action to the district court of the county where the defendant, or a majority of the defendants, reside, and the clerk of such district court shall thereupon transmit to the clerk of the district court specified in said order all papers and files in said cause."

[Laws 1899 ch. 341] See Schoch v. Winona etc. Ry. Co. 55 Minn. 479, 57 N. W. 208; Janney v. Sleeper, 30 Minn. 473, 16 N. W. 365; Chesterson v. Munson, 27 Minn. 498, 8 N. W. 593.

Digitized by Google

Change in actions brought in a municipal court—statute.

§ 288. "In any action hereafter brought in any municipal court of any city or town of this state if the county designated as the place of trial in the summons be not the county where the defendant or defendants reside, the action may notwithstanding be tried therein unless the defendant, after answering, and before the time fixed for the trial of said cause demands in writing that the trial be had in the district court of the county where the defendant or defendants reside, and the place of trial shall thereupon be changed to the proper county by the order of the court, and thereupon the clerk of such municipal court shall transmit to the clerk of the district court where the defendant or defendants reside copies of all papers and files relating to said cause."

[G. S. 1894 § 5191] This statute overrules, Janney v. Sleeper, 30 Minn. 473, 16 N. W. 365.

Practice when parties are made defendants to control venue.

§ 289. We have a statute—in part unintelligible—which authorizes a change of venue where parties are improperly made defendants for the purpose of evading the law relating to change of venue.[1] An application under it is addressed to the discretion of the court.[2] Counter affidavits may be considered.[3] An action brought in the district court for the county in which but one of three defendants resides is properly triable in said county, notwithstanding the death of said resident defendant before either of the three appears or answers in the action, where no steps are taken to change the place of trial under this statute.[4] It is an open question whether an application under this statute may be resisted on the ground of convenience of witnesses.[5]

[1] G. S. 1894 § 5190.

[2] Walker v. Nettleton, 50 Minn. 305, 52 N. W. 864.

[3] Id.

[4] Collins v. Bowen, 45 Minn. 186, 47 N. W. 719.

[5] Keith v. Briggs, 32 Minn. 185, 20 N. W. 91.

Object of statute authorizing change.

§ 290. "The primary and controlling object to be secured by the provisions of the statute regulating the place of trial in transitory actions, was, manifestly, to protect defendants against the oppressions which plaintiffs might otherwise maliciously or capriciously practice upon them through the general jurisdiction of the district courts. That object was designed to be and was secured by placing in the possession of defendants, who by answer disclose defences rendering a trial necessary, the power to control the place of trial so far as to bring it to a proper county."

Merrill v. Shaw, 5 Minn. 148 Gil. 113.

Jurisdiction of court to order change.

§ 291. A court cannot exercise the power to change the place of trial in a case not within and subject to its jurisdiction. The

Digitized by Google

order making the change is not a proceeding conferring jurisdiction but must itself rest upon a pre-existing jurisdiction.

Merrill v. Shaw, 5 Minn. 148 Gil. 113.

Waiver of right to a change.

§ 292. The venue does not go to the jurisdiction of the court over the subject matter and hence a party may waive his right to a trial in a particular county. The waiver may be expressed or implied.

Sherman v. Clark, 24 Minn. 37; Chesterson v. Munson, 27 Minn. 498, 8 N. W. 593; Allen v. Coates, 29 Minn. 46, 11 N. W. 132; Tullis v. Brawley, 3 Minn. 277 Gil. 191; Keith v. Briggs, 32 Minn. 185, 20 N. W. 91; Nystrom v. Quinby, 68 Minn. 4, 70 N. W. 777; Wilson v. Richards, 28 Minn. 337, 9 N. W. 872; Merrill v. Shaw, 5 Minn. 148 Gil. 113; Collins v. Bowen, 45 Minn. 186, 47 N. W. 719; Oltman v. Yost, 62 Minn. 261, 64 N. W. 564.

Waiver of objections to proceedings for a change.

§ 293. A party may waive objections to the mode in which proceedings for a change of venue are made or resisted or to the jurisdiction of the court to entertain such proceedings.

Keith v. Briggs, 32 Minn. 185, 20 N. W. 91. See Oltman v. Yost, 62 Minn. 261, 64 N. W. 564; Nystrom v. Quinby, 68 Minn. 4, 70 N. W. 777.

How objection to venue taken.

§ 294. Objection to the place of trial is properly made by a demand or motion for a change of venue or a motion to remand after a change. The objection cannot be raised by demurrer [1] or answer,[2] or for the first time on a motion for a new trial.[3] The question whether the venue has been changed may be raised by objecting to further proceedings in the county where the action was brought.[4]

[1] Nininger v. Board of County Commissioners, 10 Minn. 133 Gil. 106; Gill v. Bradley, 21 Minn. 15. See Kretzschmar v. Meehan, 74 Minn. 211, 77 N. W. 41; Smith v. Barr, 76 Minn. 513, 79 N. W. 507.

[2] Merrill v. Shaw, 5 Minn. 148 Gil. 113.

[3] Tullis v. Brawley, 3 Minn. 277 Gil. 191.

[4] Flowers v. Bartlett, 66 Minn. 213, 68 N. W. 976.

Change made only for strong reasons.

§ 295. When the change is not a matter of right the moving party must make out a strong case. "The right to a particular place of trial is fixed by law for wise reasons, and no party should be sent away from that place of trial, unless the grounds for a change of venue unmistakably appear."

Burke v. Mayall, 10 Minn. 287 Gil. 226.

Time of application.

§ 296. When a change is a matter of right the statute provides that the demand must be made before the time for answering expires.[1]

Digitized by Google

The statute should not be so interpreted that the time to make the demand or enforce the right will be revived or extended by unforeseen and unexpected contingencies. It is the intent of the statute that the plaintiff shall know promptly and with certainty where the place of trial is to be.[2] When the change is not a matter of right it may be stated as a general rule that the application should be made at the earliest opportunity, or at least within a reasonable time after acquiring knowledge of the existence of the ground upon which the application is based; it being incumbent on the applicant to explain any seeming lack of diligence on his part.[3]

[1] See § 280; Atlis v. White, 70 Minn. 186, 72 N. W. 1070.

[2] Potter v. Holmes, 72 Minn. 153, 75 N. W. 591.

[3] Rule 28, District Court; Potter v. Holmes, 72 Minn. 153, 75 N. W. 591; Allen v. Coates, 29 Minn. 46, 11 N. W. 132; Waldron v. City of St. Paul, 33 Minn. 87, 22 N. W. 4; McNamara v. Eustis, 46 Minn. 311, 48 N. W. 1123; Lueck v. St. Paul & Duluth Ry. Co. 57 Minn. 30, 58 N. W. 821.

Appeal.

§ 297. No appeal lies from an order denying a motion for a change of venue.[1] An order granting or denying a motion for a change of venue may be reviewed on an appeal from the final judgment [2] or on appeal from an order denying a motion for a new trial.[3] The question whether the place of trial has been changed may be raised by objecting to the hearing of a demurrer to the complaint in a county which, if the action has been removed, is not the proper county; and the question may be raised in the supreme court on appeal from an order overruling the demurrer.[4] The action of the trial court, where it is a matter of discretion, will rarely be reversed on appeal.[5]

[1] Allis v. White, 59 Minn. 97, 60 N. W. 807; Carpenter v. Comfort, 22 Minn. 539; Mayall v. Burke, 10 Minn. 285 Gil. 224.

[2] Schoch v. Winona etc. Ry. Co. 55 Minn. 479, 57 N. W. 208; Hinds v. Backus, 45 Minn. 170, 47 N. W. 655; Carpenter v. Comfort, 22 Minn. 539; Jones v. Swank, 54 Minn. 259, 55 N. W. 1126; State v. District Court, 77 Minn. 302, 79 N. W. 960.

[3] Carpenter v. Comfort, 22 Minn. 539; Wilson v. Richards, 28 Minn. 339, 9 N. W. 872; Walker v. Nettleton, 50 Minn. 305, 52 N. W. 864; Lehmicke v. St. Paul etc. Ry. Co. 19 Minn. 464 Gil. 406 (overruled); State v. District Court, 77 Minn. 302, 79 N. W. 960.

[4] Flowers v. Bartlett, 66 Minn. 213, 68 N. W. 976.

[5] See § 1895.

Digitized by Google

CHAPTER IV

SUMMONS

COMMENCEMENT OF ACTIONS

Actions commenced by summons—statutes.

§ 298. "Civil actions in the several district courts of this state shall be commenced by the service of a summons, as hereinafter provided."

[G. S. 1894 § 5193] Cited in W. W. Kimball Co. v. Brown, 73 Minn. 167, 75 N. W. 1043; Crombie v. Little, 47 Minn. 581, 50 N. W. 823.

§ 299. "From the time of the service of the summons in a civil action, the court is deemed to have acquired jurisdiction, and to have control of all the subsequent proceedings. A voluntary appearance of a defendant is equivalent to a personal service of the summons upon him."

[G. S. 1894 § 5209] See § 348.

Filing complaint not essential.

§ 300. Except for the purpose of preventing the statute of limitations from running an action is commenced by service of the summons and not, as in some states, by filing the complaint and issuing a summons.[1] Where a summons is regular on its face, and is duly served, the court acquires jurisdiction of the cause. The fact that the complaint is not filed, or a copy thereof is not served with the summons, does not render the judgment void. It is a mere irregularity and is waived unless the defendant moves to set aside the service.[2]

[1] Crombie v. Little, 47 Minn. 581, 50 N. W. 823.

[2] Millette v. Mehmke, 26 Minn. 306, 3 N. W. 700; Houlton v. Gallow, 55 Minn. 443, 57 N. W. 141; W. W. Kimball Co. v. Brown, 73 Minn. 167, 75 N. W. 1043.

Admission of service.

§ 301. The mere written admission by defendant of service of summons upon him is insufficient to authorize a judgment on default. The genuineness of defendant's signature must be proved. An attorney at law has no implied authority to admit service of summons for his client. If expressly authorized he may admit service, acting as an attorney in fact. When an admission of service is made by an attorney or agent his signature and authority must be proved to authorize a default judgment.[1] The statute provides that the admission shall be in writing and state the time, place and manner of service.[2]

[1] Masterson v. Le Claire, 4 Minn. 163 Gil. 108. See Rahilly v.

Digitized by Google

Lane, 15 Minn. 447 Gil. 360; Kipp v. Fullerton, 4 Minn. 473 Gil. 366.

[2] See § 325.

CONTENTS AND NATURE OF SUMMONS

The statutes.

§ 302. "The summons must be subscribed by the plaintiff or his attorney, and directed to the defendant, requiring him to answer the complaint, and serve a copy of his answer on the person whose name is subscribed to the summons, at a place within the state therein specified, in which there is a post-office, within twenty days after the service of the summons, exclusive of the day of service."

[G. S. 1894 § 5194]

§ 303. "The summons shall also contain a notice, in substance as follows:

(1) In an action arising on contract or judgment for the payment of money only, that he will take judgment for a sum specified therein if the defendant fails to answer the complaint.[1]

(2) In other actions for the recovery of money only, that he will, upon such failure, have the amount he is entitled to recover ascertained by the court, or under its direction, and take judgment for the amount so ascertained.[2]

(3) In other actions, that, if the defendant fails to answer the complaint, the plaintiff will apply to the court for the relief demanded therein." [3]

[G. S. 1894 § 5195 as amended by Laws 1901 ch. 27] See G. S. 1894 § 6238 as to summons in actions to foreclose a mechanic's lien.

[1] Sibley v. Young, 21 Minn. 335.

[2] Heinrich v. Englund, 34 Minn. 395, 26 N. W. 122; White v. Iltis, 24 Minn. 43.

[3] Hotchkiss v. Cutting, 14 Minn. 537 Gil. 408.

§ 304. "A copy of the complaint must be served upon the defendant with the summons, unless the complaint itself be filed in the office of the clerk of the district court of the county in which the action is commenced, in which case the service of the copy may be omitted; but the summons in such case must notify the defendant that the complaint has been filed with the clerk of said court; and if the defendant appear within ten days after the service of the summons the plaintiff must serve a copy of the complaint on the defendant or his attorney, within five days after the notice of such appearance, and the defendant shall have at least ten days thereafter to answer the same; [1] and no judgment shall be entered against him for want of an answer in such case till the expiration of the time." [2]

[G. S. 1894 § 5196]

[1] Swift v. Fletcher, 6 Minn. 550 Gil. 386.

Digitized by Google

[2] Lane v. Innes, 43 Minn. 137, 45 N. W. 4; W. W. Kimball Co. v. Brown, 73 Minn. 167, 75 N. W. 1043.

Not a process—a mere notice.

§ 305. Section 14 of article 6 of our constitution provides that the style of all process shall be, "the state of Minnesota." A summons is not process within the meaning of this provision and need not run in the name of the state. It is merely a notice given by the plaintiff's attorney to the defendant that proceedings have been instituted and judgment will be taken against him if he fails to defend. This notice is not issued out of or under the seal of the court, or by the authority of the court or any judicial officer. The fact that the court acquires jurisdiction by its service does not prove it process, for it is competent for the legislature to provide that the court shall acquire jurisdiction by the service of the complaint without a summons or in any other manner by which the defendant may be notified that proceedings have been instituted against him. "Process," in a large acceptation, is nearly synonymous with "proceedings," and means the entire proceedings in an action from the beginning to the end. In a stricter sense it is applied to the several judicial writs issued in an action. In this last sense it is manifestly used in the constitution, and when used in this sense we believe it only applies to judicial instruments issued by a court or other competent jurisdiction and returnable to the same.

Hanna v. Russell, 12 Minn. 80 Gil. 43; Lowry v. Harris, 12 Minn. 255 Gil. 166; First Nat. Bank v. Estenson, 68 Minn. 28, 70 N. W. 775. See also, Shato v. Latham, 33 Minn. 36, 21 N. W. 838; Thompson v. Bickford, 19 Minn. 17 Gil. 1; Cleland v. Tavernier, 11 Minn. 194 Gil. 126; Wolf v. McKinley, 65 Minn. 156, 68 N. W. 2.

Signature.

§ 306. A summons may be subscribed by the printed signature of the plaintiff or his attorney.[1] A written signature purporting to be that of the plaintiff in the action, but made by his agent in his presence and by his express direction is sufficient.[2]

[1] Herrick v. Morrill, 37 Minn. 250, 33 N. W. 849. See also, West v. St. Paul etc. Ry. Co. 40 Minn. 189, 41 N. W. 1031.

[2] Hotchkiss v. Cutting, 14 Minn. 537 Gil. 408.

Irregularities in.

§ 307. No general rule can be laid down as to what defects in a summons are jurisdictional. If the summons is regular on its face and is duly served the court acquires jurisdiction of the cause. Mere irregularities in the summons cannot be taken advantage of collaterally but are deemed waived unless the defendant moves to set aside the service.

Hotchkiss v. Cutting, 14 Minn. 537 Gil. 408; Millette v. Mehmke, 26 Minn. 306, 3 N. W. 700; Houlton v. Gallow, 55 Minn. 443, 57 N. W. 141; W. W. Kimball Co. v. Brown, 73 Minn. 167, 75 N. W. 1043; Lee v. Clark, 53 Minn. 315, 55 N. W. 127;

Digitized by Google

Hanna v. Russell, 12 Minn. 80 Gil. 43; White v. Iltis, 24 Minn. 43; Seurer v. Horst, 31 Minn. 479, 18 N. W. 283; Gould v. Johnston, 24 Minn. 188; Lane v. Innes, 43 Minn. 137, 45 N. W. 4; Heinrich v. Englund, 34 Minn. 395, 26 N. W. 122; Crombie v. Little, 47 Minn. 581, 50 N. W. 823; Sandwich Mfg. Co. v. Earl, 56 Minn. 390, 57 N. W. 938.

SERVICE OF SUMMONS

By whom served.

§ 308. "The summons may be served by the sheriff of the county where the defendant is found or by any other person not a party to the action; and the service shall be made, and the summons returned and filed in the clerk's office, with all reasonable diligence."[1] Of course a sheriff may serve a summons out of his county but when he does so he should make affidavit of service as a private person. The attorney for the plaintiff may serve the summons.[2] A minor is not authorized to serve.[3] The statute defining the persons by whom service may be made should be construed in accordance with common law practice.[4]

[1] G. S. 1894 § 5197. See Crosby v. Farmer, 39 Minn. 305, 40 N. W. 71; Kirkpatrick v. Lewis, 46 Minn. 164, 47 N. W. 970; Miller v. Miller, 39 Minn. 376, 40 N. W. 261.

[2] First Nat. Bank v. Estenson, 68 Minn. 28, 70 N. W. 775.

[3] Vail v. Rowell, 53 Vt. 109; Tyler v. Tyler, 2 Root (Conn.) 519.

[4] Sullivan v. La Crosse etc. Co. 10 Minn. 386 Gil. 308.

Fees not allowed to person other than officer—statute.

§ 309. "Whenever any person, other than a sheriff, or other proper officer, shall serve a summons issued out of the district court no fee shall be allowed therefor, either for traveling in making such service, or for serving such summons."

[G. S. 1894 § 5198]

Mode of service generally—statute.

§ 310. "The summons shall be served by delivering a copy thereof, as follows:

(1) If the action is against a corporation, to the president, or other head of the corporation, secretary, cashier, treasurer, a director or managing agent thereof: provided, that in case none of the officers named can be found within the state, of which the return of the sheriff that they cannot be found within his county shall be prima facie evidence, then the summons may be served by publication;[1] but such service can be made in respect to a foreign corporation only when it has property within this state, or the cause of action arose therein.[2]

(2) If against a minor under the age of fourteen years who is a resident of the state and can be found therein, to such minor personally, and also to his father, mother or guardian, or if there is none within this state, then to any person having the care or control of such minor, or with whom he resides or by whom he is employed;

Digitized by Google

if such minor, though a resident of the state, cannot be found within the same, of which the return of the sheriff of the county that after diligent search he cannot be found within his county, shall be prima facie evidence, such service may be made by delivering a copy of the summons to such father, mother or guardian if within the state, and by leaving a copy thereof at the house of such minor's usual abode, with some person of suitable age and discretion then resident therein.[2]

(3) If against a person for whom a guardian has been appointed for any cause, to such guardian, and to the defendant personally.

(4) In all other cases to the defendant personally,[4] or by leaving a copy of the summons at the house of his usual abode, with some person of suitable age and discretion then resident therein."[5]

[G. S. 1894 § 5199 as amended by Laws 1897 ch. 222]

[1] See Bausman v. Tilley, 46 Minn. 66, 48 N. W. 459; Kirkpatrick v. Lewis, 46 Minn. 164, 47 N. W. 970; Sullivan v. La Crosse etc. Co. 10 Minn. 386 Gil. 308 (overruled by statute); Guernsey v. American Ins. Co. 13 Minn. 278 Gil. 256 (overruled by statute).

[2] See § 320.

[3] Laws 1897 ch. 222; Eisenmenger v. Murphy, 42 Minn. 84, 43 N. W. 784.

[4] See § 313.

[5] See § 311.

Meaning of house of usual abode.

§ 311. In the case of a married man the house of his usual abode is prima facie the house wherein his wife and family reside. The term "the house of his usual abode" means a person's customary dwelling place or residence. It is not the equivalent of domicil in all particulars, for one's place of abode or home once acquired does not necessarily continue until another is obtained.[1] A boarding-house may be a home of usual abode.[2]

[1] Missouri etc. Co. v. Norris, 61 Minn. 256, 63 N. W. 634; Keller v. Carr, 40 Minn. 428, 42 N. W. 292; Vaule v. Miller, 64 Minn. 485, 67 N. W. 540; Kerwin v. Sabin, 50 Minn. 320, 52 N. W. 642; Venable v. Paulding, 19 Minn. 488 Gil. 422.

[2] Lee v. Macfee, 45 Minn. 33, 47 N. W. 309.

Person with whom summons may be left.

§ 312. A person fourteen years old is prima facie a person of "suitable age and discretion." It is not necessary that he should understand the nature of judicial proceedings.[1] He must be an actual resident in the house. If he is not the judgment is void.[2] The summons may be left with a person living in the same suite of rooms of an apartment house as the person to be served although he is not a member of the family or household of such person.[3]

[1] Temple v. Norris, 53 Minn. 286, 55 N. W. 133.

[2] Heffner v. Gunz, 29 Minn. 108, 12 N. W. 342.

[3] Brigham v. Conn. Mut. Life Ins. Co. 79 Minn. 350, 82 N. W. 668.

Digitized by Google

Personal service.

§ 313. Personal service must be direct. That is, it must be on the defendant personally and not through the mediation of a third person.[1] Personal service in this state is made by handing to and leaving with the person served a copy of the summons. It is not necessary to read the summons to him or acquaint him with its nature. Our statute says that the summons shall be "delivered" to him. This would undoubtedly be construed to mean "handing to and leaving with." It is probably not necessary in this state, where the summons is a mere notice, for the person making the service to exhibit the original or even to have it with him.[2]

[1] Savings Bank v. Authier, 52 Minn. 98, 53 N. W. 812; Heffner v. Gunz, 29 Minn. 108, 12 N. W. 342.

[2] See Wallace v. Prince, 3 Rich. L. (S. C.) 177.

Notice of no personal claim.

§ 314. If, in an action involving real property, "there are defendants against whom no personal claim is made, the plaintiff may serve upon such defendants, at the time of the service of the summons on them, a written notice, subscribed by the plaintiff, or his attorney, setting forth the general object of the action, a description of the property affected by it, and that no personal claim is made against such defendants. If any such defendant on whom such notice is so served unreasonably defends the action he shall pay full costs to the plaintiff." [1]

[1] G. S. 1894 § 5867; Siebert v. Quesnel, 65 Minn. 107, 67 N. W. 803.

Persons exempt from service.

§ 315. A resident of another state who has in good faith come into this state to give evidence as a witness in a cause here, is exempt from service of a summons in a civil action against him, in coming, while in attendance, and for a reasonable time thereafter in which to return.[1] And this rule applies to non-resident parties coming as witnesses.[2] A court of this state cannot acquire jurisdiction over a foreign corporation by the service of a summons upon one of its officers casually here.[3] The service of a summons upon a defendant who has been induced to come into the state for that purpose by the fraud of the plaintiff confers no jurisdiction on the court.[4] A member of the legislature is not exempt during a session.[5] A fugitive from justice brought here by interstate rendition proceedings is not exempt.[6]

[1] Sherman v. Gundlach, 37 Minn. 118, 33 N. W. 549.

[2] First Nat. Bank v. Ames, 39 Minn. 179, 39 N. W. 308 (party).

[3] See § 320.

[4] Columbia Placer Co. v. Bucyrus etc. Co. 60 Minn. 142, 62 N. W. 115. See Chubbuck v. Cleveland, 37 Minn. 466, 35 N. W. 362; Hay v. Tuttle, 67 Minn. 56, 69 N. W. 696.

[5] Rhodes v. Walsh, 55 Minn. 542, 57 N. W. 212.

[6] Reid v. Ham, 54 Minn. 305, 56 N. W. 35.

Digitized by Google

Proper service essential.

§ 316. A proper service of summons is essential to the jurisdiction of the court if the party does not voluntarily appear and a judgment upon an improper service is void and not merely voidable.[1] It is not sufficient to make a person a party to an action that he is named as such therein and has notice of its pendency.[2]

[1] See cases in preceding sections.

[2] Hokanson v. Gunderson, 54 Minn. 499, 56 N. W. 172.

Service of complaint.

§ 317. Regularly the complaint must either be filed or served with the summons,[1] but the neglect to do either is not jurisdictional.[2]

[1] See § 304.

[2] W. W. Kimball Co. v. Brown, 73 Minn. 167, 75 N. W. 1043.

Time of service—holidays.

§ 318. Summons may be served at any time of the day and on any day except Sunday, New Year's Day, Lincoln's Birthday (Feb. 12), Washington's Birthday (Feb. 22), Memorial Day (May 30), Fourth of July, Labor Day (first Monday in Sept.), Election Day and Christmas.[1] Service by publication is not invalidated by an intermediate publication occurring on a holiday.[2]

[1] Laws 1899 ch. 165.

[2] Malmgren v. Phinney, 50 Minn. 457, 52 N. W. 915.

Service of summons on whom—special provisions.

§ 319. There are special statutes regulating the service of summons on railroad companies;[1] on domestic corporations without resident officers;[2] in actions for divorce;[3] in unlawful detainer proceedings;[4] in actions against municipalities;[5] on the state in partition proceedings;[6] in actions against villages;[7] in actions against a partnership;[8] on the insurance commissioner.[9]

[1] G. S. 1894 § 5202; Schoch v. Winona etc. Ry. Co. 55 Minn. 479, 57 N. W. 208; Hillary v. Great Northern Ry. Co. 64 Minn. 361, 67 N. W. 80; In re St. Paul etc. Ry. Co. 36 Minn. 85, 30 N. W. 432.

[2] G. S. 1894 § 5203; Town of Hinckley v. Kettle River Ry. Co. 70 Minn. 105, 72 N. W. 835; Id. 80 Minn. 32, 82 N. W. 1088; In re St. Paul etc. Ry. Co. 36 Minn. 85, 30 N. W. 432.

[3] G. S. 1894 § 4796; Fowler v. Cooper, 81 Minn. 19, 83 N. W. 464.

[4] G. S. 1894 §§ 6111, 6113. [5] G. S. 1894 § 1498.

[6] G. S. 1894 § 5814. [7] G. S. 1894 § 1414.

[8] G. S. 1894 § 5177. See Dunnell, Minn. Pl. § 101.

[9] G. S. 1894 §§ 3187, 3188; Laws 1895 ch. 175 § 77 (3); Magoffin v. Mutual etc. Assoc. 91 N. W. 1115.

Service on foreign corporations—general provisions.

§ 320. Our general statute provides "that the summons or any process in any civil action or proceeding wherein a foreign corporation or association is defendant, which has property within this

Digitized by Google

state, or the cause of action arose therein, may be served by delivering a copy of such summons or process to the president, secretary or any other officer, or to any agent of such corporation or association; and such service shall be of the same force, effect and validity as like service upon domestic corporations; provided, if any such corporation or association has by an appointment in writing filed with the secretary of this state, appointed or designated some person or resident of this state upon whom summons or process can be served, such summons or process shall be served upon such person so designated; and provided, further, that any such action or proceeding may be commenced and tried in any county in which the cause of action arose, subject to be removed for cause as in other cases."[1] A subsequent statute provides that foreign corporations organized for pecuniary profit shall, as a condition of doing business in this state, "have and maintain a public office or place in this state for the transaction of its business, and shall appoint an agent, who shall reside in the county in which said public office is located, duly authorized to accept service of process, and upon whom service of process may be had in any action to which said corporation may be a party, and service upon such agent shall be taken and held as due and personal service upon such corporation."[2] To what extent this affects the general statute is as yet undetermined but it will probably be held merely cumulative.[3] If a foreign corporation has no property within this state or the cause of action did not arise here jurisdiction cannot be acquired over it by personal service of summons on its officers or agents temporarily within this state.[4] When a cause of action arises in another state the courts of this state cannot acquire jurisdiction of a foreign corporation unless it has property within this state of some substantial value and of a character to justify a reasonable probability that the creditor can secure something from a sale thereof that can be applied as a payment on his demand.[5] To constitute a person an agent of a foreign corporation, upon whom service of the summons may be made, he must be one actually appointed by and representing the corporation, and not one created by mere construction or implication, contrary to the intention of the parties.[6]

[1] G. S. 1894 § 5200; State v. Adams Express Co. 66 Minn. 271, 68 N. W. 1085 (constitutionality of amendment raised but not determined); Laws 1895 ch. 332 repealed by Laws 1899 ch. 69. See Tolerton & Stetson Co. v. Barck, 84 Minn. 497, 88 N. W. 10.

[2] Laws 1899 ch. 69.

[3] See Baldinger v. Rockford Ins. Co. 80 Minn. 147, 82 N. W. 1083.

[4] State v. District Court, 26 Minn. 233, 2 N. W. 698; Strom v. Montana Central Ry. Co. 81 Minn. 346, 84 N. W. 46. See Sullivan v. La Crosse etc. Co. 10 Minn. 386 Gil. 308. See G. S. 1894 §§ 5199, 5211.

[5] Strom v. Montana Central Ry. Co. 81 Minn. 346, 84 N. W. 46.

[6] Mikolas v. Walker & Sons, 73 Minn. 305, 76 N. W. 36. See Hess v. Adamant Mfg. Co. 66 Minn. 79, 68 N. W. 774.

Digitized by Google

Service on foreign corporations—special provisions.

§ 321. Special statutes have been enacted to facilitate the service of summons on foreign insurance companies;[1] on foreign corporations owning lands in this state;[2] on railroad companies organized in Iowa.[3]

[1] G. S. 1894 § 3158; Laws 1895 ch. 175 § 77; Baldinger v. Rockford Ins. Co. 80 Minn. 147, 82 N. W. 1083.

[2] G. S. 1894 §§ 5816, 3420.

[3] G. S. 1894 § 2751.

Service on non-resident individuals, associations or copartnerships—statute.

§ 322. "Whenever a cause of action exists or has accrued in favor of a resident of this state against any non-resident, individual, association or copartnership engaged in business in this state, by reason of said business so conducted in this state, service of the summons or other process in the action against such non-resident individuals, association or copartnership upon the manager, superintendent, foreman, agent or representative, of such individual, association or copartnership while in charge of such business in this state, shall be considered personal service upon such individual, association or copartnership. The said summons or any process in any such civil action or proceeding wherein such nonresident individual, association or copartnership is defendant may be served by delivering a copy of such summons or process to the said manager, superintendent, representative, foreman or agent while he is in actual charge of the business out of which said cause of action accrued, in the absence, from this state, of such individual or members of such association or copartnership of which the return of the sheriff of the county in which any such action shall be begun shall be prima facie evidence, and such service so made shall be due and sufficient service upon any such individual, association or copartnership."

[Laws 1901 ch. 278] See Cabanne v. Graf, 92 N. W. 461.

Unknown parties.

§ 323. Provision is made by statute for the service of summons in actions to determine adverse claims on unknown parties.[1] It has been held that this statute must be strictly construed and that the party in whose name the title appears of record must be named in the proceedings.[2] The court may acquire jurisdiction over the "unknown parties" although the named defendant in whom the title appears of record is dead when the action is begun.[3] The published summons must contain the names of parties who are known and of those who appear by the records to have an interest. Reasonable diligence must be exercised to ascertain the proper parties.[4] If the statute is complied with the court acquires jurisdiction over "unknown parties" even though they were residents and within the state at the commencement of the action.[5] No order of court is necessary.[6] The statute has been held constitutional.[7]

[1] G. S. 1894 § 5818.

Digitized by Google

[2] Ware v. Easton, 46 Minn. 180, 48 N. W. 775; Shepherd v. Ware, 46 Minn. 174, 48 N. W. 773.
[3] Inglee v. Welles, 53 Minn. 197, 55 N. W. 117; McClymond v. Noble, 84 Minn. 329, 87 N. W. 838.
[4] Sheperd v. Ware, 46 Minn. 174, 48 N. W. 773.
[5] McClymond v. Noble, 84 Minn. 329, 87 N. W. 838.
[6] Id.
[7] Sheperd v. Ware, 46 Minn. 174, 48 N. W. 773.

Unknown heirs.

§ 324. It is provided by statute "that when the heirs of a deceased person are proper parties defendant to any action relating to real property in this state, and when the names and residences of such heirs are unknown, such heirs may be proceeded against under the name and title of 'the unknown heirs' of the deceased." [1] An order of court must be obtained to authorize the publication of summons.[2] As "unknown heirs" are included in "unknown parties" and may be proceeded against as such this statute is not now very often resorted to, having been practically superseded, so far as actions to determine adverse claims are concerned, by the later statute.[3] Parties proceeded against as "unknown heirs" have a right to have a default judgment opened within one year after notice of the entry thereof.[4]

[1] G. S. 1894 § 5839. [2] G. S. 1894 § 5840. [3] See § 323.
[4] Boeing v. McKinley, 44 Minn. 392, 46 N. W. 766.

PROOF OF SERVICE OF SUMMONS

The statute.

§ 325. "Proof of the service of summons, and of the complaint or notice, if any, accompanying the same, shall be as follows:

(1) If served by the sheriff or other officer, his certificate thereof; or, if by any other person, his affidavit; or,

(2) In case of publication, the affidavit of the printer or his foreman, showing the same, and an affidavit of the deposit of a copy of the summons in the post-office, if the same has been deposited; or,

(3) The written admission of the defendant.

In case of service otherwise than by publication, the certificate, affidavit or admission shall state the time, place, and manner of service."

[G. S. 1894 § 5208]

Affidavit of personal service.

§ 326. It is not necessary that the affidavit should state that the person upon whom the service was made was to affiant known to be the person upon whom service was required to be made.[1] In an action against partners under a firm name the affidavit of the person who served the summons that the persons upon whom he served it (naming them) are members of the firm named in the summons is sufficient.[2] The absence of a venue is not fatal.[3]

Digitized by Google

[1] Cunningham v. Water-Power Sandstone Co. 74 Minn. 282, 77 N. W. 137; Young v. Young, 18 Minn. 90 Gil. 72.
[2] Gale v. Townsend, 45 Minn. 357, 47 N. W. 1064.
[3] Young v. Young, 18 Minn. 90 Gil. 72.

Affidavit of substituted service.

§ 327. When service is made by leaving a copy of the summons at the defendant's usual place of abode good practice requires that the affidavit should state the name of the person with whom it is left, but it is not indispensable.[1] It is of course not necessary when leaving a summons at the defendant's usual place of abode to state in the affidavit of service that the defendant could not be found. Under our statute substituted service is permissible even when the defendant can be found. It is otherwise in justice court practice.[2]

[1] Vaule v. Miller, 64 Minn. 485, 67 N. W. 540.
[2] See Goener v. Woll, 26 Minn. 154, 2 N. W. 163; Vaule v. Miller, 64 Minn. 485, 67 N. W. 540.

Return of sheriff.

§ 328. The return of an officer of the service of summons is conclusive in collateral proceedings, but the defendant may impeach it upon motion or other direct proceedings in the action to set aside the judgment on default if the rights of third parties have not intervened.[1] But upon grounds of public policy the return of the officer should be deemed strong evidence of the facts as to which the law requires him to certify and should ordinarily be upheld unless opposed by clear and satisfactory evidence.[2] A misnomer in the return is not fatal.[3] To a summons addressed to two defendants a sheriff returned that the defendants, naming them conjunctively, could not be found. It was held that the return should be construed disjunctively.[4] A return may be amended.[5]

[1] Crosby v. Farmer, 39 Minn. 305, 40 N. W. 71; Burton v. Schenck, 40 Minn. 52, 41 N. W. 244.
[2] Jensen v. Crevier, 33 Minn. 372, 23 N. W. 541; Gray v. Hays, 41 Minn. 12, 42 N. W. 594; Knutson v. Davies, 51 Minn. 363, 53 N. W. 646; Allen v. McIntyre, 56 Minn. 351, 57 N. W. 1060.
[3] Sandwich Mfg. Co. v. Earl, 56 Minn. 390, 57 N. W. 938.
[4] Blinn v. Chessman, 49 Minn. 140, 51 N. W. 666.
[5] See § 1346.

Filing of return.

§ 329. Ordinarily a return is not complete until it is filed.[1] The statute provides that it must be filed in the clerk's office with all reasonable diligence.[2]

[1] Corson v. Shoemaker, 55 Minn. 386, 57 N. W. 134; Easton v. Childs, 67 Minn. 242, 69 N. W. 903.
[2] G. S. 1894 § 5197.

Digitized by Google

PUBLICATION OF SUMMONS

When allowable—statute.

§ 330. "When the defendant cannot be found within the state, of which the return of the sheriff of the county in which the action is brought, that the defendant cannot be found in the county, is prima facie evidence, and upon the filing of an affidavit of the plaintiff, his agent or attorney, with the clerk of the court, stating that he believes that the defendant is not a resident of the state, or cannot be found therein, and that he has deposited a copy of the summons in the post-office, directed to the defendant at his place of residence, unless it is stated in the affidavit that such residence is not known to the affiant, and stating the existence of one of the cases hereinafter specified, the service may be made by publication of the summons by the plaintiff or his attorney in either of the following cases:

(1) When the defendant is a foreign corporation, and has property within this state.

(2) When the defendant, being a resident of this state, has departed therefrom with intent to defraud his creditors, or to avoid the service of a summons, or keeps himself concealed therein with like intent.

(3) When the defendant is not a resident of the state, but has property therein, and the court has jurisdiction of the subject of the action.

(4) When the action is for divorce, in the cases prescribed by law.

(5) When the subject of the action is real or personal property in this state, and the defendant has or claims a lien or interest, actual or contingent, therein, or the relief demanded consists wholly or partly in excluding the defendant from any interest or lien therein.

(6) When the action is to foreclose a mortgage, or to enforce a lien of any kind, on real estate in the county where the action is brought."

[G. S. 1894 § 5204] See the following cases under old laws: Mackubin v. Smith, 5 Minn. 367 Gil. 296; Harrington v. Loomis, 10 Minn. 366 Gil. 293; Smith v. Valentine, 19 Minn. 452 Gil. 393; Cleland v. Tavernier, 11 Minn. 194 Gil. 126: Hencke v. Twomey, 58 Minn. 550, 60 N. W. 667; Gemmell v. Rice, 13 Minn. 400 Gil. 371.

No order of court necessary.

§ 331. Under the law as it now stands no judicial investigation of the sufficiency of the affidavit before publication is provided for. An order of the court authorizing the publication of summons is not necessary. All that a party need do is to file the statutory affidavit and then proceed to the publication as a matter of right. Unlike many statutes upon this subject our statute does not require that the facts should be "made to appear" or be "shown" by the affidavit. All that is necessary is that the affidavit should "state" such facts.

Digitized by Google

Crombie v. Little, 47 Minn. 581, 50 N. W. 823; Easton v. Childs, 67 Minn. 242, 69 N. W. 903; McClymond v. Noble, 84 Minn. 329, 87 N. W. 838.

The affidavit—contents.

§ 332. The affidavit must state facts positively and not on information and belief except where the latter form is expressly authorized.[1] It need not be sworn to on the day on which the action is commenced. All that is necessary is that it be sworn to within such reasonably brief period before the publication that no presumption can fairly arise that the state of facts has changed in the meantime. It is not void because entitled in an action not actually commenced at the time. If it is filed with the clerk of the district court, the fact that he fails to keep his office at the county-seat will not invalidate the publication.[2] An affidavit for publication of summons against a foreign corporation need not show that there is no person within the state upon whom service might legally be made.[3] A statement in an affidavit that "the defendant is a corporation or company, established and doing business under and by virtue of the laws of the state of Illinois" sufficiently shows the corporate character of the defendant.[4] An affidavit which alleged that the action was brought under G. S. 1878 ch. 75 § 2, to determine adverse claims to certain real property; that all the defendants named were non-residents and their residences unknown; that affiants had searched for such defendants but neither they nor their places of residence could be found was held sufficient as to the nature of the action and the non-residence of defendants.[5] An affidavit cannot be aided by reference to the complaint on file.[6]

[1] Feikert v. Wilson, 38 Minn. 341, 37 N. W. 585.
[2] Crombie v. Little, 47 Minn. 581, 50 N. W. 823.
[3] Broome v. Galena etc. Co. 9 Minn. 239 Gil. 225.
[4] Id.
[5] Inglee v. Welles, 53 Minn. 197, 55 N. W. 117.
[6] Gilmore v. Lampman, (Minn.) 90 N. W. 1113.

The affidavit—filing.

§ 333. The filing of the affidavit is a condition precedent of publication. It cannot be filed after publication or after the commencement of publication.

Barber v. Morris, 37 Minn. 194, 33 N. W. 559; Brown v. St. Paul etc. Ry. Co. 38 Minn. 506, 38 N. W. 698; Bardwell v. Collins, 44 Minn. 97, 46 N. W. 315; Easton v. Childs, 67 Minn. 242, 69 N. W. 903; Cousins v. Alworth, 44 Minn. 505, 47 N. W. 169; Bogart v. Kiene, 85 Minn. 261, 88 N. W. 748. See Laws 1901 ch. 349 (validating act).

Mailing copy of summons.

§ 334. The mailing of a copy of the summons to a non-resident does not constitute personal service although it is duly received. It is the publication of the summons that gives the court jurisdiction and not the service through the mails.[1] Still, the mailing

Digitized by Google

of the copy of the summons is a condition precedent of publication and a failure to file an affidavit of mailing is fatal to the jurisdiction of the court.[2] Undoubtedly it would be held necessary in this state to file the affidavit of mailing before the commencement of publication.[3]

[1] Bausman v. Tilley, 46 Minn. 66, 48 N. W. 459.

[2] O'Rear v. Lazarus, 8 Colo. 608, Roberts v. Roberts, 3 Colo. App. 6; Schart v. Schart, 116 Cal. 91; Haase v. Corbin, 2 Mont. 409.

[3] See § 333. Under the old law see, Cleland v. Tavernier, 11 Minn. 194 Gil. 126.

Filing the complaint.

§ 335. Proper practice requires that the complaint should be filed before the commencement of the publication but this is not jurisdictional.

Crombie v. Little, 47 Minn. 581, 50 N. W. 823; Lane v. Innes, 43 Minn. 137, 45 N. W. 4.

Filing return of sheriff.

§ 336. The filing of the return of the sheriff is not a condition precedent of publication. It may be filed any time before the entry of judgment. The office of the return is not to authorize the publication but to support it after it is made, being prima facie evidence that the case was one where service by publication was authorized; to wit, where the defendant could not be found in the state.

Easton v. Childs, 67 Minn. 242, 69 N. W. 903.

Return of sheriff—sufficiency.

§ 337. To a summons addressed to two defendants a sheriff returned that the defendants, naming them conjunctively, could not be found. This official return was construed as meaning that neither of the defendants could be found.

Blinn v. Chessman, 49 Minn. 140, 51 N. W. 666.

The summons—defects in—misnomer.

§ 338. Our statute makes no special provision respecting the form and contents of a summons to be published. It is therefore proper to use the ordinary summons. A published summons should always state that the complaint has been filed but this is not essential to the jurisdiction of the court. Where the summons, as published, contains the requisites of process to bring the party into court, formal defects therein will not prevent jurisdiction attaching, any more than in cases of personal service, if publication thereof is shown by the record to have been authorized and to have been made and completed in conformity with the statute.[1] A misnomer in the summons is fatal.[2]

[1] Lane v. Innes, 43 Minn. 137, 45 N. W. 4.

[2] Clary v. O'Shea, 72 Minn. 105, 75 N. W. 115.

Digitized by Google

Publication in a newspaper—personal service out of state a substitute for publication.

§ 339. "The publication shall be made in a newspaper printed and published in the county where the action is brought, and if there is no such newspaper in the county, then in a newspaper printed and published in an adjoining county, and if there is no such newspaper in an adjoining county, then in a newspaper printed and published at the capital of the state once in each week for six consecutive weeks, and the service of the summons shall be deemed complete at the expiration of the time prescribed for publication, as aforesaid. Provided, that personal service of the summons without the state shall have the same force and effect as the service by publication herein provided for. Such service shall be made in the same manner as if served within the state, and proof of such service shall be made by the affidavit of the person serving the same, stating the time, place and manner of service, which affidavit may be taken before the clerk of any court of record or a notary public or other officer having a seal authorized to take acknowledgments in the state where such service was made."

[G. S. 1894 § 5205 as amended by Laws 1901 ch. 63]

§ 340. The publication need not be made on the same day of each week,[1] and it is valid though one of the publications is on a holiday.[2]

[1] Raun v. Leach, 53 Minn. 84, 54 N. W. 1058.

[2] Malmgren v. Phinney, 50 Minn. 457, 52 N. W. 915.

§ 341. Before making personal service out of the state it is advisable, in the absence of any decision, to proceed exactly as if the summons was to be published, that is, the affidavit and the return of the officer required by § 330 should be filed, together with the complaint.

See Adams v. Baldwin, 49 Kans. 781; Rowe v. Griffiths, 57 Neb. 488; Beaupre v. Bringham, 79 Wis. 436. Contra, Miller v. Davison, 31 Iowa 435.

Affidavit of publication.

§ 342. An affidavit of publication for "six successive weeks" is insufficient.[1] An affidavit stating that the summons was published "seven" weeks, once a week, the date of the first and last publication being shown, from which it clearly appeared that six weeks was intended was held sufficient.[2] The affidavit need not show that the publication was on the same day of each week.[3] All the facts showing that the newspaper in which the publication was made was authorized to publish legal notices are sometimes set forth in the affidavit, but this is clearly not necessary and is objectionable because it needlessly encumbers the record. It is doubtful whether such an affidavit is prima facie evidence of the facts stated with reference to the character of the newspaper. Proof of due publication may be made nunc pro tunc.[4]

[1] Godfrey v. Valentine, 39 Minn. 336, 40 N. W. 163; Ullman v. Lion, 8 Minn. 381 Gil. 338; Golcher v. Brisbin, 20 Minn. 453 Gil. 407; Bigelow v. Chatterton, 51 Fed. 614.

Digitized by Google

[2] Lane v. Innes, 43 Minn. 137, 45 N. W. 4.
[3] Raun v. Leach, 53 Minn. 84, 54 N. W. 1058.
[4] See §§ 344, 1353.

A statutory proceeding—construction.

§ 343. Service of summons by publication is in derogation of common law and allowable only where expressly authorized by statute. Statutes authorizing such a mode of service are to be strictly construed as it is the general policy of the law to secure actual notice to persons against whom judicial proceedings are instituted.

Shepherd v. Ware, 46 Minn. 174, 48 N. W. 773; Ware v. Easton, 46 Minn. 180, 48 N. W. 775; Barber v. Morris, 37 Minn. 194, 33 N. W. 559; Cousins v. Alworth, 44 Minn. 505, 47 N. W. 169; Morey v. Morey, 27 Minn. 265, 6 N. W. 783; Corson v. Shoemaker, 55 Minn. 386, 57 N. W. 134; Gilmore v. Lampman, (Minn.) 90 N. W. 1113.

When and how jurisdiction acquired.

§ 344. Jurisdiction is acquired by the publication of summons and not by the proof thereof filed, and the proof can be supplied or amended nunc pro tunc.[1] The service of the summons is deemed complete and jurisdiction thereby acquired at the expiration of the time prescribed for publication, that is, when the last publication has been made.[2]

[1] Burr v. Seymour, 43 Minn. 401, 45 N. W. 715; Bennett v. Blatz, 44 Minn. 56, 46 N. W. 319; Board of County Com'rs v. Morrison, 22 Minn. 178; Bigelow v. Chatterton, 51 Fed. 614. See § 1353.
[2] See § 339. Auerbach v. Maynard, 26 Minn. 421, 4 N. W. 816.

Presumption of jurisdiction.

§ 345. Ordinarily the jurisdiction of a domestic court of superior jurisdiction over the person of the defendant will be presumed in the absence of facts in the record affirmatively showing the contrary, but this presumption does not obtain where jurisdiction is acquired over a non-resident by publication of summons. The record must affirmatively show compliance with the statutory requirements.

Godfrey v. Valentine, 39 Minn. 336, 40 N. W. 163; Burr v. Seymour, 43 Minn. 401, 45 N. W. 715. See Bogart v. Kiene, 85 Minn. 261, 88 N. W. 748; Galpin v. Page, 18 Wall. (U. S.) 350; O'Rear v. Lazarus, 8 Colo. 608.

Constitutionality of statutes.

§ 346. It is for the legislature of a state to prescribe the mode of bringing parties into court; but this general power is subject to the limitation that the mode prescribed must be due process of law.[1] What is due process of law in this regard depends upon the nature of the action and the residence of the defendant. The process of a court cannot run beyond the territory of its sovereign and jurisdiction over a non-resident cannot be acquired by publication of summons in actions in personam.[2] But where the action is in rem, that

Digitized by Google

is, where the subject of the action is real or personal property or personal status within the jurisdiction of the court, the legislature may authorize the service of summons on non-residents by publication.[3] In such cases the court has jurisdiction of the res and publication of summons against non-residents is due process of law provided the notice is reasonable.[4] The legislature may even authorize the service of summons on residents by publication in actions in rem. Thus it has been held that our statute authorizing the publication of summons in actions to determine adverse claims against "unknown claimants" is constitutional.[5] On the other hand it has been held that in actions in personam, of a strictly judicial character, and proceeding according to the common law, service of summons by publication in a newspaper, upon resident defendants, who are personally within the state and can be found therein, is not due process of law.[6]

[1] Shepherd v. Ware, 46 Minn. 174, 48 N. W. 773; Bardwell v. Collins, 44 Minn. 97, 46 N. W. 315; Town of Hinckley v. Kettle River Ry. Co. 70 Minn. 105, 72 N. W. 835; Mutual Life Ins. Co. v. Pinner, 43 N. J. Eq. 52.

[2] See cases under § 347.

[3] Arndt v. Griggs, 134 U. S. 316; Wehrman v. Conklin, 155 U. S. 314; Cooper v. Newell, 173 U. S. 555; Roller v. Holly, 176 U. S. 398.

Lane v. Innes, 43 Minn. 137, 45 N. W. 4; Shepherd v. Ware, 46 Minn. 174, 48 N. W. 773; Corson v. Shoemaker, 55 Minn. 386, 57 N. W. 134; Crombie v. Little, 47 Minn. 581, 50 N. W. 823.

[4] Roller v. Holly, 176 U. S. 398.

[5] Shepherd v. Ware, 46 Minn. 174, 48 N. W. 773; McClymond v. Noble, 84 Minn. 329, 87 N. W. 838. See State v. Westfall, 85 Minn. 437, 89 N. W. 175.

[6] Bardwell v. Collins, 44 Minn. 97, 46 N. W. 315; McNamara v. Casserly, 61 Minn. 335, 63 N. W. 880 (a doubtful case); Smith v. Hurd, 50 Minn. 503, 52 N. W. 922.

Extent of jurisdiction acquired over non-residents.

§ 347. A court cannot acquire jurisdiction to render a personal judgment against a non-resident by publication of summons. Except in cases involving personal status or where that mode of service may be considered as having been assented to in advance, service by publication in actions against non-residents is effectual only where, in connection with process against the person for commencing the action, the property in the state is brought under the control of the court and subjected to its disposition by process adapted to that purpose, as for example, by attachment, or where the judgment is sought as a means of reaching such property, or affecting some interest therein; in other words, where the action is in the nature of a proceeding in rem. Where the proceeding is wholly in personam service by publication against a non-resident is ineffectual for any purpose. In an action to enforce a pecuniary liability against a non-resident, where process is constructively served by publication, and he does not voluntarily appear, the proceedings, although in form in personam are,

Digitized by Google

in effect, in rem. It is only by attaching property that the court acquires jurisdiction, and then only to the extent of the property attached.

Pennoyer v. Neff, 95 U. S. 714; Kenney v. Goergen, 36 Minn. 190, 31 N. W. 210; Lydiard v. Chute, 45 Minn. 277, 47 N. W. 967; Cousins v. Alworth, 44 Minn. 505, 47 N. W. 169; Plummer v. Hatton, 51 Minn. 181, 53 N. W. 460; Heffner v. Gunz, 29 Minn. 108, 12 N. W. 342; Corson v. Shoemaker, 55 Minn. 386, 57 N. W. 134; Crombie v. Little, 47 Minn. 581, 50 N. W. 823; Daly v. Bradbury, 46 Minn. 396, 49 N. W. 190; Cabanne v. Graf, 92 N. W. 461.

Digitized by Google

CHAPTER V

APPEARANCE

Definition.

§ 348. When used to designate the act of any person with reference to an action pending, the word "appear" means to come into court as a party to the suit.[1] A defendant appears in an action when he answers, demurs, or gives the plaintiff written notice of his appearance.[2]

[1] Schroeder v. Lahrman, 26 Minn. 87, 1 N. W. 801.

[2] G. S. 1894 § 5212.

Effect of a general appearance.

§ 349. A voluntary appearance of a defendant is equivalent to a personal service of the summons upon him.[1] "Since the object of a summons is only to bring the party defendant into court, and since the same object is accomplished when he appears voluntarily without process, and submits himself to its jurisdiction, or when, the process or its service being irregular, he appears and makes no objection to the irregularity, it follows that when the subject matter is one within the jurisdiction of the court, jurisdiction over the person may be conferred by consent; and it would seem to be settled by the great preponderance of authority, and to be consistent with legal reason, that such consent may be not only express, but may be implied from a voluntary appearance and participation in the proceedings before the court, without objection seasonably made. One may not thus voluntarily invoke the jurisdiction of a court, or seek the benefits of its exercise, and afterwards be heard to object that the court had not the right to adjudicate as to him."[2] Although the proceeding is in rem a voluntary appearance gives the court jurisdiction so far as the party's interest in the property is concerned.[3] A court may acquire jurisdiction over a non-resident by a voluntary appearance.[4] It is a universal rule, without exception, that a general appearance gives the court jurisdiction over the person.[5] Jurisdiction over the subject matter cannot be conferred by a general appearance.[6] The effect of an appearance in garnishment proceedings has been considered elsewhere.[7]

[1] See § 299.

[2] Anderson v. Hanson, 28 Minn. 400, 10 N. W. 429.

[3] State v. District Court, 51 Minn. 401, 53 N. W. 714.

[4] Reynolds v. La Crosse etc. Co. 10 Minn. 178 Gil. 144.

[5] Chouteau v. Rice, 1 Minn. 192 Gil. 166; Hinkley v. St. Anthony Falls Water Power Co. 9 Minn. 55 Gil. 44; Reynolds v. La Crosse etc. Co. 10 Minn. 178 Gil. 144; Williams v. McGrade, 13 Minn. 174 Gil. 165; Johnson v. Knoblauch, 14 Minn. 16 Gil. 4; Steinhart v. Pitcher, 20 Minn. 102 Gil. 86; Anderson v. Southern Minnesota Ry. Co. 21 Minn. 30; Burt v. Bailey,

Digitized by Google

21 Minn. 403; Tyrrell v. Jones, 18 Minn. 312 Gil. 281; Board of County Commissioners v. Jessup, 22 Minn. 552; Curtis v. Jackson, 23 Minn. 268; Craighead v. Martin, 24 Minn. 41; Lee v. Parrett, 24 Minn. 128; Anderson v. Hanson, 28 Minn. 400, 10 N. W. 429; Allen v. Coates, 29 Minn. 46, 11 N. W. 132; Rheiner v. Union Depot etc. Co. 31 Minn. 289, 17 N. W. 623; McKee v. Metraw, 31 Minn. 429, 18 N. W. 148; Seurer v. Horst, 31 Minn. 479, 18 N. W. 283; Frear v. Heichert, 34 Minn. 96, 24 N. W. 314; State v. District, 51 Minn. 401, 53 N. W. 714; Johnson v. Hagberg, 48 Minn. 221, 50 N. W. 1037; Farmers' Nat. Bank v. Backus, 64 Minn. 43, 66 N. W. 5; Kieckenapp v. Supervisors, 64 Minn. 547, 67 N. W. 662; Farmers' Nat. Bank v. Backus, 74 Minn. 264, 77 N. W. 142; McCubrey v. Lankis, 74 Minn. 302, 77 N. W. 144; Whitely v. Mississippi, 38 Minn. 523, 38 N. W. 753; Anderson v. Town of Decoria, 74 Minn. 339, 77 N. W. 229; Hurst v. Town of Martinsburg, 80 Minn. 40, 82 N. W. 1099; Slater v. Olson, 83 Minn. 35, 85 N. W. 825.

[e] Rahilly v. Lane, 15 Minn. 447 Gil. 360; McGinty v. Warner, 17 Minn. 41 Gil. 23; Chandler v. Kent, 8 Minn. 536 Gil. 479.

[f] See Dunnell, Minn. Pl. § 1256–1260; Iselin v. Simon, 62 Minn. 128, 64 N. W. 143; McKinney v. Mills, 80 Minn. 478, 83 N. W. 452.

§ 350. By appearing generally a party waives all defects in the summons, in its service and in the proof of service.[1] A general appearance in an action of claim and delivery does not waive irregularity in the seizure.[2]

[1] Johnson v. Knoblauch, 14 Minn. 16 Gil. 4; Tyrrell v. Jones, 18 Minn. 312 Gil. 281; Allen v. Coates, 29 Minn. 46, 11 N. W. 132; Slater v. Olson, 83 Minn. 35, 85 N. W. 825; Howland v. Jeuel, 55 Minn. 102, 56 N. W. 581; Chouteau v. Rice, 1 Minn. 192 Gil. 166; Steinhart v. Pitcher, 20 Minn. 102 Gil. 86; Anderson v. Southern Minnesota Ry. Co. 21 Minn. 30. See Houlton v. Gallow, 55 Minn. 443, 57 N. W. 141.

[2] Castle v. Thomas, 16 Minn. 490 Gil. 443.

Validating a void judgment by an appearance.

§ 351. The mere making of a motion to set aside a judgment void for want of jurisdiction over the person does not validate the judgment and confer jurisdiction retrospectively. Nor is such a judgment validated because the moving party, in such a case, also urges in his application additional reasons not inconsistent with the alleged want of jurisdiction; or because, by asking to be allowed to file an answer as in a pending cause, he indicates his present willingness to submit himself to the jurisdiction of the court, in order that, after a hearing upon the issues thus presented, the court may proceed to judgment.

Godfrey v. Valentine, 39 Minn. 336, 40 N. W. 163; Roberts v. Chicago etc. Ry. Co. 48 Minn. 521, 51 N. W. 478. See Kanne v. Minneapolis etc. Ry. Co. 33 Minn. 419, 23 N. W. 854.

Digitized by Google

Effect of general appearance in foreign court.

§ 352. Where, in an action in the court of another state for divorce, both parties voluntarily appear, and submit to the jurisdiction, they are bound by the judgment, and cannot avoid it in a collateral proceeding in this state by proof that when the action was brought and judgment rendered neither of them was a resident in that state and that both were residents in this state.

In re Ellis' Estate, 55 Minn. 401, 56 N. W. 1056.

Appearance by infant.

§ 353. An infant defendant is incompetent to waive or admit service of the summons upon him, or to confer jurisdiction upon the court by a voluntary appearance.

Phelps v. Heaton, 79 Minn. 476, 82 N. W. 990.

Effect of appearance as to notice.

§ 354. After appearance a defendant is entitled to notice of all subsequent proceedings.[1] But to require the service of notice the appearance must be by answer, demurrer or notice. A written admission of service indorsed on a summons is not an appearance in the action entitling defendant to notice of subsequent proceedings.[2] A stipulation, signed by the plaintiffs and some of the defendants to an action, for a settlement and dismissal of the action is not such an appearance.[3] The entry of a judgment is not a proceeding that requires notice to the opposite party.[4]

[1] See § 2028; Davis v. Red River Lumber Co. 61 Minn. 534, 63 N. W. 1111; Lambert v. Scandinavian-American Bank, 66 Minn. 185, 68 N. W. 834.

[2] First Nat. Bank v. Rogers, 12 Minn. 529 Gil. 437.

[3] Grant v. Schmidt, 22 Minn. 1.

[4] Piper v. Johnston, 12 Minn. 60 Gil. 27; Whitaker v. McClung, 14 Minn. 170 Gil. 131; Leyde v. Martin, 16 Minn. 38 Gil. 24.

General appearance—what is—illustrations.

§ 355. An appearance for any other purpose than to question the jurisdiction of the court is general and gives the court jurisdiction over the person.[1] No special appearance can be made except to jurisdictional questions. If a party so far appears as to call into action the powers of the court for any purpose, except to decide upon its own jurisdiction, it is a full appearance.[2] A party cannot at the same time object to and ask the court to exercise its jurisdiction.[3] In determining whether an appearance is general or special, the purposes for which it was made should be considered rather than what the party has labeled it.[4] A party appears generally when he takes or consents to any step in the cause which assumes that the jurisdiction exists or continues.[5]

[1] St. Louis Car Co. v. Stillwater Street Ry. Co. 53 Minn. 129, 54 N. W. 1064.

[2] Curtis v. Jackson, 23 Minn. 268.

[3] Papke v. Papke, 30 Minn. 260, 15 N. W. 117.

[4] Houlton v. Gallow, 55 Minn. 443, 57 N. W. 141.

Digitized by Google

[5] Burt v. Bailey, 21 Minn. 403; Johnson v. Hagberg, 48 Minn. 221, 50 N. W. 1037.

§ 356. The following appearances were held to be general: Demurring to the complaint for want of jurisdiction over the person;[1] an application for an extension of time to answer, though a motion is pending to set aside the summons;[2] a motion to set aside a judgment upon grounds not expressly limited to the jurisdiction of the court;[3] a motion objecting to the jurisdiction but at the same time asking a decision on the merits;[4] interpleading and consenting to an adjournment;[5] opposing a motion on the merits and offering to submit to an order of the court;[6] a stipulation for an adjournment;[7] an objection to the jurisdiction coupled with an objection to the appointment of a receiver.[8]

[1] Reynolds v. La Crosse etc. Co. 10 Minn. 178 Gil. 144.
[2] Yale v. Edgerton, 11 Minn. 271 Gil. 184. See also, Frear v. Heichert, 34 Minn. 96, 24 N. W. 319.
[3] Curtis v. Jackson, 23 Minn. 268.
[4] Papke v. Papke, 30 Minn. 260, 15 N. W. 117.
[5] Anderson v. Hanson, 28 Minn. 400, 10 N. W. 429.
[6] Farmers' Nat. Bank v. Backus, 64 Minn. 43, 66 N. W. 5.
[7] Johnson v. Hagberg, 48 Minn. 221, 50 N. W. 1037.
[8] St. Louis Car Co. v. Stillwater Street Ry. Co. 53 Minn. 129, 54 N. W. 1064.

General appearance by appealing.

§ 357. An appeal from an inferior to a superior court for the purpose of securing a retrial on the merits in the latter court constitutes a general appearance and gives the court jurisdiction over the person which was before wanting.

Seurer v. Horst, 31 Minn. 479, 18 N. W. 283; Craighead v. Martin, 25 Minn. 41; Lee v. Parrett, 25 Minn. 128; McCubrey v. Lankis, 74 Minn. 302, 77 N. W. 144; Wrolson v. Anderson, 53 Minn. 508, 55 N. W. 597; Whitely v. Mississippi etc. Co. 38 Minn. 523, 38 N. W. 753.

Withdrawal of appearance.

§ 358. A general appearance cannot be withdrawn except by leave of court on a showing of fraud or mistake of fact.

Anderson v. Hanson, 28 Minn. 400, 10 N. W. 429; Allen v. Coates, 29 Minn. 46, 11 N. W. 132.

Special appearance—definition—illustrations.

§ 359. A special appearance is one made solely for the purpose of urging jurisdictional objections.[1] Such appearances are not favored.[2] A party cannot be deemed to submit to the jurisdiction of a court by the mere act of denying its jurisdiction.[3]

[1] Clark v. Blackwell, 4 Greene (Iowa) 441.
[2] Yale v. Edgerton, 11 Minn. 271 Gil. 184.
[3] Higgins v. Beveridge, 35 Minn. 285, 28 N. W. 506.

§ 360. The following appearances were held special: A motion to vacate a judgment upon grounds taken solely with reference to

Digitized by Google

their supposed bearing upon the jurisdiction of the court to render the judgment and solely for the purpose of attacking said jurisdiction, the attorney appearing "for the purposes of the motion only";[1] a motion to dismiss—after stating the objections to the jurisdiction of the court the motion proceeded as follows: "If such objection to the jurisdiction be overruled, the undersigned further, as a separate defence in said matter, objects," etc., setting up a defence on the merits;[2] an answer setting forth objections to the jurisdiction;[3] an answer which simply protests against the exercise of jurisdiction and claims no other right;[4] a motion to set aside the service of a summons on the ground that the complaint was not filed, and no copy of it served with the summons, although the moving party did not state that his appearance was special.[5]

[1] Covert v. Clark, 23 Minn. 539.

[2] Board of County Com'rs v. Smith, 25 Minn. 131. See also, Perkins v. Meilicke, 66 Minn. 409, 69 N. W. 220.

[3] Higgins v. Beveridge, 35 Minn. 285, 28 N. W. 506.

[4] Chubbuck v. Cleveland, 37 Minn. 466, 35 N. W. 362.

[5] Houlton v. Gallow, 55 Minn. 443, 57 N. W. 141.

Mode of appearing specially.

§ 361. Objection to the jurisdiction of the court over the person is properly raised:

(1) By motion, before answer or demurrer, in writing, stating that the party appears specially to object to the jurisdiction of the court and specifying the grounds of objection.

Board of County Com'rs v. Smith, 25 Minn. 131; Covert v. Clark, 23 Minn. 539; Board of County Com'rs v. Jessup, 22 Minn. 552; Hooper v. Chicago etc. Ry. Co. 37 Minn. 52, 33 N. W. 314; Houlton v. Gallow, 55 Minn. 443, 57 N. W. 141; Williams v. McGrade, 13 Minn. 174 Gil. 165.

(2) By answer, when the objection does not appear on the face of the complaint.

Higgins v. Beveridge, 35 Minn. 285, 28 N. W. 506; Chubbuck v. Cleveland, 37 Minn. 466, 35 N. W. 362. See Williams v. McGrade, 13 Minn. 174 Gil. 165.

(3) By demurrer, when the objection appears on the face of the complaint.

Reynolds v. La Crosse etc. Co. 10 Minn. 178 Gil. 178.

Waiver of special appearance.

§ 362. When a party appears specially and objects to the jurisdiction of the court over his person and his objection is overruled he does not waive the objection by answering to the merits and proceeding to trial.

State v. District Court, 26 Minn. 233, 2 N. W. 698; Board of County Com'rs v. Smith, 25 Minn. 131; Hess v. Adamant Mfg. Co. 66 Minn. 79, 68 N. W. 774; Perkins v. Meilicke, 66 Minn. 409, 69 N. W. 220; Harkness v. Hyde, 98 U. S. 476; Steamship Co. v. Tugman, 106 U. S. 118; Walling v. Beers, 120 Mass. 548; Jones v. Jones, 108 N. Y. 415; Benedict v.

Digitized by Google

Johnson, 4 S. D. 387; Southern Pac. Co. v. Denton, 146 U. S. 202; Brooks v. Dun, 51 Fed. Rep. 139; May v. Grawert, (Minn.) 90 N. W. 383.

Effect of failure to appear.

§ 363. A party waives no objection by a failure to appear.[1] He simply suffers a judgment to be entered against him as authorized by the summons and complaint.[2] When a defendant has not appeared, service of notices or papers, in the ordinary proceedings in an action, need not be made upon him.[3]

[1] Holgate v. Broome, 8 Minn. 243 Gil. 209.

[2] See § 1278.

[3] First Nat. Bank v. Rogers, 12 Minn. 529 Gil. 437; Grant v. Schmidt, 22 Minn. 1; Lambert v. Scandinavian-American Bank, 66 Minn. 185, 68 N. W. 834.

Digitized by Google

CHAPTER VI

PROCEEDINGS PRELIMINARY TO TRIAL

GUARDIANS AD LITEM

I FOR INFANTS

The statutes.

§ 364. "When an infant is a plaintiff, he shall appear by his guardian, who shall be appointed by the court in which the action is prosecuted, or by a judge thereof, and shall be a competent and responsible person, resident of this state, and shall file his written consent to such appointment in the office of the clerk of the district court or court of common pleas before the issuing of the summons in such action. Whenever it shall appear to the court or judge that such guardian is not competent or responsible, he may be removed, and another substituted, without prejudice to the progress of the action; and before such guardian shall receive any money or property of such infant he shall be required, by an order of such court or judge, to give a bond, with sufficient sureties, to be approved by such court or judge, to secure such money or property, and account therefor to such infant."

[G. S. 1894 § 5160]

§ 365. "That whenever an infant is a defendant, he shall appear by guardian, to be appointed by the court in which the action is pending, or the judge thereof, or the proper court commissioner; and such court or judge may make such orders as may be necessary for the protection of the rights of such infant defendant. Such guardian must be a resident of this state, and consent in writing to such appointment, which must be filed in the office of the clerk of such court at the time of said appointment."

[G. S. 1894 § 5161]

§ 366. "That whenever it shall be necessary to appoint a guardian for any infant, a party to any action, such guardian shall be appointed as follows:

(1) When the infant is plaintiff, upon the application of the infant, if he is of the age of fourteen years, or, if under that age, upon the application of a relative or friend, or the general or testamentary guardian of the infant; if upon the application of a relative or friend of the infant, notice thereof shall first be given to the general or testamentary guardian of the infant, if he has one within this state; if he has none and resides within this state, then to the person with whom such infant resides.

(2) When the infant is defendant, upon the application of the infant, if he is of the age of fourteen years, and applies within twenty days after the service of the summons; if he is under the age of fourteen,

Digitized by Google

or neglects so to apply, then, upon the application of any other party to the action, or of the general or testamentary guardian, or of a relative or friend of the infant, notice of such application, when made by such party, relative, or friend, first being given to such general or testamentary guardian, if the infant has one within this state; if he has none, then to the infant himself, if over fourteen years of age, and within this state; or, if under that age, and within the state, then to the person with whom such infant resides.

If such infant have no general or testamentary guardian within this state, and if such infant be not within this state, notice of such application shall be given by the publication of a copy thereof once in each week, for three successive weeks, in a newspaper printed and published in the county in which the action is brought; and if there is no such newspaper in the county, then in a newspaper printed and published at the capital of the state. The return of the sheriff of the county in which the action is brought, made upon the summons, that such infant defendant cannot be found within such county, shall be prima facie evidence that such infant is not within this state, and that he has no general or testamentary guardian therein."

[G. S. 1894 § 5162]

Definitions.

§ 367. A guardian ad litem is an officer of the court appointed to look after the interests of an infant or insane party and to manage the suit for him.[1] A next friend (prochein ami) is an officer of the court appointed to prosecute an action for an insane plaintiff. An insane defendant appears by a guardian ad litem or general guardian. The distinction between a guardian ad litem and a next friend has not been carefully observed in our practice.[2] Practically the distinction is only one of form.[3] In most states an infant plaintiff appears by a next friend but here he must appear by a guardian ad litem or a general or testamentary guardian.[4]

[1] Bryant v. Livermore, 20 Minn. 313 Gil. 271, 297.

[2] See Plympton v. Hall, 55 Minn. 22, 56 N. W. 351 (the appearance should have been by a next friend); Meyenberg v. Eldred, 37 Minn. 508, 35 N. W. 371.

[3] Bryant v. Livermore, 20 Minn. 313 Gil. 271, 297.

[4] See § 368.

Necessity of appointing a guardian ad litem.

§ 368. Infants must sue and be sued in their own names, appearing by a general guardian, a testamentary guardian or a guardian ad litem.[1] It is not necessary to have a guardian ad litem appointed if there is a general or testamentary guardian. Our statutes provide that a general or testamentary guardian "shall appear for and represent his ward in all legal proceedings unless another person is appointed for that purpose."[2] This does not in any way impair the power of the district court to appoint a guardian ad litem.[3] Ordinarily a minor should appear by his general or testamentary guardian. The general statutes relating to the appointment of guardians ad litem should be invoked only where there is no general or testa-

Digitized by Google

mentary guardian or where such guardian refuses to act or is disqualified for any reason.[4] But a minor may appear by a guardian ad litem although there is a general guardian competent to act.[5] As respects proceedings to probate a will no appointment of a guardian ad litem for any minor interested in the estate is necessary.[6] Nor it is necessary, before the administration account of an executor or administrator is allowed, to appoint a guardian ad litem for minor heirs or legatees.[7]

[1] Price v. Phoenix, 17 Minn. 497 Gil. 473; Germain v. Sheehan, 25 Minn. 338; Perine v. Grand Lodge, 48 Minn. 82, 50 N. W. 1022; Peterson v. Baillif, 52 Minn. 386, 54 N. W. 185; Eisenmenger v. Murphy, 42 Minn. 84, 43 N. W. 784.

[2] G. S. 1894 §§ 4555, 4539, 4560.

[3] G. S. 1894 § 4548; Plympton v. Hall, 55 Minn. 22, 56 N. W. 351.

[4] So held in California under like statutes: Gronfier v. Puymiral, 19 Cal. 629; Fox v. Minor, 32 Cal. 119; Smith v. McDonald, 42 Cal. 484; Western Lumber Co. v. Phillips, 94 Cal. 54. See also: Hughes v. Sellers, 34 Ind. 337; Swan v. Horton, 14 Gray (Mass.) 179; Mansur v. Pratt, 101 Mass. 60. See as to practice in this state: Perine v. Grand Lodge, 48 Minn. 82, 50 N. W. 1022; Peterson v. Baillif, 52 Minn. 386, 54 N. W. 185; Beckett v. N. W. Masonic Aid Assoc. 67 Minn. 298, 69 N. W. 923.

[5] Peterson v. Baillif, 52 Minn. 386, 54 N. W. 185.

[6] Mousseau's Will, 30 Minn. 202, 14 N. W. 887; Ladd v. Weiskopf, 62 Minn. 29, 64 N. W. 99.

[7] Balch v. Hooper, 32 Minn. 158, 20 N. W. 124; Ladd v. Weiskopf, 62 Minn. 29, 64 N. W. 99.

Effect of infant appearing without guardian.

§ 369. A judgment rendered upon default against an infant over fourteen years of age, after service of summons upon him, but without the appointment of a guardian ad litem is erroneous and voidable, but not void.

Eisenmenger v. Murphy, 42 Minn. 84, 43 N. W. 784; Phelps v. Heaton, 79 Minn. 476, 82 N. W. 990.

§ 370. It is improper for an infant to appear by attorney. But if, during the pendency of the action, the infant reaches majority, it is competent for him to adopt an action thus erroneously commenced, and to ratify what has been done therein.

Germain v. Sheehan, 25 Minn. 338.

Guardian not a party.

§ 371. A guardian ad litem is not a party to the action[1] nor the real party in interest.[2] He cannot sue in his own name.[3] But a guardian is a proper party to the record. He is really the active party who institutes the suit and has the entire control of its prosecution.[4]

[1] Bryant v. Livermore, 20 Minn. 313 Gil. 271, 295.

Digitized by Google

[2] Perine v. Grand Lodge, 48 Minn. 82, 50 N. W. 1022; Price v. Phoenix, 17 Minn. 497 Gil. 473; Peterson v. Baillif, 52 Minn. 386, 54 N. W. 185.

[3] Id.

[4] Perine v. Grand Lodge, 48 Minn. 82, 50 N. W. 1022; Schuek v. Hagar, 24 Minn. 339.

Objection to competency of guardian.

§ 372. In an action brought by a guardian ad litem, the allegation in a complaint that the guardian has been duly appointed by the judge of the district court in which the action is brought, is not put in issue by an answer denying the allegations of the complaint. If such alleged appointment has not been duly made, or a person assumes to act as such guardian without any appointment, the better and more convenient practice is to take preliminary objection, by motion, before interposing an answer to the merits.

Schuek v. Hagar, 24 Minn. 339.

General duties of guardian ad litem.

§ 373. It is the general duty of the guardian to make the case of the minor his own. He must exercise the same diligence and prudence that he would if the case were his own;[1] and if he falls below this standard of conduct to the prejudice of the minor he is liable.[2] Though he is not warranted in interposing useless or vexatious defences, yet he must interpose a defence in fact, so far as may be necessary to protect the rights and interests of the minor. It is his duty to examine into the case and determine what the rights of the minor are, what defences exist and what defences may be interposed with a reasonable prospect of success.[3] He fails in his duty if he merely files a formal answer and allows the action to proceed without any real contest on the merits.[4] Our statute regulates the appointment of guardians ad litem but does not define their powers. When appointed for an infant it is the duty of the guardian to defend the interests of the infant in the action. "Some of the decisions limit his power so as practically to deprive him of all discretion or exercise of judgment in conducting the defence. Thus it has been held that the answer made by the guardian should be a full defence, specifically denying the material allegations, without regard to the truth of the denials as to anything which may be prejudicial to the minor; that he cannot waive any rights of the minor or make admissions either in the answer or for the purpose of the trial. The decisions we have cited, though they are extreme, and go further than we would be willing to go, are in line with all the authorities and accentuate the proposition that the relation between the guardian ad litem or the attorney whom he employs and the infant defendant is not the same as that between an attorney and an adult client. We would not be willing to assent to the proposition that a guardian ad litem or the attorney may not, in good faith, exercise discretion or judgment in the conduct of the cause. As our system of pleading does not provide any form of answer or verification by a guardian ad litem different from that of any other defendant, we do not think

Digitized by Google

an answer by the guardian can be condemned merely because it does not deny material allegations in the complaint. Nor can we admit that concessions or admissions such as are ordinarily made in the progress of a cause, and which are entirely consistent with good faith, and which it is frequently for the interest of a party to make, may not be made by a guardian. To hold otherwise would impeach any trial in which the guardian or attorney omitted to make objections to evidence or proceedings in the trial which he might have made. * * * The adult parties to an action have rights in it as well as the parties who are minors. The former are not to be made, without their consent, the guardians to protect the rights of the latter. It is for the court to see that the rights of the minors are protected. This duty it performs by appointing a proper person as guardian in the manner provided by law, and by the exercise, whenever necessary, of its right of supervision and control over the acts and conduct of the guardian thus appointed. In the exercise of this control the court may set aside or disregard acts or concessions of the guardian which have not already passed its scrutiny and which, though fair on their face, are shown to the court to have been improvidently or fraudulently done or made. And it may and ought to set aside or disregard such acts or concessions as apparently waive or surrender any material right of the minor, such, for instance, as the right to a trial, unless they be shown to be beneficial, or, at any rate, not prejudicial to the rights and interests of the minor." [5]

[1] Mercer v. Watson, 1 Watts (Pa.) 349; Stunz v. Stunz, 131 Ill. 210; Pinchback v. Graves, 42 Ark. 227; Tyson v. Tyson, 94 Wis. 225; Tyson v. Richardson, 103 Wis. 397.

[2] Bryant v. Livermore, 20 Minn. 313 Gil. 271, p97.

[3] Stunz v. Stunz, 131 Ill. 211; Phillips v. Dusenberry, 8 Hun (N. Y.) 348; Tyson v. Tyson, 94 Wis. 225; Tyson v. Richardson, 103 Wis. 397.

[4] Pinchback v. Graves, 42 Ark. 227.

[5] Eidam v. Finnegan, 48 Minn. 53, 50 N. W. 933. See further as to admissions: Kingsbury v. Buchner, 134 U. S. 650; Buffalo Loan Trust etc. Co. v. Knights Templar etc. Assoc. 126 N. Y. 450.

Authority of guardian continues on appeal.

§ 374. A guardian ad litem has authority to appeal to the supreme court without a special order of court.[1] "The attorneys and guardians ad litem of the respective parties in the court below, shall be deemed the attorneys and guardians of the same parties respectively in this court, until others are retained or appointed, and notice thereof served on the adverse party." [2]

[1] Tyson v. Tyson, 94 Wis. 225; Jones v. Roberts, 96 Wis. 424; Tyson v. Richardson, 103 Wis. 397.

[2] Rule 7, Supreme Court.

Compensation.

§ 375. A court appointing a guardian ad litem has power to make provision for his compensation. It may make his compensation a

Digitized by Google

lien on the property involved or order a sale. The exercise of this power is governed by no fixed rules. Each case must be determined on its own facts.

Tyson v. Richardson, 103 Wis. 397; Wilbur v. Wilbur, 138 Ill. 446.

Appointment of guardian before service of summons improper.

§ 376. Service of summons upon an infant defendant in the mode authorized by the statute must precede the appointment of a guardian ad litem for him, and although such guardian be appointed, and he appears and represents the interests of the minor, the appointment and all subsequent proceedings in the action, including the final judgment, are void as against the infant not served with process or summons.

Phelps v. Heaton, 79 Minn. 478, 82 N. W. 990.

Next friend appointed in justice court.

§ 377. The authority of a next friend, appointed under G. S. 1894 § 4972, to prosecute an action in justice court for and in behalf of an infant plaintiff is not ended or suspended by an appeal to the district court but he may continue to prosecute the action in that court.

Covell v. Porter, 81 Minn. 302, 84 N. W. 1115.

II FOR INSANE PERSONS

General statement.

§ 378. An insane person may sue and be sued, appearing by next friend, general guardian, or guardian ad litem.[1] Our statute provides that the guardian of an insane person "shall appear for and represent his ward in all legal proceedings unless another person is appointed for that purpose."[2] This provision does not deprive the district court of power to appoint a next friend or guardian ad litem for an insane party even though a general guardian has been appointed by the probate court;[3] but if such a general guardian has been appointed in this state a guardian ad litem or next friend ought not to be appointed unless the general guardian refuses to appear or is disqualified for any reason.[4] It is the general policy of our law that an insane person shall appear by his general guardian. But it is not necessary in order to institute or defend an action in the district court to first institute proceedings in the probate court for the appointment of a general guardian. Where persons are incapable of acting for themselves, as in the case of insane persons or lunatics, they are entitled to the protection of the court, and proceedings may be instituted under its direction. Suit may be brought in their name and the court will authorize some suitable person to carry it on as next friend or guardian ad litem. The power of the district courts to exercise such authority is not taken away by the statutes authorizing the probate courts to appoint general guardians for insane persons. But it is in the discretion of the court to allow an action so instituted to proceed or not, and it may order a stay of proceedings to await the due appointment of a general guardian, or order the

Digitized by Google

same to be discontinued as it may be advised.[5] The courts of this state may appoint a next friend for a non-resident insane plaintiff.[6]

[1] Plympton v. Hall, 55 Minn. 22, 56 N. W. 351.
[2] G. S. 1894 § 4555.
[3] See Plympton v. Hall, 55 Minn. 22, 56 N. W. 351; Perine v. Grand Lodge, 48 Minn. 82, 50 N. W. 1022.
[4] See § 368.
[5] Plympton v. Hall, 55 Minn. 22, 56 N. W. 351.
[6] Id.

Who should be appointed.

§ 379. It may be said to be the policy of the law that the general guardian of an infant or insane person shall appear for him in all judicial proceedings. In those states where it is held necessary to appoint a guardian ad litem although there is a general guardian it is universally held that such general guardian should be appointed guardian ad litem unless for special reasons he is disqualified.[1] In this state the general guardian may appear for his ward without special authorization and it is his duty to do so.[2] If the general guardian is disqualified for any reason or if there is no general guardian then the nearest responsible disinterested and competent relative residing in the state should be appointed guardian ad litem.[3] If no such relative is available an attorney of the court is usually selected.[4]

[1] 15 A. & E. Ency. of Law (2d Ed.) 7.
[2] See § 368.
[3] U. S. Bank v. Ritchie, 8 Pet. (U. S.) 128; Grant v. Van Schoonhoven, 9 Paige (N. Y.) 255; Rhoads v. Rhoads, 43 Ill. 239.
[4] Story v. Dayton, 22 Hun (N. Y.) 450.

§ 380. The person selected must be wholly disinterested. He must have no interests adverse to his ward.[1] He must not be the adverse party or his attorney [2] or a relative or employe of either of them.[3] He must have no business connection with the attorney of the adverse party.[4] He must have sufficient financial ability to respond to the ward for any neglect or default in the discharge of his trust [5] and this ability must appear on the face of the moving papers.[6] Although the adverse party may move the court for the appointment of a guardian he should not be permitted to name the person to be appointed.[7]

[1] Ralston v. Lahee, 8 Iowa 17; Story v. Dayton, 22 Hun (N. Y.) 450; Estes v. Bridgforth, 114 Ala. 221; Bicknell v. Bicknell, 111 Mass. 265.
[2] Hecker v. Sexton, 43 Hun (N. Y.) 593; Sargeant v. Rowsey, 89 Mo. 617.
[3] Bicknell v. Bicknell, 111 Mass. 265; Story v. Dayton, 22 Hun (N. Y.) 450.
[4] Tyson v. Richardson, 103 Wis. 397.
[5] Story v. Dayton, 22 Hun (N. Y.) 450; Tyson v. Richardson, 103 Wis. 397.
[6] McDonald v. Brass Goods Mfg. Co. 2 Abb. N. C. 434.

Digitized by Google

[7] Ralston v. Lahee, 8 Iowa 17; Knickerbocker v. De Freest, 2 Paige (N. Y.) 304.

Effect of failure to appoint guardian.

§ 381. Where personal service is obtained against an insane person the failure to appoint a guardian ad litem does not render the judgment void.

Lundberg v. Davidson, 72 Minn. 49, 74 N. W. 1018. See § 369.

CONTINUANCE

Definitions.

§ 382. Strictly, a continuance is an adjournment of a cause to a subsequent term, while a postponement is an adjournment to a subsequent day of the same term. The distinction, however, is not commonly observed with nicety.

A matter of discretion.

§ 383. The granting of a continuance or postponement of a cause is a matter lying almost wholly in the discretion of the trial court and its action will not be reversed on appeal except for a manifest abuse of discretion.

State v. McCartey, 17 Minn. 76 Gil. 54; Allis v. Day, 14 Minn. 516 Gil. 388; State v. Conway, 23 Minn. 291; Carson v. Getchell, 23 Minn. 571; Boice v. Boice, 27 Minn. 371, 7 N. W. 687; Johnson v. Chicago etc. Ry. Co. 31 Minn. 57, 16 N. W. 488; Wright v. Levy, 22 Minn. 466; Lowenstein v. Grove, 50 Minn. 383, 52 N. W. 386; West v. Hennessey, 63 Minn. 378, 65 N. W. 639; Adamek v. Plano Mfg. Co. 64 Minn. 304, 66 N. W. 981; Allen v. Brown, 72 Minn. 459, 75 N. W. 385.

Notice.

§ 384. Motions for a continuance or postponement are made in open court on the first day of the term or in the course of the trial and without notice or a service of the moving affidavits.

Counter affidavits.

§ 385. In our practice counter affidavits are not infrequently read. No doubt it is purely discretionary with the court to admit them or not.[1] They should never be admitted for the sole purpose of controverting the facts which the moving affidavits state an absent witness would testify to.[2] They are properly admissible as to diligence;[3] as to the probability of securing the evidence sought;[4] as to good faith;[5] as to the sickness of a person;[6] and as to the inconvenience to which a continuance would put the adverse party.[7]

[1] State v. Bailey, 94 Mo. 311.
[2] State v. Rainsbarger, 74 Iowa 196.
[3] Id.; State v. Murdy, 81 Iowa 603.
[4] Anonymous, 3 Day (Conn.) 308.
[5] State v. Belrel, 89 Iowa 405.
[6] State v. Murdy, 81 Iowa 603.
[7] Adamek v. Plano Mfg. Co. 64 Minn. 304, 66 N. W. 981.

Digitized by Google

Waiver.

§ 386. By consenting to a reference a party waives objection to a denial of his prior application for a continuance.

Allis v. Day, 14 Minn. 516 Gil. 388.

When application made.

§ 387. "All motions for continuance shall be made on the first day of the term, unless the cause for such continuance shall have arisen or come to the knowledge of the party subsequent to that day." [1] They need not be made on the first call of the calendar.[2]

[1] Rule 38, District Court.

[2] Rule 37, District Court.

To secure evidence.

§ 388. An application for a continuance to secure evidence will not be granted unless it is made to appear that the evidence sought could not have been secured in time for the trial by the exercise of due diligence;[1] that it is so material that it might reasonably change the result;[2] that it is admissible under the pleadings and the rules of evidence;[3] that there is reasonable ground for believing that it can be secured;[4] and that it is not merely cumulative[5] or impeaching.[6] "A motion to postpone a trial for the absence of evidence can only be made upon affidavit, stating the evidence expected to be obtained, and showing its materiality, and that due diligence has been used to procure it." [7] "In all affidavits for continuance on account of the absence of a material witness, the deponent shall set forth particularly what he expects and believes the witness would testify to were he present and orally examined in court." [8] The affidavit should state with particularity what affiant has done to secure the evidence;[9] facts from which the court may infer that there is a reasonable ground for believing that the evidence can be secured;[10] that the application is not made for delay;[11] that the evidence is not cumulative;[12] that the facts sought to be proved by the absent witness cannot be proved by any other witness;[13] and the name of the witness.[14] In this state there is neither statute nor rule of court requiring an affidavit of merits and it may therefore safely be omitted.[15] The affidavit should ordinarily be made by the party rather than his attorney [16] and if it is not so made the reasons should be stated.[17]

[1] Board of County Com'rs v. McCoy, 1 Minn. 100 Gil. 78; Cooper v. Stinson, 5 Minn. 201 Gil. 160; School District v. Thompson, 5 Minn. 280 Gil. 221; State v. Conway, 23 Minn. 291; Cargill v. Thompson, 50 Minn. 211; Mackubin v. Clarkson, 5 Minn. 247 Gil. 193; Holmes v. Corbin, 50 Minn. 209, 52 N. W. 531; Allen v. Brown, 72 Minn. 459, 75 N. W. 385.

[2] McLean v. Burbank, 12 Minn. 530 Gil. 438; Cooper v. Stinson, 5 Minn. 201 Gil. 160.

[3] Coit v. Waples, 1 Minn. 134 Gil. 110; Dingman v. State, 48 Wis. 485.

[4] State v. Conway, 23 Minn. 291; Jones v. Chicago etc. Ry. Co.

Digitized by Google

31 Minn. 57, 16 N. W. 488; Lowenstein v. Greve, 50 Minn. 383, 52 N. W. 964.

[5] People v. Jenkins, 56 Cal. 4.

[6] Lundy v. State, 44 Miss. 669.

[7] See § 390; Board of County Com'rs v. McCoy, 1 Minn. 100 Gil. 78.

[8] Rule 38, District Court; Mackubin v. Clarkson, 5 Minn. 247 Gil. 193.

[9] See cases under (1).

[10] See cases under (4) and People v. Ah Yute, 53 Cal. 613.

[11] Peoples v. Jenkins, 56 Cal. 5.

[12] People v. Thompson, 4 Cal. 239; State v. Brooks, 4 Wash. 328.

[13] People v. Ashnauer, 47 Cal. 98; Thompson v. Lord, 14 Iowa 591; State v. Brooks, 4 Wash. 328. See Cooper v. Stinson, 5 Minn. 201 Gil. 160.

[14] School District v. Thompson, 5 Minn. 280 Gil. 221.

[15] See 3 Wait, Pr. 69.

[16] People v. Jenkins, 56 Cal. 5; Clouston v. Gray, 48 Kans. 31. See Broat v. Moor, 44 Minn. 468, 47 N. W. 55.

[17] Clouston v. Gray, 48 Kans. 31; Jaffe v. Lilienthal, 101 Cal. 175.

Stipulation.

§ 389. Where a postponement is granted on stipulation of the parties for the sole purpose of securing the testimony of certain specified witnesses other witnesses cannot be substituted.

Cook v. Kittson, 68 Minn. 474, 71 N. W. 670.

Defeating application by admission—statute.

§ 390. "A motion to postpone a trial for the absence of evidence can only be made upon affidavits, stating the evidence expected to be obtained and showing its materiality, and that due diligence has been used to procure it. And if the adverse party thereupon admit that such evidence would be given, and that it be considered as actually given on the trial, or offered and overruled as improper, the trial must not be postponed."

[G. S. 1894 § 5366] Similar statutes in Cal. and Iowa.

§ 391. The admission must cover all the facts as to which the absent witness is expected to testify.[1] Upon such an admission the testimony of the absent witness is regarded as actually before the court.[2] The affidavit may be read to the jury as the basis of the admission,[3] but only so far as it states facts to which the witness would be allowed to testify if present.[4] The admission does not preclude any legal objection which might be made if the witness were present.[5] The witness cannot be impeached by evidence of contradictory statements.[6] Of course the evidence may be contradicted by other evidence. The admission under our statute is not an admission of the facts sought to be proved by the absent witness.

[1] Peck v. Lovett, 41 Cal. 521.

[2] Boggs v. Merced Mfg. Co. 14 Cal. 358.

[3] Strong v. Hart, 7 Iowa 484.

Digitized by Google

[4] State v. Sater, 8 Iowa 420.
[5] State v. Geddis, 42 Iowa 264.
[6] State v. Shannehan, 22 Iowa 435.

Cases in which continuance allowed.

§ 392. Where a witness was pregnant so that she could not attend without danger to her life and health;[1] where, in a criminal prosecution, the county attorney was absent from the county;[2] illness of counsel, when there is not time in which to secure other counsel;[3] material amendment of pleadings involving surprise and requiring fresh preparation;[4] a well-founded belief that the cause would not be called for trial;[5] misunderstanding as to the time to which a cause had been continued;[6] illness of a party, if it is shown that he is a material witness or that his presence is essential for the proper conduct of the trial;[7] death of a party;[8] death of counsel, when there is not time before trial to secure other counsel;[9] consent of parties sanctioned by the court;[10] absence of counsel, but only in exceptional cases and when other counsel cannot be secured.[11]

[1] Wright v. Levy, 22 Minn. 466.
[2] State v. Nerbovig, 33 Minn. 480, 24 N. W. 321.
[3] People v. Logan, 4 Cal. 188; Thompson v. Thornton, 41 Cal. 626; Rice v. Melendy, 36 Iowa 166.
[4] Sapp v. Aiken, 68 Iowa, 699; Knauer v. Morrow, 23 Kans. 360.
[5] Smith v. Brand, 44 Ga. 403.
[6] Probasco v. Hartough, 10 N. J. L. 55.
[7] Pate v. Tait, 72 Ind. 452; Michelsen v. Spies, 32 N. Y. Supp. 17.
[8] See Dunnell, Minn. Pl. §§ 202–213.
[9] State v. Zellers, 7 N. J. L. 220.
[10] Moulders v. Kempff, 115 Ind. 459; Ford v. Holmes, 61 Ga. 419.
[11] Lightner v. Menzel, 35 Cal. 452; Bartel v. Tiernan, 55 Ind. 438; Trulock v. State, 1 Iowa 515; Jackson v. Wakeman, 2 Cow. (N. Y.) 578.

Cases in which continuance refused.

§ 393. Where a party was compelled by prior engagements to go out of the state;[1] where assistant counsel was unable to be present, there being no claim that he alone was advised as to the law and facts of the case and able to present them intelligently to the court;[2] where the attorney of one of the parties was professionally engaged elsewhere in the trial of a cause;[3] where one of the parties was necessarily absent from a second trial of the cause and the adverse party consented to let the testimony of the absent party at the former trial be read and considered as actually given on the second trial;[4] where the attorney of one of the parties was absent on account of a violent storm;[5] where an attorney wanted time in which to prepare on a motion to set aside a default judgment;[6] where a witness was absent whom the party had neglected to subpœna, relying on the promise of the witness to be present;[7] where a witness who was a member of the legislature was absent and his deposition might easily have been taken in St. Paul;[8] where the evidence sought was inadmissible under the pleadings;[9] where there

Digitized by Google

was a failure to exercise due diligence in securing the evidence sought;[10] where, in a criminal action, the testimony of the absent witness given before the committing magistrate was read to the jury, under a stipulation of the parties;[11] where a witness was sick but no adequate proof of the sickness was offered;[12] where there was no evidence that an absent witness could ever be found;[13] where the application was based on nothing but the unsworn oral statement of counsel;[14] where a deposition sought to be obtained might easily have been secured in time for trial;[15] where a witness was absent who had been subpœnaed and there was no evidence that he was not within reach of process of the court;[16] where it was discovered on the trial that a juror was disqualified.[17]

[1] West v. Hennessey, 63 Minn. 378, 65 N. W. 639.
[2] Id.
[3] Adamek v. Plano Mfg. Co. 64 Minn. 304, 66 N. W. 981. See Glaeser v. City of St. Paul, 67 Minn. 368, 69 N. W. 1101.
[4] Conrad v. Dobmeier, 64 Minn. 284, 67 N. W. 5.
[5] Boice v. Boice, 27 Minn. 371, 7 N. W. 687.
[7] Beaulieu v. Parsons, 2 Minn. 37 Gil. 26; Mackubin v. Clarkson, 5 Minn. 247 Gil. 193.
[8] Board of County Com'rs v. McCoy, 1 Minn. 100 Gil. 78.
[9] Coit v. Waples, 1 Minn. 134 Gil. 110.
[10] See cases under (1) § 388.
[11] State v. Conway, 23 Minn. 291.
[12] State v. McCartey, 17 Minn. 76 Gil. 54.
[13] Johnson v. Chicago etc. Ry. Co. 31 Minn. 57, 16 N. W. 488. See cases under (4) § 388.
[14] Cheney v. Dry Wood Lumber Co. 34 Minn. 440, 26 N. W. 236.
[15] Holmes v. Corbin, 50 Minn. 209, 52 N. W. 531; Allen v. Brown, 72 Minn. 459, 75 N. W. 385.
[16] West v. Hennessey, 63 Minn. 378, 65 N. W. 639.
[17] Wells-Stone Mercantile Co. v. Bowman, 59 Minn. 364, 61 N. W. 135.

Postponement granted more freely than continuance.

§ 394. Courts are always more free to grant a motion for a postponement to a subsequent day of the same term than a continuance over the term.

West v. Hennessey, 63 Minn. 378, 65 N. W. 639.

Effect of failure to move for.

§ 395. A failure to move for a postponement or continuance to secure evidence known to a party will defeat his subsequent motion for a new trial on account of such evidence as newly discovered.

Lowe v. Minneapolis Street Ry. Co. 37 Minn. 283, 34 N. W. 33; State v. Bagan, 41 Minn. 285, 43 Minn. 5; Hendrickson v. Tracy, 53 Minn. 404, 55 N. W. 622.

Refusal of—ground for new trial.

§ 396. The improper refusal of an application for a continuance or postponement is a ground for a new trial.[1] If the application is

Digitized by Google

not made on the trial the motion for a new trial is properly based on affidavit.[2] A party moving for a new trial for a refusal to grant a continuance to secure evidence should present the affidavits of the absent witnesses stating what they will testify to.[3]

[1] Wright v. Levy, 22 Minn. 466; Cooper v. Stinson, 5 Minn. 201 Gil. 160; State v. Conway, 23 Minn. 291; Adamek v. Plano Mfg. Co. 64 Minn. 304, 66 N. W. 981; Holmes v. Corbin, 50 Minn. 209, 52 N. W. 531; Allen v. Brown, 72 Minn. 459, 75 N. W. 459.

[2] See Holmes v. Corbin, 50 Minn. 209, 52 N. W. 531.

[3] People v. Jocelyn, 29 Cal. 562.

Appeal.

§ 397. Of course no appeal lies directly from an order denying a motion for a continuance. The proper practice is to move for a new trial and appeal from an order denying the motion[1] or to appeal from the final judgment and have the order reviewed as an intermediate order.[2]

[1] See cases under (1) § 388.

[2] See Lowenstein v. Greve, 50 Minn. 383, 52 N. W. 964.

DISMISSAL OF ACTION

Statutes.

§ 398. "The action may be dismissed, without a final determination of its merits, in the following cases:

(1) By the plaintiff, at any time before trial, if a provisional remedy has not been allowed, or counterclaim made, or affirmative relief demanded in the answer: provided, that an action on the same cause of action against any defendant shall not be dismissed more than once without the written consent of the defendant, or an order of the court on notice and cause shown.

(2) By either party with the written consent of the other; or by the court, upon the application of either party, after notice to the other and sufficient cause shown, at any time before the trial.

(3) By the court, where, upon the trial, and before the final submission of the case, the plaintiff abandons it, or fails to substantiate or establish his claim, or cause of action, or right to recover.

(4) By the court, when the plaintiff fails to appear on the trial, and the defendant appears and asks for the dismissal.

(5) By the court, on the application of some of the defendants, when there are others whom the plaintiff fails to prosecute with diligence.

All other modes of dismissing an action, by nonsuit, or otherwise, are abolished. The dismissal mentioned in the first two subdivisions is made by an entry in the clerk's register, and a notice served on the adverse party; judgment may thereupon be entered accordingly."

[G. S. 1894 § 5408]

Digitized by Google

§ 399. "In every case, other than those mentioned in the last section, the judgment shall be rendered on the merits."
[G. S. 1894 § 5409]

Unknown at common law.

§ 400. A judgment of dismissal was unknown at the common law. Under our practice a judgment of dismissal has the same effect as a judgment of nonsuit at common law and not the effect of the dismissal of a bill in equity.

Boom v. St. Paul etc. Co. 33 Minn. 253, 22 N. W. 538; Collins v. Waggoner, 20 Wis. 48.

Form of judgment.

§ 401. It is usual, in entering a judgment of dismissal, to follow the language of the statute—"It is therefore adjudged that this action be and it is hereby dismissed." [1] But a judgment that plaintiff "take nothing" by his action is sufficient.[2] When the plaintiff is nonsuited it is improper to enter a judgment of dismissal "on the merits." [3] Where, in unlawful detainer proceedings before a justice, the plaintiff recovered possession but on appeal to the district court the action was dismissed it was held proper in the judgment of dismissal to award restitution of possession to the defendant.[4]

[1] See McCune v. Eaton, 77 Minn. 404, 80 N. W. 355; Andrews v. School District, 35 Minn. 70, 127 N. W. 303.

[2] P. P. Mast & Co. v. Matthews, 30 Minn. 441, 16 N. W. 155. See Andrews v. School District, 35 Minn. 70, 27 N. W. 303.

[3] McCune v. Eaton, 77 Minn. 404, 80 N. W. 355.

[4] Fish v. Toner, 40 Minn. 211, 41 N. W. 972.

To defeat plea of another action pending.

§ 402. When a defendant in his answer sets up the defence of a former action pending the plaintiff may thereupon dismiss the first action and set up the fact of such dismissal in his reply; and this will constitute a good answer to such defence.

Page v. Mitchell, 37 Minn. 368, 34 N. W. 896; Nichols v. State Bank, 45 Minn. 102, 47 N. W. 462; Althen v. Tarbox, 48 Minn. 18, 50 N. W. 1018; Wolf v. Great Northern Ry. Co. 72 Minn. 435, 75 N. W. 702.

Other modes of terminating action abolished.

§ 403. The statute provides that all other modes of dismissing an action, by nonsuit or otherwise, are abolished. Discontinuance, retraxit, demurrer to the evidence and withdrawing a juror are all illegitimate modes of terminating an action in our practice. A directed verdict is a determination of the action on the merits and hence is not prohibited.

See Hunsden v. Churchill, 20 Minn. 408 Gil. 360; Walker v. St. Paul City Ry. Co. 52 Minn. 127, 53 N. W. 1068.

Not ordinarily an estoppel.

§ 404. A judgment of dismissal is not regularly a judgment on the merits and therefore does not operate as a bar to a subsequent

Digitized by Google

action on the same cause.[1] But form is not controlling and if a judgment of dismissal is in fact on the merits it will operate as an estoppel.[2] To determine whether such a judgment is on the merits it is always permissible to look into the entire record.[3] The record, however, cannot be contradicted or impeached collaterally though it be erroneous. In such cases the aggrieved party must seek his remedy by appeal or motion in the same action.[4]

[1] Andrews v. School District, 35 Minn. 70, 27 N. W. 303; Craver v. Christian, 34 Minn. 397, 26 N. W. 8; Rolfe v. Burlington etc. Ry. Co. 39 Minn. 398, 40 N. W. 267; Gunn v. Peakes, 36 Minn. 177, 30 N. W. 466; McCune v. Eaton, 77 Minn. 404, 80 N. W. 355; Phelps v. Winona etc. Ry. Co. 37 Minn. 485, 35 N. W. 273; Walker v. St. Paul City Ry. Co. 52 Minn. 127, 53 N. W. 1068; N. W. Railroader v. Prior, 68 Minn. 95, 70 N. W. 869. See Johnson v. Vaule, 61 Minn. 401, 63 N. W. 1039; Richardson v. Richards, 36 Minn. 111, 30 N. W. 457; Spurr v. Home Ins. Co. 40 Minn. 424, 42 N. W. 206; Woolsey v. Bohn, 41 Minn. 235, 42 N. W. 1022.

[2] Boom v. St. Paul etc. Co. 33 Minn. 253, 22 N. W. 538; Thomas v. Joslin, 36 Minn. 1, 29 N. W. 344; Cameron v. Chicago etc. Ry. Co. 51 Minn. 153, 53 N. W. 199; Wagner v. Wagner, 36 Minn. 239, 30 N. W. 766; Winnebago Paper Mills v. N. W. Printing etc. Co. 61 Minn. 373, 63 N. W. 1024. See State v. Hard, 25 Minn. 460.

[3] Andrews v. School District, 35 Minn. 70, 27 N. W. 303; Boom v. St. Paul etc. Co. 33 Minn. 253, 22 N. W. 538.

[4] Andrews v. School District, 35 Minn. 70, 27 N. W. 303.

Dismissal by plaintiff before trial.

§ 405. At any time before the trial the plaintiff has an absolute right to dismiss his action, at least once, if a provisional remedy has not been allowed or counterclaim made or affirmative relief demanded in the answer.[1] The rule applies upon an appeal from a justice court [2] and after a new trial is granted.[3]

[1] Fallman v. Gilman, 1 Minn. 179 Gil. 153; Koerper v. St. Paul etc. Ry. Co. 40 Minn. 132, 41 N. W. 156; Phelps v. Winona etc. Ry. Co. 37 Minn. 485, 35 N. W. 273.

[2] Fallman v. Gilman, 1 Minn. 179 Gil. 153.

[3] Phelps v. Winona etc. Ry. Co. 37 Minn. 485, 35 N. W. 272.

§ 406. The phrase "before the trial" means before the commencement of the trial and not before the final submission of the case to the court or jury.[1] When a cause has been called for trial in its order, and a jury has been called to try the cause, the trial has been begun, even though the jury has not been sworn.[2] Merely calling a cause for trial is not the commencement of a trial.[3]

[1] Bettis v. Schreiber, 31 Minn. 329, 17 N. W. 863. See Deuel v. Hawke, 2 Minn. 50 Gil. 37.

[2] St. Anthony etc. Co. v. King etc. Co. 23 Minn. 186.

[3] Scheffer v. Nat. Life Ins. Co. 25 Minn. 534; Mathews v. Taaffe, 44 Minn. 400, 46 N. W. 850.

Digitized by Google

§ 407. The dismissal is made by an entry to that effect in the clerk's register and a written notice served on the adverse party.[1] The entry may be made either by the clerk at the request of the plaintiff or by the attorney of the plaintiff.[2] It is not necessary that there should be an entry of judgment or payment of costs.[3] An entry in the clerk's register signed by the plaintiff's attorney that, "The above action is hereby dismissed" is sufficient.[4] To defeat a plea of a former action pending such an entry without a notice is sufficient.[5]

[1] See § 398.

[2] Blandy v. Raguet, 14 Minn. 491 Gil. 368; Nichols v. State Bank, 45 Minn. 102, 47 N. W. 462.

[3] Blandy v. Raguet, 14 Minn. 491, Gil. 368; Page v. Mitchell, 37 Minn. 368, 34 N. W. 896; Nichols v. State, 45 Minn. 102, 47 N. W. 462; Althen v. Tarbox, 48 Minn. 18, 50 N. W. 1018.

[4] Nichols v. State Bank, 45 Minn. 102, 47 N. W. 462.

[5] Id.

§ 408. In an action of claim and delivery, where the property is taken by the plaintiff and returned to the defendant on the proper bond a provisional remedy has been allowed and the plaintiff cannot dismiss of right even though the attorney for the defendant retains the notice of dismissal.[1] The rule is otherwise if the property is not taken by the plaintiff.[2] Where, in an action to recover certain personal property, the defendant obtained an order of interpleader and the appointment of a receiver to take possession of the property, the question whether plaintiff could dismiss of right was raised but not determined.[3]

[1] Williams v. McGrade, 18 Minn. 82 Gil. 65.

[2] Blandy v. Raguet, 14 Minn. 496 Gil. 368.

[3] Hooper v. Balch, 31 Minn. 276, 17 N. W. 617.

§ 409. The relief to which the statute refers as affirmative is only that for which the defendant might maintain an action entirely independent of plaintiff's claim, and which he might proceed to establish and recover even if plaintiff abandoned his cause of action, or failed to establish it. In other words, the answer must be in the nature of a cross-action, thereby rendering the action defendant's as well as plaintiff's. Relief which is simply conditioned on recovery by the plaintiff is not affirmative.[1] A demand of affirmative relief without allegations of facts authorizing it is not enough to defeat the right to a dismissal.[2]

[1] Koerper v. St. Paul etc. Ry. Co. 40 Minn. 132, 41 N. W. 156. See Kremer v. Chicago etc. Ry. Co. 54 Minn. 157, 55 N. W. 928.

[2] Curtiss v. Livingston, 36 Minn. 312, 30 N. W. 814.

§ 410. Where the defendant pleads a counterclaim the plaintiff cannot dismiss as of right.

Griffin v. Jorgenson, 22 Minn. 92. As to what constitutes a counterclaim see Dunnell, Minn. Pl. §§ 525–588.

§ 411. The proviso in the statute against more than one dismissal as of right is merely prohibitory and a dismissal forbidden thereby

Digitized by Google

does not in itself operate as a determination of the action on the merits.

Walker v. St. Paul City Ry. Co. 52 Minn. 127, 53 N. W. 1068.

Dismissal by the court before trial.

§ 412. The court may dismiss an action upon the application of either party, after notice to the other, and sufficient cause shown, at any time before the trial.[1] It may do so regardless of whether a provisional remedy has been allowed, a counterclaim made or affirmative relief demanded in the answer.[2] If a plaintiff, after a demurrer to his complaint is overruled, unreasonably neglects to perfect judgment to which he is entitled, the defendant may have an order of dismissal.[3] An order of dismissal will be presumed to have been properly made in the absence of a complete record on appeal.[4] When the action is dismissed by the court before trial a formal order is of course necessary. A mere entry in the clerk's docket by the attorney of a party would be insufficient.

[1] See § 398.

[2] Mathews v. Taaffe, 44 Minn. 400, 46 N. W. 850.

[3] Deuel v. Hawke, 2 Minn. 50 Gil. 37; See Sherrerd v. Frazer, 6 Minn. 572 Gil. 406.

[4] Mathews v. Taaffe, 44 Minn. 400, 46 N. W. 850.

Dismissal by consent before trial.

§ 413. The parties may always stipulate before trial for a dismissal and the sanction of the court is not necessary. The only limitation is that the stipulation must be in writing. Upon the filing of such a stipulation the dismissal is effected by an entry in the clerk's register, made either by the clerk or one of the attorneys.[1] The effect of such a dismissal depends so completely on the wording of the stipulation that it is useless to do more than cite a few illustrative cases.[2]

[1] See § 398.

[2] Rolfe v. Burlington etc. Ry. Co. 39 Minn. 398, 40 N. W. 267; Eastman v. St. Anthony Falls etc. Co. 17 Minn. 48 Gil. 31; Hunsden v. Churchill, 20 Minn. 408 Gil. 360; Grant v. Schmidt, 22 Minn. 1; Herrick v. Butler, 30 Minn. 156, 14 N. W. 794; Cameron v. Chicago etc. Ry. Co. 51 Minn. 153 53 N. W. 199; Rogers v. Greenwood, 14 Minn. 333 Gil. 256.

Voluntary nonsuit.

§ 414. At any time before final submission the plaintiff has an absolute right to "abandon" his action, that is, to take a voluntary nonsuit or dismissal.[1] If the plaintiff asks the court to be permitted to dismiss, it is of course discretionary with the court to grant or deny the application.[2] But if the plaintiff "abandons" his action—walks out of court at any time before final submission—the court is helpless to render any judgment against him except one of dismissal. It is not a contempt of court to refuse to go on with an action. A party cannot be compelled to submit proof.

[1] See § 398 (3).

Digitized by Google

[3] Althen v. Tarbox, 48 Minn. 1, 50 N. W. 828; Lando v. Chicago etc. Ry. Co. 81 Minn. 279, 83 N. W. 1089. See In re Iron Bay Co. 57 Minn. 338, 59 N. W. 346; Kremer v. Chicago etc. Ry. Co. 51 Minn. 15, 52 N. W. 977 as to withdrawal of counterclaim.

§ 415. By implication our statutes give a party pleading a counterclaim an absolute right to have it tried without regard to the wishes of the adverse party. The plaintiff cannot defeat this right by taking a voluntary nonsuit. But he may nevertheless take a dismissal as to his own cause, leaving the cause of the adverse party for trial.

Adams v. Osgood, 55 Neb. 766, 76 N. W. 446, Grignon v. Black, 76 Wis. 674. See Griffin v. Jorgenson, 22 Minn. 92.

Dismissal on failure of plaintiff to appear.

§ 416. The statute provides that the court may dismiss an action "when the plaintiff fails to appear on the trial, and the defendant appears and asks for the dismissal." [1] A trial and judgment on the merits are not authorized.[2] A demurrer to the complaint cannot be ruled upon in the absence of the plaintiff.[3] If the defendant sets up a counterclaim the court cannot grant judgment for the defendant without proof if the plaintiff fails to appear.[4]

[1] See § 398.

[2] Keator v. Glaspie, 44 Minn. 448, 47 N. W. 52; Diment v. Bloom, 67 Minn. 111, 69 N. W. 700.

[3] Boyle v. Adams, 50 Minn. 255, 52 N. W. 860.

[4] Newman v. Newman, 68 Minn. 1, 70 N. W. 776.

Dismissal on demurrer.

§ 417. When a demurrer to a complaint is sustained without leave to amend the defendant is entitled to a judgment of dismissal.[1] Such a judgment is not a bar to a subsequent action on the same cause between the same parties based on a good complaint.[2]

[1] Deuel v. Hawke, 2 Minn. 50 Gil. 37.

[2] Swanson v. Great Northern Ry. Co. 73 Minn. 103, 75 N. W. 1033; Watson v. St. Paul etc. Ry. Co. 76 Minn. 358, 79 N. W. 308. See Dunnell, Minn. Trial Book § 1065.

Dismissal for failure to obey order of court.

§ 418. A trial court has a general power to dismiss an action for the failure of the plaintiff to comply with its orders,[1] as, for example, when the plaintiff fails to bring in additional parties,[2] or to serve a summons and amended complaint in interpleader proceedings,[3] or to enter judgment.[4]

[1] Sherrerd v. Frazer, 6 Minn. 572 Gil. 406.

[2] Johnson v. Robinson, 20 Minn. 170 Gil. 153; N. W. Cement etc. Co. v. Norwegian-Danish etc. Seminary, 43 Minn. 449, 45 N. W. 868.

[3] Hooper v. Balch, 31 Minn. 276, 17 N. W. 617.

[4] Sherrerd v. Frazer, 6 Minn. 572 Gil. 406; Deuel v. Hawke, 2 Minn. 50 Gil. 37.

Digitized by Google

Miscellaneous grounds for dismissal.

§ 419. The court may dismiss an action on the following grounds: that the complaint does not state facts sufficient to constitute a cause of action;[1] that an answer by way of counterclaim does not state a cause of action;[2] misjoinder of parties;[3] want of jurisdiction over the subject-matter of the action;[4] want of jurisdiction over the person;[5] tender of rent and costs in unlawful detainer proceedings;[6] when the reply admits or fails to deny a good defence set up in the answer;[7] when the reply is a departure from the complaint;[8] want of capacity to sue;[9] defect of parties;[10] another action pending;[11] complaint in intervention not showing a right to intervene.[12]

[1] D. M. Osborne & Co. v. Johnson, 35 Minn. 300, 28 N. W. 510. See Dunnell, Minn. Pl. §§ 759–765.

[2] See Dunnell, Minn. Pl. § 768.

[3] See Dunnell, Minn. Pl. §§ 199, 200.

[4] See Stratton v. Allen, 7 Minn. 502 Gil. 409; Ames v. Boland, 1 Minn. 365 Gil. 268; Hagemeyer v. Board of County Com'rs, 71 Minn. 42, 73 N. W. 628.

[5] See § 361.

[6] George v. Mahoney, 62 Minn. 370, 64 N. W. 911.

[7] See upon the general subject of judgment on the pleadings, Dunnell, Minn. Pl. §§ 770–777.

[8] Hoxsie v. Kempton, 77 Minn. 462, 80 N. W. 353; Townsend v. Minneapolis etc. Co. 46 Minn. 121, 48 N. W. 682; Webb v. Bidwell, 15 Minn. 479, Gil. 394.

[9] Dunham v. Byrnes, 36 Minn. 106, 30 N. W. 402.

[10] Mason v. St. Paul etc. Ins. Co. 82 Minn. 336, 85 N. W. 13; Rudd v. Fosseen, 82 Minn. 336, 84 N. W. 496, 1116. See Dunnell, Minn. Pl. §§ 196–201.

[11] Merriam v. Baker, 9 Minn. 40 Gil. 28. See Dunnell, Minn. Pl. §§ 931–943.

[12] Lewis v. Harwood, 28 Minn. 428, 10 N. W. 586.

§ 420. A non-resident defendant whose property has been attached cannot have an action dismissed on the ground that he has no interest in the property.[1] The fact that an action is dismissed as to the original defendant is not alone a reason for dismissing it as to an intervening defendant.[2] A stranger to an action cannot intervene and move for a dismissal.[3]

[1] Whitney v. Sherin, 74 Minn. 4, 76 N. W. 787.

[2] Masterman v. Lumbermen's Nat. Bank, 61 Minn. 299, 63 N. W. 723.

[3] Hunt v. O'Leary, 84 Minn. 200, 87 N. W. 611.

Digitized by Google

NOTICE OF TRIAL AND NOTE OF ISSUE

The statute.

§ 421. "At any time after issue, and at least eight days before the term, either party may give notice of trial; and the party giving notice shall furnish the clerk, at least seven days before the term, with a note of issue, containing the title of the action, the names of the attorneys, and the time when the last pleading was served: and the clerk shall thereupon enter the cause upon the calendar according to the date of the issue. The cause once placed upon the calendar of a term if not tried at the term for which notice was given, need not be noticed for a subsequent term, but shall remain upon the calendar from term to term, until finally disposed of or stricken off by the court. The party upon whom notice of trial is served may also file the note of issue, and cause the action to be placed upon the calendar, without further notice on his part."

[G. S. 1894 § 5362] See G. S. 1894 § 4861 for special law for Ramsey county.

Notice of trial.

§ 422. A party is entitled to a notice of trial as a matter of right. If a new trial is ordered and an appeal taken from the order the cause must be again noticed for trial if the order is affirmed. A right to have a cause stricken from the calendar is not waived by participating in a trial after a refusal of the court to strike from the calendar or to continue the cause.[1] In this state, contrary to the prevailing rule elsewhere, a notice of trial is not avoided by a subsequent amendment of the pleadings.[2] No notice is necessary in case of default, but if a party appears he is entitled to notice although he does not answer.[3] Service is to be made in the mode stated in § 1931 and upon the attorney rather than the party.[4] If the attorney has removed from the state since the commencement of the action notice may, in certain cases, be made on him by mail.[5] When there are several parties appearing by different attorneys each of such attorneys must be served with notice.[6] No doubt a notice may be served on the same day issue is formed but it must be after issue is formed and fractions of a day will be considered.[7] A notice not served in time is a mere nullity and need not be returned.[8] Error in names or dates is not fatal unless the adverse party was in fact misled.[9] Admission of service of a notice of trial is not a waiver of objection to the want of jurisdiction over the subject matter.[10] A notice is necessary although the trial is to be had at a special term.[11] The erroneous refusal of the court to strike from the calendar a case based on an improper notice of trial is a ground for a new trial.[12] The mere fact that an action is not brought to trial for many years affords no reason for disturbing the decision of the trial court on the merits.[13]

[1] Mead v. Billings, 43 Minn. 239, 45 N. W. 228; Flanagan v. Borg, 64 Minn. 394, 67 N. W. 216.

Digitized by Google

[2] Stevens v. Curry, 10 Minn. 316 Gil. 249; Griggs v. Edelbrock, 59 Minn. 485, 61 N. W. 555.
[3] See §§ 1928, 1956; Tracy v. New York etc. Co. 1 E. D. Smith (N. Y.) 349.
[4] See § 1935.
[5] Olmstead v. Firth, 64 Minn. 243, 66 N. W. 988.
[6] Atty. General v. Stevens, 3 Price 72.
[7] Wallace v. Syracuse etc. Ry. Co. 27 N. Y. App. Div. 457.
[8] Walker v. Chilson, 65 Hun (N. Y.) 529.
[9] Douw v. Rice, 11 Wend. (N. Y.) 178; Homberger v. Brandenberg, 35 Minn. 401, 29 N. W. 123.
[10] Hagemeyer v. Board of County Com'rs, 71 Minn. 42, 73 N. W. 628.
[11] Colt v. Vedder, 19 Minn. 539 Gil. 469.
[12] Flanagan v. Borg, 64 Minn. 394, 67 N. W. 216.
[13] Auerbach v. Gieseke, 40 Minn. 258, 41 N. W. 946.

Note of issue.

§ 423. The object of the note of issue is to fix the place of the cause on the calendar as the clerk is required by the statute to "enter the cause upon the calendar according to the date of the issue," irrespective of the time of filing. Irregularities in a note which did not in fact mislead will be disregarded.[1] A new note should be filed whenever a new notice of trial is served [2] and the notice of trial and note of issue must correspond as to the term.[3] In Hennepin county it is provided by rule of court that "all notes of issue hereafter filed with the clerk of this court for the general terms thereof, shall contain a statement showing whether said cause is a court or jury case; and where said cause is a default divorce case, the words 'Default Divorce' shall be entered upon said note of issue."

[1] Homberger v. Brandenberg, 35 Minn. 401, 29 N. W. 123.
[2] See Mead v. Billings, 43 Minn. 239, 45 N. W. 228.
[3] Finelite v. Dorian, 14 N. Y. App. Div. 125.

NOTICE TO MUNICIPALITIES IN NEGLIGENCE CASES

The statute.

§ 424. "Before any city, village or borough in this state shall be liable to any person for damages for, or on account of, any injury or loss alleged to have been received or suffered by reason of any defect in any bridge, street, road, sidewalk, park, public ground, ferry boat, or public works of any kind in said city, village or borough, or by reason of any alleged negligence of any officer, agent, servant or employe of said city, village or borough, the person so alleged to be injured, or some one in his behalf, shall give to the city or village council, or trustees or other governing body of such city, village or borough, within thirty days after the alleged injury, notice thereof; and shall present his or their claim to compensation to such council or governing body in writing, stating the time

Digitized by Google

when, the place where and the circumstances under which such alleged loss or injury occurred and the amount of compensation or the nature of the relief demanded from the city, village or borough, and such body shall have ten days' time within which to decide upon the course it will pursue with relation to such claim; and no action shall be maintained until the expiration of such time on account of such claim nor unless the same shall be commenced within one year after the happening of such alleged injury or loss."

[Laws 1897 ch. 248]

§ 425. This statute has been declared unconstitutional so far as it relates to actions for the negligence of municipal officers not connected with "any bridge, street, road, sidewalk, park, public ground, ferry boat or public works of any kind."[1] It is not unconstitutional as special legislation.[2] Its provisions are mandatory and apply to all cities, villages and boroughs of the state.[3] It repeals and supersedes similar provisions found in the charters of many cities.[4] The object of the statute is to give the proper municipal officers information so that they may investigate the matter promptly and determine whether it is advisable to settle or resist the claim.[5] If the notice is to be presented to the council when it is in session, the orderly course of procedure is to deliver it to the clerk or other officer having charge of the records of the council for its consideration. If the council is not in session when the notice is served, it may be directed to the council, and left with the clerk or other officer who has charge of the records and files of the council, with a request annexed that it be laid before the council at its next meeting;[6] but such a request is not essential.[7] It is sufficient if the notice and claim reach the council or governing body in due time although it passes through the hands of others.[8] Service on the mayor of a city is insufficient.[9] Service on a village recorder is sufficient if made at his office or place of transacting the official business of his office.[10] If a notice and claim is addressed to the council and served on the proper officer the fact that it never reaches the council does not prejudice the claimant.[11] The notice may be served on an assistant city clerk.[12] Service may be made by delivering to the proper officer copies of the notice.[13] There is no exclusive mode of making the service. It must be done in some practical, orderly, and effective way, and in determining the sufficiency of the method adopted in any particular case technical strictness will not be required; a substantial compliance with the statute is all that is required.[14] The place of the accident must be designated specifically.[15] The claimant is not concluded by the amount of compensation stated in his notice but in a subsequent action may recover his actual damages.[16] Where the claim is for money compensation it is not sufficient that the notice state the nature of the relief demanded without stating the amount of compensation demanded. The clause "nature of the relief demanded" applies to cases where some other relief than money compensation is demanded.[17] A notice to which the claimant signed the initials of her husband's name instead of her own has been held sufficient.[18] A pump

Digitized by Google

house connected with a city's waterworks is included in the term "public works."[19] Error in the address is immaterial if the notice is actually served on the proper person.[20] The words "any defect in any bridge, street etc." refer to defects in such public ways or structures as such, and with regard to their usefulness and safety for the purposes of travel.[21] The statute applies to cases of injury to property as well as person.[22] If a notice conveys the necessary information to the proper person it is good even though there are some inaccuracies in it.[23] The statute is not applicable to an action by the personal representatives of a deceased person whose death was caused by such a defect.[24]

[1] Winters v. City of Duluth, 82 Minn. 127, 84 N. W. 788.
[2] Bausher v. City of St. Paul, 72 Minn. 539, 75 N. W. 745.
[3] Id.; Engstrom v. City of Minneapolis, 78 Minn. 200, 80 N. W. 962; Doyle v. City of Duluth, 74 Minn. 157, 76 N. W. 1029.
[4] Nicol v. City of St. Paul, 80 Minn. 415, 83 N. W. 375; Neissen v. City of St. Paul, 80 Minn. 414, 83 N. W. 376.
[5] Id.; Terryll v. City of Faribault, 84 Minn. 341, 87 N. W. 917; Kelly v. City of Minneapolis, 77 Minn. 76, 79 N. W. 653; Doyle v. City of Duluth, 74 Minn. 157, 76 N. W. 1029; Nichols v. City of Minneapolis, 30 Minn. 545, 16 N. W. 410; McDevitt v. City of St. Paul, 66 Minn. 14, 68 N. W. 178.
[6] Lyons v. City of Red Wing, 76 Minn. 20, 78 N. W. 868; Doyle v. City of Duluth, 74 Minn. 157, 76 N. W. 1029.
[7] Roberts v. Village of St. James, 76 Minn. 456, 79 N. W. 519.
[8] Lyons v. City of Red Wing, 76 Minn. 20, 78 N. W. 868.
[9] Doyle v. City of Duluth, 74 Minn. 157, 76 N. W. 1029.
[10] Peterson v. Village, 84 Minn. 205, 87 N. W. 615.
[11] Id.
[12] Kelly v. City of Minneapolis, 77 Minn. 76, 79 N. W. 653.
[13] Id.
[14] Roberts v. Village of St. James, 76 Minn. 456, 79 N. W. 519; Kelly v. City of Minneapolis, 77 Minn. 76, 79 N. W. 653; Ljungberg v. Village of North Mankato, (Minn. 1902) 92 N. W. 401.
[15] Lyons v. City of Red Wing, 76 Minn. 20, 78 N. W. 868; Harder v. City of Minneapolis, 40 Minn. 446, 42 N. W. 350.
[16] Terryll v. City of Faribault, 84 Minn. 541, 87 N. W. 917.
[17] Bausher v. City of St. Paul, 72 Minn. 539, 75 N. W. 745.
[18] Terryll v. City of Faribault, 81 Minn. 519, 84 N. W. 458.
[19] Winters v. City of Duluth, 82 Minn. 127, 84 N. W. 127.
[20] Johnson v. City of St. Paul, 52 Minn. 364, 54 N. W. 735.
[21] Pye v. City of Mankato, 38 Minn. 536, 38 N. W. 621; Moran v. City of St. Paul, 54 Minn. 279, 56 N. W. 80.
[22] Nichols v. City of Minneapolis, 30 Minn. 545, 16 N. W. 410.
[23] Harder v. City of Minneapolis, 40 Minn. 446, 42 N. W. 350.
[24] Orth v. Village of Belgrade, (Minn. 1902) 91 N. W. 843.

Digitized by Google

NOTICE TO NEWSPAPER BEFORE ACTION FOR LIBEL

The statute.

§ 426. It is provided by statute that "before any suit shall be brought for the publication of a libel in any newspaper in this state, the aggrieved party shall, at least three days before filing or serving the complaint in such suit, serve notice on the publisher or publishers of said newspaper at their principal office of publication, specifying the statements in the said articles which he or they allege to be false and defamatory." [1] Personal service of the notice may be made elsewhere than at his office provided it is made at such a place and under such circumstances as to afford reasonable opportunity to act upon it for the purpose of publishing a retraction.[2] Failure to serve the notice does not go to the cause of action but only to the damages recoverable.[3]

[1] G. S. 1894 § 5417. See Allen v. Pioneer Press Co. 40 Minn. 117, 41 N. W. 936; Clementson v. Minnesota Tribune Co. 45 Minn. 303, 47 N. W. 781; Gray v. Minnesota Tribune Co. 81 Minn. 333, 84 N. W. 113; Gray v. Times Newspaper Co. 74 Minn. 452, 77 N. W. 204.

[2] Holston v. Boyle, 46 Minn. 432, 49 N. W. 203.

[3] Clementson v. Minnesota Tribune Co. 45 Minn. 303, 47 N. W. 781.

COMPULSORY EXAMINATION OF PLAINTIFF IN PERSONAL INJURY CASES

General statement.

§ 427. In a civil action for personal injuries, in which the plaintiff tenders an issue as to his physical condition the trial court has a discretionary power, under proper safeguards to protect the rights of both parties, to order the plaintiff to submit to a physical examination of his person in order to ascertain the nature and extent of his injuries and if he refuses to submit his action may be dismissed.[1] This extraordinary power, which has been denied in the highest courts of this country, should be exercised only in exceptional cases and only when it is manifest that the injuries alleged are of such a character that their existence and extent could not be brought out by the ordinary examination and cross-examination on the trial. In the case of a female plaintiff the court should never appoint male physicians to conduct the examination, without her consent, if the injury is of a private nature. An application should be denied if not made a reasonable time before the trial. The court should select the physicians and they should not be suggested by the defendant.

[1] Wanek v. City of Winona, 78 Minn. 98, 80 N. W. 851; Wittenberg v. Onsgard, 78 Minn. 342, 81 N. W. 14; Aske v. Duluth etc. Ry. Co. 83 Minn. 197, 85 N. W. 1011 (query as to whether order is admissible in evidence to give credit to examiner).

Digitized by Google

§ 428. Whether a person can be compelled to submit to be photographed by the use of the Roentgen or X-rays is undetermined.
Wittenberg v. Onsgard, 78 Minn. 342, 81 N. W. 14.

NOTICE TO PRODUCE DOCUMENTS

When necessary.

§ 429. Secondary evidence of the contents of documents may not be given unless the party proposing to give it has, if the originals are in the possession or under the control of the adverse party, given him such notice to produce the documents as the court regards as reasonably sufficient;[1] or has, if the originals are in the possession of a stranger to the action, served him with a subpœna duces tecum requiring their production.[2] Such notice is not necessary:

(1) When the document to be proved is itself a notice.[3]

(2) When the action is founded upon the assumption that the document is in the possession or power of the adverse party and requires its production.[4]

(3) When it appears or is proved that the adverse party has obtained possession of the original from a person subpœnaed to produce it.[5]

(4) When the adverse party or his agent has the original in court.[6]

(5) When the adverse party has sought in any way to prevent its production.[7]

(6) When the adverse party has admitted its loss.[8]

(7) When the adverse party denies possession.[9]

(8) When the document was executed in duplicate.[10]

[1] Desnoyer v. McDonald, 4 Minn. 515 Gil. 402; City of Winona v. Huff, 11 Minn. 119 Gil. 75; Smith v. Moorhead, 23 Minn. 141; Lovejoy v. Howe, 55 Minn. 353, 57 N. W. 57; Hobe v. Swift, 58 Minn. 84, 59 N. W. 831; Rosemond v. N. W. Autographic Register Co. 62 Minn. 374, 64 N. W. 925; McNamara v. Pengilly, 64 Minn. 543, 67 N. W. 661; Clary v. O'Shea, 72 Minn. 105 75 N. W. 115 (denial of existence of document no excuse for want of notice).

[2] Desnoyer v. McDonald, 4 Minn. 515 Gil. 402.

[3] Eagle Bank v. Chapin, 3 Pick. (Mass.) 182; Morrow v. Com. 48 Pa. St. 308; Gethin v. Walker, 59 Cal. 502; Quinley v. Atkins, 9 Gray (Mass.) 370.

[4] Lawson v. Bachman, 81 N. Y. 616; Dana v. Conant, 30 Vt. 246; Merrill v. Boston etc. Ry. Co. 58 N. H. 68; Ross v. Lewis, 10 Mich. 483; Kellar v. Savage, 20 Me. 199; Zipp v. Colchester Rubber Co. 12 S. D. 218, 80 N. W. 367.

[5] Leeds v. Cook, 4 Esp. 256.

[6] McPherson v. Rathbone, 7 Wend. (N. Y.) 216; Kerr v. McGuire, 28 N. Y. 446; Chadwick v. U. S. 3 Fed. 750.

[7] Mitchell v. Jacobs, 17 Ill. 236; Bright v. Pennywit, 21 Ark. 130.

[8] Foster v. Pointer, 9 C. & P. 718. See Smith v. Moorhead Mfg. Co. 23 Minn. 141.

Digitized by Google

[9] Roberts v. Spencer, 123 Mass. 397.
[10] Totten v. Bucy, 57 Md. 446.

Necessity of introducing document produced.

§ 430. When a party calls for a document which he has given the other party notice to produce, and such document is produced to, and inspected by, the party calling for its production, he is bound to give it as evidence if the party producing it requires him to do so and it is relevant and admissible.

Stephen, Ev. Art. 138; Long v. Drew, 114 Mass. 77; Blake v. Russ, 33 Me. 360; Merrill v. Merrill, 67 Me. 70; Morrison v. Whiteside, 17 Md. 452; Com. v. Davidson, 1 Cush. (Mass.) 33.

Effect of refusal to produce.

§ 431. When a party refuses to produce a document which he has had notice to produce, he may not afterwards use the document as evidence without the consent of the other party, and every presumption may be indulged against him.

Stephen, Ev. Art. 139; McGuiness v. School District, 39 Minn. 499, 41 N. W. 103.

Notice to attorney.

§ 432. The notice should be served on the attorney of the adverse party.

Brown v. Littlefield, 7 Wend. (N. Y.) 454.

Specification of papers sought.

§ 433. The notice must specify with reasonable definiteness the papers sought. It is generally sufficient in the case of correspondence to demand the production of all letters received from a designated person on a designated subject between certain dates.

McDowell v. Aetna Ins. Co. 164 Mass. 444. See Carson v. Hawley, 82 Minn. 204, 84 N. W. 746.

INSPECTION OF DOCUMENTS

The statute.

§ 434. "The court before which an action is pending, or a judge thereof, may order either party to give to the other, within a specified time, an inspection and copy, or permission to take a copy, of any book, document or paper in his possession or under his control, containing evidence relating to the merits of the action, or the defence therein; if compliance with the order is refused, the court may exclude the book, document or paper from being given in evidence, or, if wanted as evidence by the party applying, may direct the jury to presume it to be such as he alleges it to be; and the court may also punish the party refusing. This section is not to be construed to prevent a party from compelling another to produce books, papers or documents, when he is examined as a witness."

[G. S. 1894 § 5750] Substantially the same statute is to be found in all the code states.

Digitized by Google

Scope and purpose of statute.

§ 435. The sole object of our statute is to enable a party to obtain information for the conduct of his action or defence from papers in the possession of the adverse party. There is no authority in this state to order an inspection to enable a party to draft his complaint, answer or reply.

See Kraus v. Sentinel Co. 62 Wis. 660.

Order discretionary—rarely granted.

§ 436. An order for inspection of papers is not a matter of right but rests in the discretion of the trial court.[1] It is a discretion to be cautiously and sparingly exercised and only when a claim or defence might otherwise be lost and the party has no other adequate remedy. The remedy must be indispensably necessary and not merely a precautionary measure. Every doubt should be resolved against granting an order.[2]

[1] Clyde v. Rogers, 87 N. Y. 625; Finlay v. Chapman, 119 N. Y. 404.

[2] Woods v. De Figaniere, 25 How. Pr. (N. Y.) 522; Campbell v. Hoge, 2 Hun (N. Y.) 308; Harbison v. Von Volkenburgh, 5 Hun (N. Y.) 454.

When application will be denied.

§ 437. An application for an order for inspection will be denied when the evidence sought is such that it would not be admissible on the trial;[1] when the evidence sought is not in support of the applicant's case but in support of the adverse party's cause of action or defence;[2] when the evidence sought does not go to the merits;[3] when the evidence sought might criminate the party;[4] when the evidence sought is a privileged communication;[5] when it is not made to appear that the applicant is without other means of requiring the information;[6] when a production of the papers on the trial in response to a tecum duces would be equally effective;[7] when an examination of the adverse party under the statute would be equally effective;[8] when the disclosure would subject the party to a penalty or forfeiture.[9]

[1] Powell v. Northern Pacific Ry. Co. 46 Minn. 249, 48 N. W. 907; Woods v. De Figaniere, 1 Robt. (N. Y.) 681.

[2] Lester v. People, 150 Ill. 408; Abrahams v. Swann, 18 W. Va. 274, 278.

[3] Davis v. Dunham, 13 How. Pr. (N. Y.) 425; Sanger v. Seymour, 42 Hun (N. Y.) 641.

[4] Lester v. People, 150 Ill. 408; Kellogg v. Sowerby, 32 Misc. (N. Y.) 327. Aliter if prosecution barred by statute of limitations, McCreery v. Ghormley, 6 N. Y. App. Div. 170.

[5] Lowenthal v. Leonard, 20 N. Y. App. Div. 330.

[6] McAllister v. Pond, 15 How. Pr. (N. Y.) 299; Woods v. De Figaniere, 1 Robt. (N. Y.) 681.

[7] Commercial Bank v. Dunham, 13 How. Pr. (N. Y.) 541; Lowenthal v. Leonard, 20 N. Y. App. Div. 330.

[8] Commercial Bank v. Dunham, 13 How. Pr. (N. Y.) 541.

Digitized by Google

[6] Newgold v. American etc. Co. 108 Fed. 341. See State v. Standard Oil Co. (Neb. 1900) 84 N. W. 413.

Mode of application.

§ 438. The proper practice is to apply for the order by motion upon a regular notice of eight days or an order to show cause. A peremptory order for disclosure should never be granted ex parte.[1] The notice should be served on the attorney rather than the party.[2] The motion should be based on an affidavit setting forth the grounds of the application. The affidavit may be made either by the party or his attorney.[3]

[1] Dick v. Phillips, 41 Hun (N. Y.) 1603.
[2] Union Trust Co. v. Driggs, 49 N. Y. App. Div. 406.
[3] Schuetze v. Cent. Ins. Co. 69 Wis. 252.

Showing necessary—affidavit.

§ 439. The affidavit upon which the application is made should show:

(1) That an action is pending wherein the application is made and that the parties are at issue.[1]

(2) The particular information sought.[2]

(3) A specific description of the papers sought to be inspected. The description must be sufficiently definite and certain to inform the adverse party just what is sought and to enable the court to determine whether the papers are subject to inspection and liable to contain admissible and material evidence.[3]

(4) That the papers are in the possession or under the control of the adverse party and not in the possession or under the control of the applicant.[4]

(5) That it is reasonably certain that the papers contain evidence bearing on the merits of the applicant's cause of action or defence. It is not enough to show that the papers might contain such evidence. Facts and circumstances must be stated sufficient to satisfy the court that the books and papers sought to be examined do, in fact, contain material evidence for the party, and it is not enough that the party believes or is advised that material evidence will be found.[5] The facts must be stated positively, or if stated on information and belief the sources and grounds of such information and belief must be given so that the court may determine whether they are reasonable.[6]

(6) The materiality and necessity of the evidence sought. Facts must be stated showing why and how the evidence sought is material and necessary; that the evidence cannot be obtained from any other source; that the facts sought to be proved cannot be proved by any other available evidence; that a subpœna duces tecum or an examination of the party would not answer the purpose; that the applicant would be likely to fail in his cause of action or defence without the evidence.[7]

(7) The admissibility of the evidence. This should be shown by a definite description of the evidence expected to be obtained.[8]

[1] Sheek v. Sain, 127 N. C. 266.
[2] Walker v. Granite Bank, 44 Barb. (N. Y.) 39.

Digitized by Google

[3] Low v. Graydon, 14 Abb. Pr. (N. Y.) 443; Speyers v. Torstritch, 5 Robt. (N. Y.) 606.

[4] Jackling v. Edmonds, 3 E. D. Smith (N. Y.) 539 (rule of court in N. Y.).

[5] Walsh v. Press Co. 48 N. Y. App. Div. 333; New England Iron Co. v. N. Y. Loan etc. Co. 55 How. Pr. (N. Y.) 351;

[6] Goodyear Rubber Co. v. Gorham, 86 Hun (N. Y.) 342; Walker v. Granite Bank, 19 Abb. Pr. (N. Y.) 111.

[7] Commercial Bank v. Dunham, 13 How. Pr. (N. Y.) 541; Pegram v. Carson, 18 How. Pr. (N. Y.) 519; Morrison v. Sturges, 26 How. Pr. (N. Y.) 177; New England Iron Co. v. New York Loan etc. Co. 55 How. Pr. (N. Y.) 351 and cases under § 437.

[8] Powell v. Northern Pac. Ry. Co. 46 Minn. 249, 48 N. W. 907.

Effect of denial of possession.

§ 440. If the adverse party unequivocally denies possession or control of the papers sought the application must be denied as a matter of course.[1] If it appears that the papers were at one time in the possession of the party it is not enough for him to deny present possession or control; he must go further and show what he did with them.[2]

[1] Bradstreet v. Bailey, 4 Abb. Pr. (N. Y.) 233.

[2] Union Trust Co. v. Driggs, 49 N. Y. App. Div. 406.

Bills of discovery abrogated.

§ 441. This and other statutes have abrogated bills of discovery as formerly granted by courts of equity.

Turnbull v. Crick, 63 Minn. 91, 65 N. W. 135.

Compulsory examination of party before trial.

§ 442. There is no authority in this state for the compulsory examination of a party before trial either orally or upon written interrogatories.

Leuthold v. Fairchild, 35 Minn. 99, 27 N. W. 503, 28 N. W. 218.

Time of application.

§ 443. It is quite clear that under our statute an application cannot be made before issue is formed.[1] The contrary practice in New York is based on a rule of court. It must be made promptly after issue is formed and will be denied when not made until just before the trial.[2]

[1] Sheek v. Sain, 127 N. C. 266.

[2] Mut. Reserve Fund Assoc. v. Patterson, 33 Misc. (N. Y.) 572; Moran v. Vreeland, 29 N. Y. App. Div. 243.

Digitized by Google

DEPOSITIONS

I UPON NOTICE BY PARTY

The statute.

§ 444. "Whenever the testimony of any person within[1] or without this state, or in any other portion of the United States, is wanted in any civil action or proceeding in any court of this state, the same may be taken by and before any officer authorized to administer an oath in the state or territory or district of the United States in which the testimony of such person may be taken, upon notice to the adverse party of the time and place of taking the same. Such notice shall be in writing, and shall be served as other notices in civil actions are required to be served,[2] and shall be served so as to allow the adverse party sufficient time, by the usual route of travel,[3] allowing one day for every one hundred miles of distance between the place of the service of the notice and the place of the taking of such testimony, and one day for preparation, exclusive of Sundays and the day of service; and the examination may, if so stated in the notice, be adjourned from day to day: provided, that the justice of the peace, or judge of the court before which, or the court commissioner of the county in which, the action is pending, may, on motion, and by order in the cause, designate the time and place for the taking of the testimony, and the time within which a copy of the order shall be served on the adverse party or his attorney: and provided, further, that whenever the defendant in any action or proceeding is in default for want of an answer or other defence, such notice or order need not be served upon him."

[G. S. 1894 § 5688]

[1] Originally this statute applied only to depositions to be taken out of the state. By Laws 1885 ch. 53 "within or" were added and the amendment has been held constitutional. Atkinson v. Nash, 56 Minn. 472, 58 N. W. 39; Carner v. Chicago etc. Ry. Co. 43 Minn. 375, 45 N. W. 713.

[2] See § 2031.

[3] See § 464.

§ 445. This method of taking depositions is so simple that it has practically superseded all other methods in cases where it can properly be employed. It is to be observed that a deposition cannot be taken in a foreign country under this statute, but resort must be had to a commission or stipulation. So, too, if the parties wish to avoid the expense of being present at the examination in person or by attorney the deposition cannot, apparently, be taken under this statute, but written interrogatories and cross-interrogatories must be sent out under a commission or stipulation.

Mode of taking—certificate—return.

§ 446. "At the time and place specified in the notice or order, or within one hour thereafter, the examination shall commence. Each witness shall, before testifying, be sworn by the officer to testify the

Digitized by Google

whole truth and nothing but the truth relative to the cause specified in the notice or order.[1] The testimony shall be written by the officer.[2] The proceeding may be adjourned from day to day until the examinations are closed.[3] Either party may appear in person, or by an agent or attorney, and take part in the examination.[4] The testimony of each witness, when completed, shall be carefully read over by the officer to him, whereupon he may add thereto or qualify the same as he may desire. When the deposition is completed, the witness shall sign his name, or make his mark, at the end thereof, as well as upon each piece of paper on which any portion of his testimony is written.[5] Thereupon the officer taking such deposition shall annex thereto a copy of the notice or order, and a certificate, under his hand and official seal (if he have one), stating what office he held and exercised when taking such depositions, and that, by virtue thereof, he was then and there authorized to administer an oath, and that each witness, before testifying, was duly sworn to testify the whole truth and nothing but the truth relative to the cause specified in the notice or order, and that each of such depositions were taken pursuant to such notice or order, and who, if any one, examined for the parties respectively. Such certificate shall be prima facie evidence of the matters therein stated, and it may be substantially in the following form:

State of }
County of } ss.

Be it known, that I took the annexed depositions pursuant to the annexed notice (or order); that I was then and there (state the title of the officer); that I exercised the power of that office in taking such deposition; that, by virtue thereof, I was then and there authorized to administer an oath; that each witness, before testifying, was duly sworn to testify to the whole truth and nothing but the truth relative to the cause specified in the annexed notice (or order); that the testimony of each witness was correctly read over to him by me before he signed the same; that the examination was conducted on behalf of the plaintiff by ; that the examination was conducted on behalf of the defendant by .

Witness my hand and seal this day of , A. D. 187–.

Such depositions shall be returned by mail to the justice of the peace before whom the cause is pending, or, if it be pending in a probate court, to the judge thereof, or, if it be pending in any other court of record, then to the clerk thereof; and upon their return, they shall be opened and subject to the inspection of either party."

[G. S. 1894 § 5689]

[1] See § 470.

[2] This apparently precludes the employment of a clerk or stenographer unless both parties are present and consent.

[3] But only if it is so stated in the notice or both parties are present and consent. See § 444.

[4] See § 488 as to contrary practice under commission.

[5] See § 455.

Digitized by Google

Use of as evidence—objections.

§ 447. "Such deposition may be read in evidence at the trial of the action or proceeding; but when the same is offered in evidence, objection may be interposed to the competency of the witness, or to any question put to him, or to the whole or any part of his testimony, in like manner, upon the same grounds, and with the like effect, as if the witness was there testifying in open court: provided, that no objection to the form of any question can be made, unless such objection was made before, and noted by the officer taking such deposition."

[G. S. 1894 § 5690]

§ 448. A party seeking to introduce a deposition in evidence has the burden of showing that a statutory cause existed for its being taken and still exists.[1] A deposition taken at the instance of one party and not used by him may be introduced by the other party. The latter makes such deposition his own and as respects matters of substance the party at whose instance it was taken may raise objections to the interrogatories and answers as if the deposition had been taken at the instance of the other party.[2] Where the party at whose instance a deposition is taken has used the answers to the direct interrogatories, he may, if the opposite party declines to do so, read the answers to the cross-interrogatories.[3] A party offering evidence taken by deposition is not obliged to offer or to read the whole deposition. He may offer and read parts, subject to the order of the court that the whole be read at the same time.[4] Where depositions were taken on a stipulation which waived all objections except to the competency, relevancy, and materiality of the testimony, and the parties appeared, examined and cross-examined the witnesses and took and had noted certain objections to the testimony, it was held that one of the parties could not, on the trial, take other objections to other parts of the testimony.[5] A deposition taken at the instance of one of two interveners was held admissible in favor of the other in view of the facts of the case.[6]

[1] See § 462.

[2] In re Smith, 34 Minn. 436, 26 N. W. 234; Byers v. Orensstein, 42 Minn. 386, 44 N. W. 129; Lowry v. Harris, 12 Minn. 255 Gil. 166.

[3] Lowry v. Harris, 12 Minn. 255 Gil. 166.

[4] Watson v. St. Paul City Ry. Co. 76 Minn. 358, 79 N. W. 308.

[5] Pioneer Savings & Loan Co. v. St. Paul etc. Ins. Co. 68 Minn. 170, 70 N. W. 979.

[6] Lougee v. Bray, 42 Minn. 323, 44 N. W. 194.

§ 449. That an interrogatory and answer in a deposition are excluded for any sufficient reason is, as a general rule, no ground for excluding the whole deposition.[1] Where an answer in a deposition is in part proper and in part inadmissible, a party objecting must limit his objection to the part which is inadmissible.[2]

[1] Lowry v. Harris, 12 Minn. 255 Gil. 166; St. Anthony Falls Water Power Co. v. Eastman, 20 Minn. 277 Gil. 249.

[2] Day v. Raguet, 14 Minn. 273 Gil. 203.

Digitized by Google

§ 450. Answers to interrogatories must be full, frank, explicit and responsive and if they are not their admission may be objected to on the trial.[1] It is held, for reasons that are manifest, that when the evidence of a witness is presented to the court in the form of a deposition it must appear that the answers to the cross-interrogatories are fully and fairly given, without the suppression of any fact material to the case. But to determine in any case whether an answer is full and responsive, reference must be had to the interrogatory. If that is general, the answer may be general. If the answer is as full and minute as the interrogatory, naturally and fairly interpreted, calls for, it is sufficient.[2] Where, in answer to a cross-interrogatory, as to the grounds of witness' opinion given in answer to a direct interrogatory, the witness merely refers to his answer to the direct interrogatory, in which he states such grounds fully, it is sufficient.[3]

[1] McMahon v. Davidson, 12 Minn. 357 Gil. 232; Lowry v. Harris, 12 Minn. 255 Gil. 166; St. Anthony Falls Water Power Co. v. Eastman, 20 Minn. 277 Gil. 249; Stone v. Evans, 32 Minn. 243, 20 N. W. 149.

[2] McMahon v. Davidson, 12 Minn. 357 Gil. 232.

[3] St. Anthony Falls Water Power Co. v. Eastman, 20 Minn. 277 Gil. 249.

§ 451. At common law depositions could not be received in evidence and can only be admitted by virtue of the statute or of a stipulation when all the requirements of the same are complied with. They are at best considered an unsatisfactory species of evidence, and courts have uniformly scrutinized them closely and exercised caution in their admission.

Walker v. Barron, 4 Minn. 253 Gil. 178; Chapman v. Dodd, 10 Minn. 350 Gil. 277; State v. Elliott, 75 Minn. 391, 77 N. W. 952.

Effect of informalities—motion to suppress—waiver.

§ 452. "No informality, error or defect in any proceeding under this statute shall be sufficient ground for excluding the deposition, unless the party making objection thereto shall make it appear, to the satisfaction of the court, that the officer taking such deposition was not authorized to administer an oath then and there, or that such party was, by such informality, error or defect, precluded from appearing and cross-examining the witness; and every objection to the sufficiency of the notice, or to the manner of taking, or certifying, or returning such depositions, shall be deemed to have been forever waived, unless such objections are taken by motion to suppress such depositions, which motion shall be made within ten days after service of such notice in writing of the return thereof."

[G. S. 1894 § 5691]

§ 453. The proper construction of this section seems to be that the first part applies only when the objection is raised for the first time on the trial and there was a notice of the return of the deposition and an opportunity to move to suppress before trial. But it has been held[1]—we think erroneously—that the omission of the official seal to the certificate of authentication of a deposition taken

Digitized by Google

before a notary in another state is an "informality" merely under the first part of the section and not sufficient to warrant the rejection of the deposition on the trial, although no notice of the return was served.

[1] Rachac v. Spencer, 49 Minn. 235, 51 N. W. 920. See Everett v. Boyington, 29 Minn. 264, 13 N. W. 45.

§ 454. The effect of a failure to give notice of the return of a deposition is not to render it inadmissible but simply to leave the adverse party at liberty to make at the trial any objections that he could have made on a motion to suppress.[1] Where the time elapsing between notice of the filing of a deposition and the trial is less than ten days so that the adverse party has not the statutory time within which to move to suppress before trial the effect is not to render the deposition inadmissible, but to leave the adverse party in the same position as if no notice had been given; that is to say, he may make at the trial all objections that he could have made upon a motion to suppress.[2] The following objections must be made by a motion to suppress, if an opportunity was given and cannot be raised on the trial: that the depositions contain the testimony of witnesses not named in the notice;[3] that the name of a witness was not properly given in the notice;[4] that the notice was not signed by the firm name of the attorneys appearing for the party taking the depositions;[5] that the deposition was written out in the third person.[6]

[1] Osgood v. Sutherland, 36 Minn. 243, 31 N. W. 211; Tancre v. Reynolds, 35 Minn. 476, 29 N. W. 171; Smith v. Groneweg, 40 Minn. 148, 41 N. W. 939.

[2] Tancre v. Reynolds, 35 Minn. 476, 29 N. W. 171.

[3] Thompson v. St. Paul City Ry. Co. 45 Minn. 13, 47 N. W. 259.

[4] Waldron v. City of St. Paul, 33 Minn. 87, 22 N. W. 4.

[5] Osgood v. Sutherland, 36 Minn. 243, 31 N. W. 211.

[6] Hahn v. Bettingen, 81 Minn. 91, 83 N. W. 467.

§ 455. Where depositions are taken upon notice of the party and the parties attend and take part in the examination of the witnesses, and there is no suggestion that the depositions are not full and complete and returned in the same condition in which they were taken, the omission of the witnesses to sign or mark each separate sheet containing the evidence may be treated as an irregularity merely, and the decision of the trial judge, who had an opportunity to inspect the original record, refusing to suppress the deposition, will not ordinarily be disturbed by the supreme court.

Smith v. Groneweg, 40 Minn. 178, 41 N. W. 939.

§ 456. Defects of a purely formal nature which could not have misled or prejudiced the adverse party are not a ground for suppressing a deposition or for excluding it at the trial.

Osgood v. Sutherland, 36 Minn. 243, 31 N. W. 211; Smith v. Groneweg, 40 Minn. 178, 41 N. W. 939; Breckett v. Gridley, 67 Minn. 37, 69 N. W. 622; Molm v. Barton, 27 Minn. 530, 8 N. W. 765.

Digitized by Google

Costs on failure to appear.

§ 457. "Whenever any party shall, under the provisions of this act, serve notice of the taking of the testimony of any person, and the adverse party shall, by himself or attorney, in pursuance of such notice, attend at the time and place therein named, and the party serving such notice shall fail or neglect to appear and proceed with the taking of such testimony, the justice of the peace, or judge of the court, before whom, or in which, the action is pending, shall allow such adverse party such sum for expenses and for attorney's fees incurred in making such attendance as he shall deem proper, which sum shall be collected in the same manner as other costs and disbursements in the action or proceeding."

[G. S. 1894 § 5692]

II UPON NOTICE BY JUSTICE OF PEACE

General provision.

§ 458. "Depositions may be taken in the manner, and according to the regulations, provided in this chapter, to be used before any magistrates or other persons authorized to examine witnesses, in any other than criminal cases."

[G. S. 1894 § 5667] Our statutes regulating this mode of taking depositions were taken from Mass.

§ 459. A subsequent statute provides that depositions may be taken and used in behalf of the accused in criminal actions in the same manner and in the like cases as they are taken and used in civil actions.

G. S. 1894 § 6284. See State v. Gut, 13 Minn. 341 Gil. 315.

§ 460. A party may take a second deposition of the same witness. Akers v. Demond, 103 Mass. 318.

In what cases allowable.

§ 461. "When a witness whose testimony is wanted in any civil cause pending in this state, lives more than thirty miles from the place of trial, or is about to go out of the state, and not to return in time for the trial, or is so sick, infirm or aged as to make it probable that he will not be able to attend at the trial, his deposition may be taken in the manner hereinafter provided."

[G. S. 1894 § 5668]

§ 462. These causes for taking and using depositions are exclusive and before a deposition taken in this state can be introduced in evidence it must be made to appear to the satisfaction of the court that one of these causes existed at the time the deposition was taken and still exists. If the deposition was taken under notice by a justice of the peace this proof may be made out prima facie by the statement of the true cause required to be embodied in the certificate of the justice. The certificate of the justice may be contradicted or evidence may be introduced to show that the cause of taking the deposition no longer exists. The burden of proof rests

Digitized by Google

on the party introducing the deposition. If the deposition was taken under notice by one of the parties proof must be made aliunde the certificate of the officer taking the deposition. This proof may undoubtedly be made out prima facie by the evidence of the witnesses themselves in the deposition.

Atkinson v. Nash, 56 Minn. 472, 58 N. W. 39; Davison v. Sherburne, 57 Minn. 355, 59 N. W. 316; State v. Elliott, 75 Minn. 391, 77 N. W. 952.

§ 463. The certificate of the justice, in order to make it prima facie evidence of the existence of one of the causes must be full and explicit. For example, it is insufficient merely to state that the witness is sick but it should state that he is so sick as to make it probable that he will not be able to attend at the trial.

Lund v. Dawes, 41 Vt. 370. See also Barron v. Pettes, 18 Vt. 385.

§ 464. The distance is to be calculated in accordance with the customary way of travel.[1] A witness "lives" within the meaning of the statute where he can be found and is sojourning, residing or abiding. The test is not where his domicil is.[2]

[1] In re Foster, 44 Vt. 570; Marston v. Forward, 5 Ala. 347.

[2] Mutual Benefit Life Ins. Co. v. Robison, 58 Fed. 723.

§ 465. The deposition of a non-resident temporarily within the state may be taken on the ground that he is about to go out of the state.[1] The intention of the witness to leave the state sufficiently appears from the certificate of the officer to that effect, though the witness in the body of the deposition testifies to the contrary, if in fact the witness did leave the state before the trial.[2]

[1] Higginson v. New York Second Nat. Bank, 53 Hun (N. Y.) 129; Schoneman v. Fegley, 7 Pa. St. 433.

[2] Livesey v. Bennett, 14 Gray (Mass.) 130.

Time of taking—notice by justice.

§ 466. "At any time after the cause is commenced by the service of process or otherwise, or after it is submitted to arbitrators or referees, either party may apply to any justice of the peace, who shall issue a notice to the adverse party, to appear before the said justice, or any other justice of the peace, at the time and place appointed for taking the deposition, and to put such interrogatories as he may see fit."

[G. S. 1894 § 5669]

§ 467. A party does not waive proper notice merely by appearing at the examination and examining the witnesses.[1] The statutory requirement as to service of notice must be followed with strictness. A mere reading of the notice to the party is insufficient.[2] The person notified must have not less than twenty-four hours notice before the time required for his attendance; and if he has to travel to the place of attendance, he must have sufficient time for that purpose, not less than at the rate of one day for every twenty miles of travel. The time and distance are measured by hours, and there-

Digitized by Google

fore fractions of a day may be computed, both as to notice and the time necessary to reach the place of appointment. The party is not entitled to twenty-four hours in addition to the time allowed for his travel if his travel takes a day.[3] The affidavit of service should state the hour of service.[4]

[1] Hunt v. Lowell Gas Light Co. 1 Allen (Mass.) 343.
[2] Young v. Capen, 7 Met. (Mass.) 287.
[3] City Bank v. Fullerton, 11 Met. (Mass.) 73.
[4] Hunt v. Lowell Gas Light Co. 1 Allen (Mass.) 343.

Service of notice—waiver.

§ 468. "The said notice may be served on the agent or attorney of the adverse party, and shall have the same effect as if served on the party himself. When there are several persons, plaintiffs or defendants, a notice served on either of them is sufficient. The notice shall be served by delivering an attested copy thereof to the person to be notified, or by leaving such copy at his place of abode, allowing in all cases not less than twenty-four hours after such notice before the time appointed for taking the depositions, and also allowing time for his travel to the place appointed after being notified, not less than at the rate of one day, Sundays excepted, for every twenty miles travel. The written notice before prescribed may be wholly omitted, if the adverse party or his attorney, in writing, waives the right to it."

[G. S. 1894 §§ 5670–5673]

Oath of deponent—examination.

§ 469. "The deponent shall be sworn to testify the whole truth, and nothing but the truth, relating to the cause for which the deposition is taken, and he shall then be examined by the parties, if they see fit, or by the justice, and his testimony shall be taken in writing."

[G. S. 1894 § 5674]

§ 470. The certificate of the justice must be explicit to the effect that the witnesses were sworn as required by this statute. It is not enough to state that the witnesses were sworn to testify the whole truth and nothing but the truth.[1] The same strictness is not required in the certificates of officers out of the state.[2]

[1] Simpson v. Carleton, 1 Allen (Mass.) 109; Hackett v. King, 8 Allen (Mass.) 144; Burt v. Allen, 103 Mass. 41.
[2] Burt v. Allen, 103 Mass. 41.

Order of examination.

§ 471. "The party producing the deponent shall be allowed first to examine him, either upon verbal or written interrogatories, on all points which he deems material, and then the adverse party may examine the deponent in like manner; after which either party may propose such further interrogatories as the case requires."

[G. S. 1894 § 5675]

Must be written, read and signed.

§ 472. "The deposition shall be written by the justice or by the deponent, or by some disinterested person, in the presence and under

Digitized by Google

the direction of the justice, and be carefully read to or by the deponent, and shall then be subscribed by him."

[G. S. 1894 § 5676]

§ 473. This statute was enacted before the days of stenography and type-writing but it would probably be held permissible for the justice to employ a stenographer to take the testimony and then write it out on a type-writer. No doubt the type-writing could be done out of the presence of the justice.[1] The testimony must be given orally by the witnesses in the presence of the justice.[2] A deposition previously prepared by a party or by his agent or attorney cannot be admitted in evidence.[3] The deposition must be read to or by the deponent before he signs it[4] and he cannot waive this requirement.[5] The certificate of the justice must affirmatively show that the deposition was written in his presence.[6]

[1] See Tuthill Spring Co. v. Smith, 90 Iowa 331; Stoddard v. Hill, 38 S. C. 385; Behrensmeyer v. Kreitz, 135 Ill. 591; New Kentucky Coal Co. v. Union Pacific Ry. Co. 52 Neb. 127, 71 N. W. 948.

[2] Summers v. McKim, 12 S. & R. (Pa.) 405.

[3] Amory v. Fellows, 5 Mass. 219; In re Eldridge, 82 N. Y. 161.

[4] Goodhue v. Grant, 1 Pin. (Wis.) 556; Williams v. Chadbourne, 6 Cal. 560.

[5] Godfrey v. White, 43 Mich. 171.

[6] New Kentucky Coal Co. v. Union Pacific Ry. Co. 52 Neb. 127, 71 N. W. 948. See Brown v. King, 5 Met. (Mass.) 173.

Delivery to court.

§ 474. "The deposition shall be delivered by the justice to the court, or arbitrators, or referees, before whom the cause is pending, or shall be inclosed and sealed by him, and directed to them, and shall remain sealed until opened by said court, or the clerk thereof, or arbitrators, or referees."

[G. S. 1894 § 5678]

§ 475. The certificate of the clerk of court that a deposition has been opened and filed by him is sufficient evidence that it has been duly returned, filed and opened.

Rodn v. Hapgood, 8 Gray (Mass.) 394.

Cause for taking must exist at time of trial.

§ 476. "No deposition shall be used if it appears that the reason for taking it no longer exists; provided, that if the party producing the deposition in such case shows any sufficient cause then existing for using such deposition, it may be admitted."

[G. S. 1894 § 5679]

§ 477. A deposition of a witness, since deceased, may be read although after it was taken, and on the first trial of the action, he was sworn and examined as a witness.[1] Proof that the cause for taking the deposition assigned in the certificate of the justice no longer exists throws the burden of proof on the proponent to show

Digitized by Google

that some sufficient cause exists at the time of the trial for using the deposition.[2]

[1] Lamberton v. Windom, 18 Minn. 506 Gil. 455.

[2] Atkinson v. Nash, 56 Minn. 472, 58 N. W. 39.

Objections—how and when taken.

§ 478. "Every objection to the competency or credibility of the deponent, and to the propriety of any question put to him, or of any answer made by him, may be made when the deposition is produced, in the same manner as if the witness was personally examined on the trial: provided, that all objections to the form of any interrogatory shall be made before it is answered, and, if the interrogatory is not withdrawn, the objection shall be noted in the deposition; otherwise the objection shall not be afterward entertained." [G. S. 1894 § 5680]

§ 479. An objection that interrogatories are leading cannot be raised for the first time on the trial.

Akers v. Demond, 103 Mass. 318.

§ 480. An amendment of the complaint does not affect the admissibility of a deposition taken prior thereto.

Weatherby v. Brown, 106 Mass. 338.

§ 481. It would probably be held under this statute that all objections not therein specified must be raised on a motion to suppress before trial, provided the deposition is returned in season to make such a motion. It is a general rule that all objections to depositions must be made before trial except as otherwise provided by statute. This rule is based on the consideration that the party ought to have an opportunity to take fresh depositions and correct the error. It is generally held that the following objections must be raised before trial if an opportunity is presented: that the notice was defective;[1] that the certificate is improper;[2] that the deponent failed to answer material questions;[3] or refused to do so.[4] The statutes in the several states vary so greatly that there are no well established general rules.

[1] Pilmer v. Branch of State Bank, 16 Iowa 321; Palms v. Richardson, 51 Mich. 85; University v. Shanks, 40 Wis. 352.

[2] Walker v. Steel, 9 Colo. 388.

[3] Vilmar v. Schall, 61 N. Y. 564. See Stone v. Evans, 32 Minn. 243, 20 N. W. 243.

[4] Baker v. Thompson, 89 Ga. 486.

Use in subsequent actions.

§ 482. "When the plaintiff in any action discontinues it, or it is dismissed for any cause, and another action is afterward commenced for the same cause between the same parties, or their respective representatives, all depositions lawfully taken for the first action may be used in the second, in the same manner, and subject to the same conditions and objections, as if originally taken for the second action: provided, that the deposition has been duly filed in the court where the first action was pending, and remained in

Digitized by Google

the custody of the court, from the termination of the first action until the commencement of the second."

[G. S. 1894 § 5681]

§ 483. The general rule is that the admissibility on the trial of a second action of a deposition taken in a former one is made to turn upon the identity of the matters in issue, and the opportunity of the party against whom the deposition is offered to cross-examine the witness, rather than upon the perfect mutuality between the parties.[1] Depositions taken in a cause may be used on a new trial without any order of court.[2] The deposition of a witness since deceased may be used on a second trial, although after it was taken, and on the first trial, he was sworn and examined as a witness.[3]

[1] Lougee v. Bray, 42 Minn. 323, 44 N. W. 194; Watson v. St. Paul City Ry. Co. 76 Minn. 358, 79 N. W. 308. See Chapman v. Dodd, 10 Minn. 350 Gil. 277.

[2] Chouteau v. Parker, 2 Minn. 119 Gil. 96.

[3] Lamberton v. Windom, 18 Minn. 506 Gil. 455.

Use on appeal.

§ 484. "When an action is appealed from one court to another, all depositions lawfully taken to be used in the court below may be used in the appellate court, in the same manner, and subject to the same exceptions for informality or irregularity, as were taken to such depositions in writing in the court below."

[G. S. 1894 § 5682]

Compelling deposition by subpœna.

§ 485. "Any witness may be subpœnaed and compelled to give his deposition, at any place within twenty miles of his abode, in like manner, and under the same penalties, as he may be subpœnaed and compelled to attend as a witness in any court."

[G. S. 1894 § 5683]

§ 486. The adverse party may be compelled to give his deposition[1] but it is an open question in this state whether he may be examined as if upon cross-examination.[2]

[1] Hart v. Eastman, 7 Minn. 74 Gil. 50; Couch v. Steele, 63 Minn. 504, 65 N. W. 946; Buckingham v. Barnum, 30 Conn. 359; Roberts v. Parrish, 17 Or. 583.

[2] Couch v. Steele, 63 Minn. 504, 65 N. W. 946. See Leuthold v. Fairchild, 35 Minn. 99, 27 N. W. 503, 28 N. W. 218; Turnbull v. Crick, 63 Minn. 91, 65 N. W. 135.

Digitized by Google

III UPON COMMISSION

Deposition without state on commission.

§ 487. "The deposition of any witness without this state may be taken under a commission issued to any competent person in any state or country, by the court in which the cause is pending, or upon a reference as hereinafter provided; and the deposition may be used in the same manner, and subject to the same conditions and objections, as if it had been taken in this state."

[G. S. 1894 § 5684]

§ 488. Neither party has a right to be present or to have anyone present for him, unless by consent, at the execution of a commission to take testimony in another state.[1] The testimony of a party to the action may be taken under a commission.[2] When a commission names several commissioners the return must show that all were present or notified of the time and place of executing it.[3] The certificate should state directly that the witnesses were sworn before the commissioner but this may be inferred from the whole certificate.[4] Where the same commissioner takes several depositions under one commission it is not necessary to attach a certificate to each deposition.[5] When, in a commission to take testimony, an interrogatory is to be put if a previous question is answered in a particular way, and the question is not answered in that way, the interrogatory ought not to be put, and if put the answer ought not to be admitted.[6] Rules of court respecting the taking and return of depositions must be followed,[7] but a substantial compliance is generally sufficient.[8] The interrogatories and cross-interrogatories can neither be added to or diminished at the time of taking the deposition.[9]

[1] Walker v. Barron, 4 Minn. 253 Gil. 178.
[2] Claflin v. Lawler, 1 Minn. 298 Gil. 231; Tyson v. Kane, 3 Minn. 287 Gil. 197; Hart v. Eastman, 7 Minn. 74 Gil. 50.
[3] Mair v. January, 4 Minn. 239 Gil. 169.
[4] Cooper v. Stinson, 5 Minn. 201 Gil. 160.
[5] Day v. Raguet, 14 Minn. 273 Gil. 203.
[6] Selden v. Bank of Commerce, 3 Minn. 166 Gil. 108.
[7] Beaty v. Ambs, 11 Minn. 331 Gil. 234; Mair v. January, 4 Minn. 239 Gil. 169.
[8] Tyson v. Kane, 3 Minn. 287 Gil. 197; Cooper v. Stinson, 5 Minn. 201 Gil. 160.
[9] Walker v. Barron, 4 Minn. 253 Gil. 178.

When commission may issue.

§ 489. "No commission shall be issued to take testimony out of this state, except in the following cases:

(1) When an issue has been joined in an action in a court of record in this state, and it shall appear, on the application of either party, that any witness not residing in this state is material in the prosecution or defence of such action, and that due notice of such

Digitized by Google

application was served upon the adverse party at least eight days before the application was made;

(2) When, in an action commenced in a court of record in this state, the time of answering the complaint has expired, and the defendant has not answered or demurred to the said complaint, and it appears, upon the application of the plaintiff, that the testimony of any witness not residing in this state is material and necessary to establish the facts stated in the complaint, and to enable the court to render judgment in such action."

[G. S. 1894 § 5685] See Coombs v. Bodkin, 81 Minn. 245, 83 N. W. 986.

§ 490. "When the application is made by the plaintiff, and there has been no appearance for the defendant in the action, it may be made ex parte and without notice; and the deposition may be taken upon interrogatories filed by the plaintiff, and annexed to the commission. In all other cases, such depositions shall be taken under a commission, and upon written interrogatories, to be exhibited to the adverse party or his attorney, and cross-interrogatories, to be filed by him, if he see fit: provided, that the parties may, by stipulation in writing, agree upon any other mode of taking depositions, and, when taken pursuant to such stipulations, they may be used upon the trial, with like force and effect, in all respects, as if taken upon the commission and written interrogatories as herein provided."

[G. S. 1894 § 5686]

§ 491. "All oaths or affidavits taken out of the state, before any officer authorized to administer oaths, and certified by the clerk of a court of record, may be used and read upon the argument of any motion, to the same extent, and with like effect, as if taken within this state: provided, that if such affidavit is taken before a notary public, or commissioner for this state, no such certificate shall be required."

[G. S. 1894 § 5687]

How issued—settling interrogatories.

§ 492. "Commissions to take testimony without this state may be issued on notice, and application to the court, or judge thereof, either in term time or in vacation. Within five days after the entry of the order for a commission, the party applying therefor shall serve a copy of the interrogatories proposed by him on the opposite party. Within five days thereafter the opposite party may serve cross interrogatories. After the expiration of the time for serving cross interrogatories either party may within five days give five days' notice of settlement of the interrogatories before the court, or judge thereof. If no such notice be given within five days, the interrogatories and cross interrogatories, if any served, shall be considered adopted. Whenever a commission is applied for, and the other party wishes to join therein, interrogatories and cross interrogatories to be administered to his witnesses may be served and settled or adopted within the same times and in the same man-

Digitized by Google

ner as those to the witnesses of the party applying. After the interrogatories are settled, they must be engrossed by the party proposing the interrogatories in chief, and the engrossed copy or copies be signed by the officer settling the same, and must be annexed to the commission and forwarded to the commissioners. If the interrogatories and cross interrogatories are adopted without settlement, engrossed copies need not be made, but the originals or copies served may be annexed and forwarded with the commission."

[Rule 30, District Court]

Absence of one of several commissioners.

§ 493. "Should any or either of the commissioners fail to attend at the time and place for taking testimony, after being notified thereof, any one or more of the commissioners named in the commission may proceed to execute the same."

[Rule 31, District Court]

Return of commissioner.

§ 494. "In taking the deposition of a witness when the deposition is completed, the witness shall sign his name or make his mark at the end thereof as well as upon each piece of paper on which any portion of his deposition is written, and the commissioner or commissioners shall annex to the commission a certificate showing the time or times and place of executing it, which certificate may be substantially in the following form:

I, , commissioner named in the within and above written commission, do certify that the said commission was executed, and the testimony of was taken before me at in on the day of , 19 , at o'clock in the noon, and was reduced to writing by myself (or by deponent, or by , a disinterested person, in my presence and under my direction).

That the said testimony was taken by and pursuant to the authority and requirements of the said commission, upon the interrogatories annexed and herewith returned. The said witness before examination was sworn to testify the whole truth, and nothing but the truth, relative to the cause specified in said commission, and that the testimony of said witness was carefully read to (or by) said witness (by me) and then by him subscribed in my presence. A. B. Commissioner.

And shall also state whether any commissioner not attending was notified of the time and place of the taking of the deposition. The commissioner or commissioners shall annex the deposition, with such certificate, to the commission, seal them up in an envelope and direct to the clerk of the court of the county in which the action is pending. They may be transmitted by mail or private conveyance. The clerk, on receipt of the same, shall open the envelope, and file it with the commission and deposition, marking thereon the time. They cannot be taken from his custody except upon

Digitized by Google

the order of the court, or of a referee appointed to take proofs or try any issues in the cause. The clerk shall produce them in court to be used upon the trial of the cause, upon the request of either party."

[Rule 32, District Court]

Objections to depositions.

§ 495. "All objections to the manner of taking, or certifying, or returning depositions shall be deemed to have been forever waived unless the party objecting thereto shall make it appear, to the satisfaction of the court, that the officer taking such depositions was not authorized to administer an oath then and there, or that such party was, by such informality, error or defect, precluded from appearing and cross-examining the witness; and every objection to the sufficiency of a notice, or to the manner of taking, or certifying, or returning such deposition, shall be deemed to have been forever waived, unless such objections are taken by motion to suppress such deposition, which motion shall be made within ten days after service of such notice, in writing, of the return thereof."

[Rule 33, District Court]

Digitized by Google

CHAPTER VII

TRIAL BY THE COURT

WHEN DEMANDABLE OF RIGHT

In legal actions.

§ 496. When the parties agree to waive a jury trial and demand a trial by the court of issues of fact arising on contract the court has no discretion in the matter but is bound to try them.[1] In other actions of a legal nature the parties cannot demand a trial by the court as of right.[2] But all actions of a legal nature are triable by the court without a jury when the parties ask it and the court consents.[3]

[1] G. S. 1894 § 5385. See § 586.
[2] Id.; Wittenberg v. Onsgard, 78 Minn. 342, 81 N. W. 14.
[3] G. S. 1894 § 5385. See § 586.

In equitable actions.

§ 497. If a party has an equitable cause of action he has a right to have it tried by the court, subject, however, to the right of the court to order that the whole issue or any specific question of fact involved therein be tried by a jury or referred.

See §§ 580, 582.

Waiver of right to trial by court.

§ 498. When an action is triable by the court but without objection it is tried by a jury objection to the mode of trial is waived and the verdict is a sufficient foundation for a judgment.[1] When a jury are called and sworn without objection the parties will be deemed under ordinary circumstances to have waived the right to have the case tried by the court.[2] But the court may disregard the waiver and discharge the jury.[3]

[1] Finch v. Green, 16 Minn. 355 Gil. 315. See McArthur v. Craigie, 22 Minn. 351.
[2] Brown v. Lawler, 21 Minn. 327; Brown v. Nagel, 21 Minn. 415. See Guernsey v. American Ins. Co. 17 Minn. 104 Gil. 83.
[3] Garner v. Reis, 25 Minn. 475.

FINDINGS AND CONCLUSIONS

The statute.

§ 499. "Upon the trial of an issue of fact by the court, its decision shall be in writing; in giving the decision the facts found and the conclusions of law shall be separately stated; judgment upon the decision shall be entered accordingly."

[G. S. 1894 § 5386 in part]

Digitized by Google

Definitions and distinctions.

§ 500. The findings of fact and conclusions of law together constitute the decision of the court.[1] They are not the judgment of the court,[2] but rather the authorization or basis of the judgment.[3] No order for judgment is necessary apart from the findings of fact and conclusions of law,[4] but it is customary practice to add to the conclusions of law, "Let judgment be entered accordingly." There may be a "decision" without findings where the case goes off on questions of law.[5]

[1] See Ashton v. Thompson, 28 Minn. 330, 9 N. W. 876; Ramaley v. Ramaley, 69 Minn. 491, 72 N. W. 694.

[2] Ramaley v. Ramaley, 69 Minn. 491, 72 N. W. 694; Andrews v. Welch, 47 Wis. 134.

[3] Ramaley v. Ramaley, 69 Minn. 491, 72 N. W. 694; Wagner v. Nagel, 33 Minn. 348, 23 N. W. 308. See Ryan v. Kranz, 25 Minn. 362.

[4] Seymour v. Laycock, 47 Wis. 272. See § 499.

[5] See § 503.

Object of statute.

§ 501. The objects of the statute requiring the court to give its decision in writing and to state the facts found and conclusions of law separately are to abolish the doctrine of "implied findings"; to make definite and certain just what is decided, not only for the purposes of the particular action, but also for the purpose of applying the doctrine of estoppel to future actions; and, finally, to separate questions of law and fact so that they may be the more conveniently, intelligently and fairly considered and reviewed on a motion for a new trial or on appeal.

Abrahamson v. Lamberson, 68 Minn. 454, 71 N. W. 676; Califf v. Hillhouse, 3 Minn. 311 Gil. 217; Dodd v. Clarke, 51 Cal. 262; Dietz v. Neenah, 91 Wis. 422.

Conclusions of law authority for the judgment.

§ 502. The legal conclusions which flow from the existence of certain facts, and a direction to enter judgment in accordance therewith, are the mandatory part of the findings. The decision should contain a sufficient statement of facts to form a basis for the conclusions of law, and these conclusions and the order for judgment based thereon are the mandatory guide for the clerk in the performance of his ministerial duty in entering judgment. A judgment is an adjudication of the rights of the parties upon the issues involved. The findings of fact are one thing, but the judgment entered upon the conclusions of law upon facts found is a very different matter. The first involves a judicial determination into some matters of fact, while the latter embodies the sentence of the law upon the facts found; and it is the relief granted or right adjudicated by the conclusions of law that goes into the judgment, and to such conclusions we must look in determining whether anything improper or erroneous has gone into such judgment.

Ramaley v. Ramaley, 69 Minn. 491, 72 N. W. 694.

Digitized by Google

When findings necessary.

§ 503. Whenever the main issues of fact in an action are tried by the court, findings of fact must be made.[1] It is not alone issues made by the pleadings upon which findings must be made. If the parties by consent or without objection litigate issues not made by the pleadings it is the duty of the court to make findings on such issues [2] and to order judgment accordingly, granting as full measure of relief as if the issues had been made by the pleadings.[3] It is not necessary to make findings as to immaterial issues; [4] as to facts admitted by the pleadings; [5] as to facts stipulated by the parties; [6] when a case is submitted on an agreed statement of facts; [7] when judgment is ordered on the pleadings; [8] when judgment is ordered on a demurrer.[9]

[1] Newman v. Newman, 68 Minn. 1, 70 N. W. 776. See State v. Copeland, 74 Minn. 371, 77 N. W. 221 (mandamus).

[2] Warner v. Foote, 40 Minn. 176, 41 N. W. 935; Dean v. Hitchings, 40 Minn. 31, 41 N. W. 240; Village of Wayzata v. Great Northern Ry. Co. 50 Minn. 438, 52 N. W. 913; Abbott v. Morrissette, 46 Minn. 10, 48 N. W. 416; Fergestad v. Gjertsen, 46 Minn. 369, 49 N. W. 127; Jones v. Wilder, 28 Minn. 238, 9 N. W. 707; Olson v. St. Paul etc. Ry. Co. 38 Minn. 479, 38 N. W. 490; Deiber v. Loehr, 44 Minn. 451, 47 N. W. 50; Ahlberg v. Swedish American Bank, 51 Minn. 162, 53 N. W. 196. See § 1845 and Dunnell, Minn. Pl. §§ 681–684.

[3] Bassett v. Haren, 61 Minn. 346, 63 N. W. 713.

[4] Lowell v. North, 4 Minn. 32 Gil. 15; Brainard v. Hastings, 3 Minn. 45 Gil. 17.

[5] Dickinson v. Kinney, 5 Minn. 409 Gil. 332; Palmer v. Pollock, 26 Minn. 433, 4 N. W. 1113; Fenske v. Nelson, 74 Minn. 1, 76 N. W. 785; Brainard v. Hastings, 3 Minn. 45 Gil. 17.

[6] Frush v. East Portland, 6 Or. 281.

[7] Saltonstall v. Russell, 152 U. S. 628; Laveaga v. Wise, 13 Nev. 296; Gregory v. Gregory, 102 Cal. 50; Brown v. Brown, 12 S. D. 506, 81 N. W. 883.

[8] Eaton v. Wells, 22 Hun (N. Y.) 123; Taylor v. Palmer, 31 Cal. 240.

[9] Dickinson v. Kinney, 5 Minn. 409 Gil. 332.

§ 504. If the action is dismissed by the court for insufficiency of the evidence to warrant findings and judgment for the plaintiff findings of fact are unnecessary.[1] But a court has no right to dismiss an action without findings, on the ground that the plaintiff has failed to establish a cause of action, except where the evidence adduced by the plaintiff would not have justified findings in his favor.[2]

[1] Thompson v. Myrick, 24 Minn. 4; Miller v. Miller, 47 Minn. 546, 50 N. W. 612.

[2] Tharalson v. Wyman, 58 Minn. 233, 59 N. W. 1009; Keene v. Masterman, 66 Minn. 72, 68 N. W. 771; Herrick v. Barnes, 78 Minn. 475, 81 N. W. 526; Hamm Realty Co. v. New Hampshire Fire Ins. Co. 80 Minn. 139, 83 N. W. 41.

Digitized by Google

§ 505. It is not necessary for the court to make findings of fact as the basis of an interlocutory order.[1] But if it does so and omits to find all the facts legally necessary the order will be reversed unless the record conclusively shows that it is right.[2]

[1] Wells v. Penfield, 70 Minn. 66, 72 N. W. 816; Wildner v. Ferguson, 42 Minn. 112, 43 N. W. 794; Sjoberg v. Security Savings & Loan Assoc. 73 Minn. 203, 75 N. W. 1116; Minneapolis Trust Co. v. Menage, (Minn.) 90 N. W. 3.

[2] Sjoberg v. Security Savings & Loan Assoc. 73 Minn. 203, 75 N. W. 1116.

Waiver of findings.

§ 506. It is an open question in this state whether parties can waive the making of findings of fact. It would probably be held that they cannot inasmuch as the statutory requirement is not solely for their benefit. It has been held that a party does not waive the making of findings by failing to appear.[1]

[1] Newman v. Newman, 68 Minn. 1, 70 N. W. 776.

Nature of the facts to be found.

§ 507. The facts which the court must find and state separately are the ultimate issuable facts—the facts put in issue by the pleadings or actually litigated as issuable facts by consent or without objection.[1] The findings should not contain evidentiary facts, argument, explanations, or comment of any kind.[2] The test is, would they be sufficient to authorize a judgment if presented in the form of a special verdict?[3] They must include all the facts essential to the judgment and upon which it is based.[4] They must be so full that the facts upon which the judgment rests may be ascertained with clearness without resort to the evidence.[5] The findings are the sole authority for the entry of judgment and constitute the sole basis upon which it must rest. If the findings do not support the judgment it is unauthorized.[6]

[1] Conlan v. Grace, 36 Minn. 276, 30 N. W. 880; Butler v. Bohn, 31 Minn. 325, 17 N. W. 862; Bazille v. Ullman, 2 Minn. 134 Gil. 110; Newman v. Newman, 68 Minn. 1, 70 N. W. 776; Payne v. Payne, 46 Minn. 467, 49 N. W. 230.

[2] Conlan v. Grace, 36 Minn. 276, 30 N. W. 880; Wagner v. Nagel, 33 Minn. 348, 23 N. W. 308; McMurphy v. Walker, 20 Minn. 382 Gil. 334; Payne v. Payne, 46 Minn. 467, 49 N. W. 230; Bates v. A. E. Johnson Co. 79 Minn. 354, 82 N. W. 649.

[3] Conlan v. Grace, 36 Minn. 276, 30 N. W. 880.

[4] Hodge v. Ludlum, 45 Minn. 290, 47 N. W. 805; Miller v. Chatterton, 46 Minn. 338, 48 N. W. 1109; Lowell v. North, 4 Minn. 32 Gil. 15.

[5] Hodge v. Ludlum, 45 Minn. 290, 47 N. W. 805.

[6] Wagner v. Nagel, 33 Minn. 348, 23 N. W. 308; Miller v. Chatterton, 46 Minn. 338, 48 N. W. 1109.

Sufficiency of particular findings.

§ 508. When in a pleading facts are specifically set forth which, if established, would entitle a party to relief as a legal conclusion,

Digitized by Google

a finding by the court of the truth of the allegations in the pleading is sufficient.[1] But a finding that the allegations of the complaint are true is insufficient if there are issues formed on new matter in the answer.[2] Where the complaint does not state facts sufficient to constitute a cause of action a finding that the allegations of the complaint are true is not sufficient to support a judgment for the plaintiff.[3] A finding that all the "material" allegations of the complaint are true is insufficient.[4]

[1] School District v. Wrabeck, 31 Minn. 77, 16 N. W. 493; Knudson v. Curley, 30 Minn. 433, 15 N. W. 873; Moody v. Tschabold, 52 Minn. 51, 53 N. W. 1023; Combination Steel & Iron Co. v. St. Paul City Ry. Co. 52 Minn. 203, 53 N. W. 1144; Crosson v. Olson, 47 Minn. 27, 49 N. W. 406; Abrahamson v. Lamberson, 68 Minn. 454, 71 N. W. 676.

[2] Bahnsen v. Gilbert, 55 Minn. 334, 56 N. W. 1117.

[3] Knudson v. Curley, 30 Minn. 433, 15 N. W. 873.

[4] Abrahamson v. Lamberson, 68 Minn. 454, 71 N. W. 676.

§ 509. A finding "that the allegations of fact in the complaint are not proved" is sufficient to sustain a judgment for the defendant.[1] A general finding that each and all of the allegations of the complaint are untrue is equivalent to a special finding as to each allegation that it is untrue.[2] A finding by the court that the allegations of the complaint are not established by the evidence is equivalent to a general finding that the facts are not as alleged.[3] A finding that there was no evidence as to a particular issue is a finding against the party having the affirmative of the issue.[4] A finding that the party on whom the burden rests has not proved the false representations, negatives such representations.[5]

[1] Hewitt v. Blumenkranz, 33 Minn. 417, 23 N. W. 858.

[2] Fidelity & Casualty Co. v. Crays, 76 Minn. 450, 79 N. W. 581.

[3] Reynolds v. Reynolds, 44 Minn. 132, 46 N. W. 236.

[4] Watson v. Chicago etc. Ry. Co. 46 Minn. 321, 48 N. W. 1129.

[5] McMurphy v. Walker, 20 Minn. 382.

Findings and conclusions to be stated separately.

§ 510. The findings of fact and conclusions of law must be stated separately [1] and if not so stated the decision is subject to correction on motion.[2]

[1] Baldwin v. Allison, 3 Minn. 83 Gil. 41; Minor v. Willoughby, 3 Minn. 225 Gil. 154; Califf v. Hillhouse, 3 Minn. 311 Gil. 217; McMurphy v. Walker, 20 Minn. 382 Gil. 334.

[2] See § 522.

Effect of finding a fact as a conclusion of law.

§ 511. A fact found by the court, although expressed as a conclusion of law, will be treated on appeal as a finding of fact,[1] unless to do so would render otherwise clear and specific findings indefinite and conflicting.[2]

[1] Cushing v. Cable, 54 Minn. 6, 55 N. W. 736; Chase v. New York Mortgage Loan Co. 49 Minn. 111, 51 N. W. 816; Missouri,

Digitized by Google

Kansas & Texas Trust Co. v. McLachlan, 59 Minn. 468, 61 N. W. 560; Town of Campbell v. Waite, 84 Minn. 254, 87 N. W. 782.

[2] Kinney v. Mathias, 81 Minn. 64, 83 N. W. 497.

Findings must be definite and consistent.

§ 512. Findings should be concise, specific, definite and certain.[1] They must be consistent.[2]

[1] Lesher v. Getman, 28 Minn. 93, 9 N. W. 585.

[2] See § 532.

Findings must cover all the issues.

§ 513. The findings must cover all the material issues and a judgment based on findings which are insufficient in this respect cannot be sustained on appeal, if the objection was properly raised below.

Roussain v. Patten, 46 Minn. 308, 48 N. W. 1122; McCarthy v. Groff, 48 Minn. 325, 51 N. W. 218.

The judgment must be justified by the findings.

§ 514. The findings are the sole authority for the judgment and constitute the basis upon which it must rest. The judgment must be warranted by the findings and if it is not the objection can be raised for the first time on appeal.[1] The supreme court cannot draw inferences of fact in order to sustain a judgment.[2]

[1] Wagner v. Nagel, 33 Minn. 348, 23 N. W. 308; Schneider v. Ashworth, 34 Minn. 426, 26 N. W. 233; Benjamin v. Levy, 39 Minn. 11, 38 N. W. 702; Lesher v. Getman, 28 Minn. 93, 9 N. W. 585; In re Shotwell, 43 Minn. 389, 45 N. W. 842; Wolford v. Farnham, 44 Minn. 159, 46 N. W. 295; Knudson v. Curley, 30 Minn. 433, 15 N. W. 873; Hodge v. Ludlum, 45 Minn. 290, 47 N. W. 805; Smith v. National Credit Ins. Co. 79 Minn. 486, 82 N. W. 976.

[2] St. Paul etc. Ry. Co. v. Village of Hinckley, 53 Minn. 398, 55 N. W. 560.

Findings must be within the issues.

§ 515. The findings must be within the issues made by the pleadings or litigated by consent or without objection.

Cochrane v. Halsey, 25 Minn. 52; Fergestad v. Gjertsen, 46 Minn. 369, 49 N. W. 127; Cobb v. Cole, 51 Minn. 48, 52 N. W. 985; Babcock v. Murray, 58 Minn. 385, 59 N. W. 1038; Cobb v. Cole, 55 Minn. 235, 56 N. W. 828; Joannin-Hansen Co. v. Barnes & Co. 77 Minn. 428, 80 N. W. 364.

Effect of finding only evidentiary facts.

§ 516. A judgment based upon findings of evidence as distinguished from issuable facts cannot be sustained.[1] All the issuable facts must be found directly and not inferentially. It is insufficient to find the evidentiary facts from which the issuable facts might be inferred.[2] Even if the issuable facts are a necessary consequence of the evidentiary facts the finding of the latter alone is insufficient, for

Digitized by Google

a judgment cannot rest on inferences.[3] Of course the finding of evidentiary facts in addition to the issuable facts does not vitiate the judgment.

[1] Schneider v. Ashworth, 34 Minn. 426, 26 N. W. 233; Wagner v. Nagel, 33 Minn. 348, 23 N. W. 308; Benjamin v. Levy, 39 Minn. 11, 38 N. W. 702.

[2] Wagner v. Nagel, 33 Minn. 348, 23 N. W. 308; Miller v. Chatterton, 46 Minn. 338, 48 N. W. 1109; In re Shotwell, 43 Minn. 389, 45 N. W. 842; Lesher v. Getman, 28 Minn. 93, 9 N. W. 585; Martini v. Christensen, 60 Minn. 491, 62 N. W. 1127.

[3] But see Smith v. Conkwright, 28 Minn. 23, 8 N. W. 876 (a doubtful case). See in connection with this case: In re Shotwell, 43 Minn. 389, 45 N. W. 842; Lesher v. Getman, 28 Minn. 93, 9 N. W. 585; Wolford v. Farnham, 44 Minn. 159, 46 N. W. 295.

Construction of findings.

§ 517. Findings of fact must be fairly construed with reference to the pleadings and the manifest intention of the trial court.[1] Where the specific facts are found in detail by the court a general conclusion which is clearly an inference from such specific findings must be controlled thereby.[2]

[1] Fenske v. Nelson, 74 Minn. 1, 76 N. W. 785; Ware v. Squyer, 81 Minn. 388, 84 N. W. 126.

[2] Wheeler v. Gorman, 80 Minn. 462, 83 N. W. 442; Lamberton v. Youmans, 84 Minn. 109, 86 N. W. 894. See Payne v. Payne, 46 Minn. 467, 49 N. W. 230.

§ 518. Where, in findings directing a foreclosure, the amount was not stated, but the court afterwards made an order fixing the amount, and directing that it be inserted in the findings, it was held that the order should be deemed a part of the findings although the amount was not actually inserted.

Baker v. Byerly, 40 Minn. 489, 42 N. W. 395.

By whom made.

§ 519. Only the judge who tried the cause can make or amend findings. There is no exception in the case of death or termination of office.[1] After an action was tried but before it was decided the county wherein it was tried was attached to a different judicial district. It was held that the judge who tried the action was authorized to render a decision.[2]

[1] Bahnsen v. Gilbert, 55 Minn. 334, 56 N. W. 1117; Aultman & Taylor Co. v. O'Dowd, 73 Minn. 58, 75 N. W. 756.

[2] Darelius v. Davis, 74 Minn. 345, 77 N. W. 214.

When findings become part of record.

§ 520. Findings of fact do not become a part of the record until signed and filed.[1] The findings are included in the judgment-roll [2] and therefore constitute a part of the record on appeal without the settlement of a case.

[1] Seibert v. Minneapolis etc. Ry. Co. 58 Minn. 72, 59 N. W. 828.

[2] See § 1743 and Baker v. Byerly, 40 Minn. 489, 42 N. W. 395.

Digitized by Google

Time within which findings must be filed.

§ 521. "All questions of fact and law, and all motions and matters which shall hereafter be submitted to a judge for his decision or disposition shall be decided by him, and his decision in writing filed with the clerk within five months after such submission, unless prevented by sickness, or unavoidable casualty, or the time be extended by stipulation in writing signed by the counsel for the respective parties and filed with the judge before the expiration of the five months; that the provisions of this act shall be construed as mandatory and not directory, and the state auditor is hereby directed not to sign or to issue a warrant upon the state treasurer for the payment of the salary, or any installment of the salary, of any judge of the district court of this state unless the voucher or requisition, for such warrant, filed with the state auditor, shall contain, or be accompanied by, a certificate of the judge requesting such warrant, that all matters submitted to him for decision five months or more prior to the filing of said application have been decided as required herein; and, in case the time has been extended by stipulation in writing, as herein provided, or a decision has been prevented by sickness, or unavoidable casualty, within the limitation of time herein fixed, such certificate shall state the facts excusing the delay, and the making and filing of a false certificate shall be deemed just cause for complaint to the next legislature."

[G. S. 1894 § 5386 as amended by Laws 1901 ch. 47] See Vogle v. Grace, 5 Minn. 294 Gil. 232.

MODE OF RAISING OBJECTIONS TO FINDINGS OF FACT AND CONCLUSIONS OF LAW

Failure to state findings and conclusions separately.

§ 522. If the court fails to state its findings of fact and conclusions of law separately, as required by statute, the remedy is not a motion for a new trial or an appeal but a motion for a separate statement.

Minor v. Willoughby, 3 Minn. 225 Gil. 154; Califf v. Hillhouse, 3 Minn. 311 Gil. 217.

Indefinite findings.

§ 523. If the findings of the court are indefinite or misleading or not sufficiently specific the remedy is a motion for proper findings and not a motion for a new trial or an appeal from the judgment.

Englebrecht v. Rickert, 14 Minn. 140 Gil. 108; Smith v. Pendergast, 26 Minn. 318, 3 N. W. 978; Bradbury v. Bedbury, 31 Minn. 163, 16 N. W. 854; Hewitt v. Blumenkranz, 33 Minn. 417, 23 N. W. 858; School District v. Wrabeck, 31 Minn. 77, 16 N. W. 493; Schulte v. First Nat. Bank, 34 Minn. 48, 24 N. W. 320; Leonard v. Green, 34 Minn. 137, 24 N. W. 915; Hurley v. Mississippi etc. Co. 34 Minn. 143, 24 N. W. 917; Cummings v. Rogers, 36 Minn. 317, 30 N. W. 892; Slosson v. Hall, 17 Minn. 95 Gil. 71; Combination Steel & Iron Co. v. St. Paul City Ry. Co. 52 Minn. 203, 53 N. W. 1144; State v. Minneapolis etc. Ry. Co. 80 Minn. 191, 83 N. W. 60.

Digitized by Google

§ 524. Of course indefiniteness merges into insufficiency. If findings are so vague and indefinite that it is impossible to tell what the court intended to find they are insufficient to sustain a judgment and the objection may be raised for the first time on appeal.

Lesher v. Getman, 28 Minn. 93, 9 N. W. 585.

Failure to find on material issues.

§ 525. If the court fails to find on all the material issues made by the pleadings or litigated by consent or without objection the remedy is a motion for additional findings and not a motion for a new trial or an appeal from the judgment.[1] The motion may be made after entry of judgment.[2]

[1] Conklin v. Hinds, 16 Minn. 457 Gil. 411; Bazille v. Ullman, 2 Minn. 134 Gil. 110; Bryant v. Lord, 19 Minn. 396 Gil. 342; Bradbury v. Bedbury, 31 Minn. 163, 16 N. W. 854; Cummings v. Rogers, 36 Minn. 317, 30 N. W. 892; Warner v. Foote, 40 Minn. 176, 41 N. W. 935; Dean v. Hitchins, 40 Minn. 31, 41 N. W. 240; Combination Steel & Iron Co. v. St. Paul City Ry. Co. 52 Minn. 203, 53 N. W. 1144; Commercial Bank of St. Paul v. Azotine Mfg. Co. 66 Minn. 413, 69 N. W. 217; Thiele v. Berge, 81 Minn. 505, 84 N. W. 320; Flanigan v. Pomeroy, 85 Minn. 264, 88 N. W. 761.

[2] Conklin v. Hinds, 16 Minn. 457 Gil. 411.

§ 526. The refusal of the court, on proper application, to make findings, warranted by the evidence, upon material issues, is error and ground for reversal on appeal.[1] In such cases the supreme court may either grant a new trial directly or remand the cause to the district court with instructions to amend its findings of fact and conclusions of law or grant a new trial in the exercise of its judicial discretion.[2] Where the trial court omits by manifest oversight to include in its findings a fact put in issue, but which was indisputably proved and not contested or litigated on the trial, it may be assumed and treated as if found by the supreme court, in its discretion, without the formality of sending the case back for a further finding.[3]

[1] Wagner v. Finnegan, 65 Minn. 115, 67 N. W. 795; Hall v. Saunty, 72 Minn. 420, 75 N. W. 720; Brigham v. Connecticut Mutual Life Ins. Co. 74 Minn. 33, 76 N. W. 952; Lowell v. North, 4 Minn. 32 Gil. 15; Clark v. B. B. Richards Lumber Co. 68 Minn. 282, 71 N. W. 389; Abrahamson v. Lamberson, 68 Minn. 454, 71 N. W. 676; Pfefferle v. Wieland, 55 Minn. 202, 56 N. W. 824; Fergestad v. Gjertsen, 46 Minn. 369, 49 N. W. 127.

[2] Pfefferle v. Wieland, 55 Minn. 202, 56 N. W. 824.

[3] Lovejoy v. Howe, 55 Minn. 353, 57 N. W. 57; Menzel v. Tubbs, 51 Minn. 364, 57 N. W. 57.

§ 527. It is proper for the court to refuse to make additional findings upon issues not tendered by the pleadings;[1] or in conflict with findings already made;[2] or upon immaterial facts.[3]

[1] Fergestad v. Gjertsen, 46 Minn. 369 49 N. W. 127.

[2] Banning v. Hall, 70 Minn. 89, 72 N. W. 817.

[3] Coggins v. Higbie, 83 Minn. 83, 85 N. W. 930.

Digitized by Google

§ 528. The refusal of the trial court to make additional findings will be sustained on appeal unless the evidence conclusively establishes the truth of the proposed findings.

Mann v. Lamb, 83 Minn. 14, 85 N. W. 827.

Failure to make any findings before entry of judgment.

§ 529. If at the close of the trial the court orders judgment but fails to make any findings the remedy is not a motion for a new trial or an appeal from the judgment but a motion for proper findings.[1] It is not necessary that the judgment should be set aside. The findings and conclusions may be made and filed by the court after judgment nunc pro tunc.[2]

[1] Williams v. Schembri, 44 Minn. 250, 46 N. W. 403; State v. District Court, 52 Minn. 283, 53 N. W. 1157. See Chickering & Sons v. White, 42 Minn. 457, 44 N. W. 988.

[2] Swanstrom v. Marvin, 38 Minn. 359, 37 N. W. 455.

Findings not within the issues.

§ 530. It is ordinarily advisable to raise the objection that the findings are not responsive to the issues in the trial court by motion either for a correction of the findings or for a new trial. Undoubtedly the trial court may grant a new trial for this cause but the question has never been directly passed upon by our supreme court.[1] It is held in some states that the decision in such a case is "contrary to law," and new trials are granted on that ground.[2] Instead of granting a new trial the court may amend the findings and judgment, striking out the improper findings and modifying the judgment accordingly. Probably the court may go to the length of recasting all its findings and reversing or revising its decision even after judgment.[3] Our statute is exceedingly broad and ought to be construed so as to give the court authority to correct its errors of law and fact on motion and thereby save the parties the expense and annoyance of a new trial. If a party wishes to raise the objection that the findings are not within the issues on appeal he should be careful to have a record containing all the evidence introduced on the trial and showing that the issues were not tried by consent or without objection.[4]

[1] See cases under § 515.

[2] Wilson v. City Nat. Bank, 51 Neb. 87.

[3] See Gallagher v. Irish American Bank, 79 Minn. 226, 81 N. W. 1057.

[4] Olson v. St. Paul etc. Ry. Co. 38 Minn. 479, 38 N. W. 490.

Findings not justified by the evidence.

§ 531. The objection that the findings are not justified by the evidence can be raised by a motion for a new trial;[1] by an appeal from the judgment,[2] if the record is complete;[3] and probably by a motion for a change of findings. It is generally held that after the findings have been filed it is error for the court, on motion of one of the parties, to open the case for further evidence or re-examine the evidence already adduced and change—not merely amend—its

Digitized by Google

former decision by substituting different findings.[4] Our statute authorizing amendments is unusually broad and it is probable that a court in this state may reverse its findings on motion even after judgment. It has been held that a court may change its conclusions of law and judgment on motion.[5] It is difficult to see why findings of fact should not be equally subject to change. The statute ought to be liberally construed so as to enable a court to correct its errors of fact without imposing on the parties the expense and annoyance of a new trial or an appeal.[6]

[1] See § 1065.
[2] See § 954.
[3] See § 1755.
[4] Heath v. New York Loan Banking Co. 146 N. Y. 260; Prince v. Lynch, 38 Cal. 528; Carpenter v. Gardiner, 29 Cal. 160; Wray v. Hill, 85 Ind. 546; Levy v. Chittenden, 120 Ind. 37; Radabaugh v. Silvers, 135 Ind. 605. See Conklin v. Hinds, 16 Minn. 457 Gil. 411; Backus v. Burke, 52 Minn. 109, 53 N. W. 1013; Seibert v. Minneapolis & St. Louis Ry. Co. 58 Minn. 72, 59 N. W. 825; Bergh v. Warner, 47 Minn. 250, 50 N. W. 77.
[5] Gallagher v. Irish American Bank, 79 Minn. 226, 81 N. W. 1057.
[6] See Bergh v. Warner, 47 Minn. 250, 50 N. W. 77.

Inconsistent findings.

§ 532. The objection that findings are inconsistent may be raised by a motion for a new trial on the ground that the decision is contrary to law;[1] it may be raised for the first time on appeal;[2] and it may probably be raised in this state by a motion to set aside and for proper findings. On such a motion the court might grant a new trial in its discretion. The practice is in an unsettled state.[3]

[1] Langan v. Langan, 89 Cal. 195.
[2] Norton v. Metropolitan Life Ins. Co. 74 Minn. 484, 77 N. W. 539; Lesher v. Getman, 28 Minn. 93, 9 N. W. 585; Bates v. A. E. Johnson Co. 79 Minn. 354, 82 N. W. 649.
[3] See § 531.

Conclusions of law not justified by the findings.

§ 533. The objection that the conclusions of law are not justified by the findings of fact may be raised by a motion for a modification, by a motion for a new trial or by an appeal from the judgment. These are alternative remedies. A party is not required to move the trial court but may raise the objection for the first time on appeal from the judgment.[1] In one of our cases it was said that "a court has a right upon motion after its findings have been filed, at least any time before judgment has been entered thereon, to change or modify its conclusions of law from the facts."[2] The doubt here expressed as to whether conclusions of law may be changed after entry of judgment has since been removed. It is held that the court has power to change its conclusions of law on motion even after judgment within the period limited for appeal.[3]

Digitized by Google

[1] See §§ 534, 1882.

[2] Jones v. Wilder, 28 Minn. 238, 9 N. W. 707. See also, Shepard v. Pettit, 30 Minn. 119, 14 N. W. 511; Hurley v. City of West St. Paul, 83 Minn. 401, 86 N. W. 427.

[3] Gallagher v. Irish-American Bank, 79 Minn. 226, 81 N. W. 1057 (this case involves the modification of a judgment, but of course that is practically the same thing as the modification of conclusions of law).

§ 534. While the fact that the conclusions of law are not justified by the findings of fact is not a ground for a new trial,[1] yet, on a motion for a new trial, if all the parties are represented or had notice, it is proper for the court to modify its conclusions of law if their incorrectness is called to its attention.[2] If a party wishes to raise such an objection on a motion for a new trial he should indicate his intention to do so in the notice of motion. In the absence of proper notice we apprehend that the court could not modify its conclusions of law on a motion for a new trial unless all the parties were represented at the hearing.

[1] Farnham v. Thompson, 34 Minn. 330, 26 N. W. 9; Lumbermen's Ins. Co. v. City of St. Paul, 82 Minn. 497, 85 N. W. 525.

[2] Farnham v. Thompson, 34 Minn. 330, 26 N. W. 9; Tilleny v. Wolverton, 54 Minn. 75, 55 N. W. 822 and cases cited; Lumbermen's Ins. Co. v. City of St. Paul, 82 Minn. 497, 85 N. W. 525; Hibbs v. Marpe, 84 Minn. 178, 87 N. W. 363.

Amendment of findings.

§ 535. A court may at any time before or after judgment—at least while the judgment remains unexecuted—amend its findings so as to make them conform to what it intended they should be.[1] In case of appeal the court may thus amend its findings any time before the return is made.[2]

[1] McClure v. Bruck, 43 Minn. 305, 45 N. W. 438. See Berg v. Warner, 47 Minn. 250, 50 N. W. 77; Chase v. Whitten, 62 Minn. 498, 65 N. W. 84; Aldrich v. Chase, 70 Minn. 243, 73 N. W. 161; Knappen v. Freeman, 47 Minn. 491, 50 N. W. 533; Jones v. Wilder, 28 Minn. 238, 9 N. W. 707; Hurley v. City of West St. Paul, 83 Minn. 401, 86 N. W. 427.

[2] State Sash & Door Mfg. Co. v. Adams, 47 Minn. 399, 50 N. W. 360; Hurley v. City of West St. Paul, 83 Minn. 401, 86 N. W. 427; United States Invest. Co. v. Ulrickson, 84 Minn. 14, 86 N. W. 613.

Amendment of conclusions of law or judgment.

§ 536. A court may at any time before or after judgment—at least where no rights of third parties would be affected—correct its own clerical mistakes so as to make its conclusions of law or judgment conform to what it intended they should be.[1] So if the clerk commits an error in entering judgment the court may correct it at any time under like limitations.[2] The court may also modify its judgment on motion.[3]

Digitized by Google

[1] Chase v. Whitten, 62 Minn. 498, 65 N. W. 84; Aldrich v. Chase, 70 Minn. 243, 73 N. W. 161; Knappen v. Freeman, 47 Minn. 491, 50 N. W. 533. See Fithian v. Weidenborner, 72 Minn. 331, 75 N. W. 331; Norton v. Metropolitan Life Ins. Co. 74 Minn. 484, 77 N. W. 539.

[2] Nell v. Dayton, 47 Minn. 257, 49 N. W. 981.

[3] See § 533.

ISSUES TO THE JURY

Statute—general statement.

§ 537. In an action tried by the court the statute provides that the court may order "that the whole issue or any specific question of fact involved therein, be tried by a jury." [1] This does not mean that the court may submit "the whole issue" in the sense of the whole case to a jury and instruct them to bring in a verdict either for the plaintiff or the defendant. It simply means that issues covering the whole case may be framed and submitted to the jury for a special verdict. There is no such thing as a general verdict in an equitable action. The statute affirms in substance the former equity practice. The court may now, as the chancellor could formerly, either on application of a party or of its own motion, direct any of the issues of fact to be tried by a jury. What change has been made in the manner of doing this? The most noticeable grows out of the fact that the court which directs the issues to be tried by a jury has the jury present to try them. Formerly a decree was entered directing one of the parties to bring an action in a court of law and to make up and bring to a trial there certain issues specified by the decree. Now it is not necessary to go into another court nor to bring another action. Again, the chancellor could at any stage direct the jury trial; now it must be done before the trial is entered on. The chancellor directed the trial by a decree. Now the court directs it by an order.[2]

[1] G. S. 1894 § 5361.

[2] Berkey v. Judd, 14 Minn. 394 Gil. 300.

A matter of discretion generally.

§ 538. The power of the court in an equitable action to submit all or a portion of the issues to a jury is not unlimited. The court is not authorized to submit issues intrinsically unfit to be tried by a jury—as, for example, issues involving complicated accounts.[1] But when the issues are suitable for submission the discretion of the court is absolute. It may submit all or some of the issues or refuse to do so without regard to the wishes of the parties.[2]

[1] Berkey v. Judd, 14 Minn. 394 Gil. 300.

[2] Jordan v. White, 20 Minn. 91 Gil. 77; Sumner v. Jones, 27 Minn. 312, 7 N. W. 265; Russell v. Reed, 32 Minn. 45, 19 N. W. 86; Cobb v. Cole, 44 Minn. 278, 46 N. W. 364; Schmidt v. Schmidt, 47 Minn. 451, 50 N. W. 598; Roussain v. Patten, 46 Minn. 309, 48 N. W. 1122; Banning v. Hall, 70 Minn. 89, 72 N. W. 817.

Digitized by Google

Issues suitable for submission.

§ 539. The practice of attempting to submit all the issues in an equitable action is objectionable. "Our code, following the analogy of the former equity practice, provides for the submission to a jury of questions of fact in cases triable by the court. But usually this ought only to be done where the question is a simple, well-defined issue of pure fact, in its nature peculiarly appropriate to be submitted to a jury, and upon which the evidence is likely to be conflicting. Such are the questions of the genuineness of a disputed signature, or whether a deed said to be lost ever existed, or, under certain circumstances, the question of actual fraud; also, the assessment of damages. But ordinarily, in equitable actions, the questions involved are too complex to be conveniently tried by a jury—a tribunal never designed for the trial of such cases. It will usually be found difficult, in advance of hearing the evidence, to frame a series of questions in such cases that will fully and fairly cover the entire case, and not leave some room for doubt or difficulty after verdict."[1] The issue of will or no will is proper for submission.[2] Issues involving complicated accounts are not.[3]

[1] Pint v. Bauer, 31 Minn. 4, 16 N. W. 425.

[2] Schmidt v. Schmidt, 47 Minn. 451, 50 N. W. 598.

[3] Berkey v. Judd, 14 Minn. 394 Gil. 300; Fair v. Stickney Farm Co. 35 Minn. 380, 29 N. W. 49. See Cummings v. Taylor, 24 Minn. 429.

Rule of court as to framing issues.

§ 540. "In cases where the trial of issues of facts is not provided for by Section 216 of Chapter 66, of General Statutes of Minnesota [G. S. 1894 § 5360; § 580, infra] if either party shall desire a trial by jury such party shall, within ten days after issue joined, give notice of a motion to be made upon the pleadings, that the whole issue or any specific question of fact involved therein, be tried by a jury. With the notice of motion shall be served a distinct and brief statement of the questions of fact proposed to be submitted to the jury for trial, in proper form, to be incorporated in the order, and the court or judge may settle the issues, or may refer it to a referee to settle the same. The court or judge may, in his discretion, thereupon make an order for trial by jury, setting forth the questions of fact as settled, and such questions only shall be tried by the jury, subject, however, to the right of the court to allow an amendment of such issues upon the trial in like manner as pleadings may be amended upon trial."

[Rule 29, District Court]

§ 541. This rule is not exclusive. The court on its own motion may submit issues of its own framing.[1] It is always the better practice to have the issues submitted by a formal order.[2]

[1] Russell v. Reed, 32 Minn. 45, 19 N. W. 86. See Smith v. Barclay, 54 Minn. 47, 55 N. W. 827.

[2] Berkey v. Judd, 14 Minn. 394 Gil. 300.

Digitized by Google

Court must find on reserved issues.

§ 542. If, as is usually the case, the verdict of the jury does not cover all the issues, it is the duty of the court to make findings on the reserved issues and order judgment on the verdict and findings.[1] It is not necessary for the court to make an order reserving the cause after the return of the verdict.[2] When the court erroneously orders judgment on the verdict without making findings on the reserved issues the remedy is not a motion for a new trial but a motion for trial of the reserved issues.[3] If all the issues are covered by the special verdict judgment may be ordered thereon.[4]

[1] Piper v. Packer, 20 Minn. 274 Gil. 245; Sumner v. Jones, 27 Minn. 312, 7 N. W. 265; Schmitt v. Schmitt, 31 Minn. 106, 16 N. W. 543.

[2] Schmitt v. Schmitt, 31 Minn. 106, 16 N. W. 543.

[3] Cobb v. Cole, 44 Minn. 278, 46 N. W. 364; Id. 51 Minn. 48, 52 N. W. 985; Id. 55 Minn. 235, 56 N. W. 828.

[4] See § 917.

Dismissal of action—directing verdict.

§ 543. Where, in an action tried by the court, certain questions are submitted to a jury and an affirmative answer to one of them is essential to a recovery, the action may be dismissed, if, when plaintiff rests, there is no evidence which would warrant the jury in returning an affirmative answer to such question.[1] The court may direct a verdict as in other cases.[2]

[1] Sloan v. Becker, 31 Minn. 414, 18 N. W. 143.

[2] McAlpine v. Resch, 82 Minn. 523, 85 N. W. 545.

Mode of trial when issues are submitted.

§ 544. The order in which an equitable action is to be tried is a matter of discretion with the trial court.[1] "Under our practice, whenever an issue of fact is directed to be tried by a jury in an equitable action, or in any other proceeding, it is tried in the presence of the court, and under its direction, and in the same manner, in every respect, as every other issue of fact in any action is tried."[2] Where a portion of the issues are submitted to a jury it is discretionary with the court either to have all the evidence in the case submitted at the time of the trial before the jury or to have the evidence relating to the issues reserved submitted at a different time and apart from the jury.[3] Unless it is understood that the whole case is on trial at one and the same time, partly before the court and partly before the jury, a party may confine himself to the issues which are on trial before the jury.[4]

[1] Ashton v. Thompson, 28 Minn. 330, 9 N. W. 876.

[2] Marvin v. Dutcher, 26 Minn. 391, 410, 4 N. W. 685.

[3] Schmitt v. Schmitt, 31 Minn. 106, 16 N. W. 543; Sloan v. Becker, 31 Minn. 414, 18 N. W. 143; Guernsey v. American Ins. Co. 17 Minn. 104 Gil. 83.

[4] Sloan v. Becker, 31 Minn. 414, 18 N. W. 143.

Digitized by Google

Findings of jury how far conclusive on court.

§ 545. The verdict of the jury upon the issues submitted to them is binding on the court until vacated or set aside and cannot be disregarded in the determination of the action.[1] After a court has submitted issues to a jury it may withdraw them before verdict, discharge the jury and determine the issues itself.[2]

[1] Marvin v. Dutcher, 26 Minn. 391, 4 N. W. 685; Niggeler v. Maurin, 34 Minn. 118, 39 N. W. 142; Wilson v. McCormick, 10 Minn. 216 Gil. 174; Stanek v. Libera, 73 Minn. 171, 75 N. W. 1124.

[2] Smith v. Barclay, 54 Minn. 47, 55 N. W. 827.

Digitized by Google

CHAPTER VIII

REFERENCE

The statutes.

§ 546. "Upon the agreement of the parties to a civil action, or a proceeding of a civil nature, filed with the clerk or entered upon the minutes, a reference may be ordered:

(1) To try any or all the issues in such action or proceeding, whether of fact or law (except an action for divorce); and to report a judgment thereon.

(2) To ascertain and report any fact in such action or special proceeding, or to take and report the evidence therein.

(3) That whenever, in the opinion of the presiding judge of a district court in this state, a press of business makes the same advisable and necessary, such judge, counsel consenting thereto, may make an order referring any civil action or proceeding of a civil nature (except an action for divorce) to a referee for trial and judgment, or for any one or more of the purposes named in this title; and the fees of such a referee, after being taxed by the judge making the order of reference, shall be paid on the order of said judge out of the state treasury as salaries of state officers are now paid. Said judge shall state as a part of said order of reference that in his opinion the press of business makes such reference advisable."

[G. S. 1894 § 5391]

§ 547. "When the parties do not consent, the court may, upon the application of either, or of its own motion, direct a reference in the following cases:

(1) When the trial of an issue of fact requires the examination of a long account on either side, in which case the referee may be directed to hear and decide the whole issue, or to report upon any specific question of fact involved therein;

(2) When the taking of an account is necessary for the information of the court, before judgment, or for carrying a judgment or order into effect;

(3) When a question of fact, other than upon the pleadings, arises, upon motion or otherwise, in any stage of the action;[1] or,

(4) When it is necessary for the information of the court in a special proceeding of a civil nature."

[G. S. 1894 § 5392]

[1] Strom v. Montana Central Ry. Co. 81 Minn. 346, 84 N. W. 46.

§ 548. "The trial by referees shall be conducted in the same manner, and on similar notice, as a trial by the court. They shall have the same power to grant adjournments and to allow amendments to any pleadings, as the court upon such trial, and upon the same terms and with like effect. They shall have the same power to administer oaths and enforce the attendance of witnesses as is pos-

Digitized by Google

sessed by the court. They shall state the facts found and the conclusions of law separately, and their decision shall be given, and may be excepted to and reviewed, in like manner, but not otherwise; and they may in like manner settle a case or exceptions. The report of referees upon the whole issue shall stand as the decision of the court, and judgment may be entered thereon in the same manner as if the action had been tried by the court. When the reference is to report the facts, the report shall have the effect of a special verdict: provided, that whenever a finding has been made, or a decision or a judgment rendered upon the findings of the referee or referees, and the said finding or decision shall be set aside, or a new trial granted in the action, the cause referred shall be placed upon the calendar for trial by the court or a jury, as the case may be, the same as though no reference had ever been made, subject, nevertheless, to the same right of reference as in the first instance."

[G. S. 1894 § 5394]

§ 549. "A reference may be ordered to any person or persons, not exceeding three, agreed upon by the parties; or, if the parties do not agree, the court or judge shall appoint one or more persons, not exceeding three, residents of any county in this state, and having the qualification of electors."

[G. S. 1894 § 5393]

§ 550. "When there are three referees, all shall meet, but two of them may do any act which might be done by all; and whenever any authority is conferred on three or more persons, it may be exercised by a majority upon the meeting of all, unless expressly otherwise provided by statute."

[G. S. 1894 § 5395]

Nature of office—statutes constitutional.

§ 551. The statutes authorizing a reference are constitutional except in so far as they authorize a compulsory reference in actions of a legal nature. A referee under our statutes is a person appointed by the court to perform certain offices in the progress of a cause pending in the court of his appointment and it may be to try the whole issue. There is no such officer as a permanent referee. There can be no referee created until there is a cause pending and the appointment of a referee, even to try all the issues and report a judgment, does not take the cause out of the court, but merely calls this officer into the court to act in the cause in a certain manner, at all times in strict subordination to the court itself. During the trial of the issue before the referee, the cause is as much pending in the court as if the trial were by jury. The court speaks and operates through the referee, its subordinate officer. The referee exerts no power proprio vigore. Nothing can originate before a referee, and nothing can terminate with or by the decision of a referee. The judgment rendered is the judgment of the court.

Carson v. Smith, 5 Minn. 78 Gil. 58. See also, St. Paul etc. Ry. Co. v. Gardner, 19 Minn. 132 Gil. 99; Thayer v. Barney, 12 Minn. 502 Gil. 406.

Digitized by Google

Consent.

§ 552. Consent to a reference must be explicit.[1] Inasmuch as all the parties must consent a reference cannot be ordered, as upon consent, in an action including "unknown parties."[2] In the absence of anything in the record to the contrary it will be presumed on appeal that the parties consented to a reference where their consent was necessary.[3] A party cannot withdraw his consent to a reference, after it has been acted upon, without leave of court.[4] If a referee appointed by consent refuses to act [5] or dies [6] a new referee cannot be appointed without a new consent. A court should not force a party to consent to a reference as a condition of obtaining a favor.[7] The court has no authority to enlarge or modify the consent of the parties.[8] Upon a new trial a new consent is necessary.[9] Whether an action to which an infant is a party can be referred by consent is doubtful.[10] An oral consent given in open court and entered in the minutes is sufficient.[11]

[1] St. Paul etc. Ry. Co. v. Gardner, 19 Minn. 132 Gil. 99.
[2] Hastings v. Cunningham, 35 Cal. 549.
[3] Duncan v. Erickson, 82 Wis. 128.
[4] Dexter v. Young, 40 N. H. 130; Ferris v. Munn, 22 N. J. L. 161; Jeffers v. Hazen, 69 Vt. 456.
[5] Lecocq v. Pottier, 65 Hun (N. Y.) 598.
[6] Emmet v. Bowers, 23 How. Pr. (N. Y.) 300.
[7] Cordier v. Cordier, 26 How. Pr. (N. Y.) 187; Deering v. McCarthy, 36 Minn. 302, 30 N. W. 302.
[8] Rice v. Clark, 8 Vt. 104.
[9] See § 577.
[10] Gamache v. Prevost, 71 Mo. 84; Fischer v. Fischer, 54 Ill. 231; Jenkins v. Freyer, 4 Paige (N. Y.) 47.
[11] Heald v. Yumisko, 7 N. D. 422, 75 N. W. 806.

Waiver of objection to reference.

§ 553. Objection to a reference to take testimony is waived by appearing at the hearing without objection. It is too late to raise the objection for the first time on a motion for a new trial.

Bohles v. Boland, 44 Minn. 481, 47 N. W. 155.

Waiver of jury trial.

§ 554. Entering into a stipulation for a reference constitutes a waiver of the right to a jury trial.

Deering v. McCarthy, 36 Minn. 302, 30 N. W. 813.

Order of reference.

§ 555. An order of reference is indispensable and is not waived by proceeding to trial without objection.[1] If made in open court and entered in the minutes it need not be signed by the judge.[2] In our practice it may unquestionably be made at chambers. The order should state whether it is made with or without the consent of the parties and should be precise and explicit as to the issues to be determined. Formal defects are waived by proceeding to trial without objection.[3] An order referring "this cause" will be held to mean all the issues.[4] It is not indispensable that the order should recite

Digitized by Google

the grounds on which it is made.[5] The order cannot be made until there is an action pending.[6] An objection that the record does not show a reference cannot be raised for the first time on appeal.[7]

[1] Stone v. Merrill, 43 Wis. 72. But see Spencer v. Levering, 8 Minn. 461 Gil. 410.
[2] Leyde v. Martin, 16 Minn. 38 Gil. 24.
[3] Quinn v. Lloyd, 7 Robt. (N. Y.) 157; Bucklin v. Chapin, 35 How. Prac. (N. Y.) 155; Shepherd v. Shepherd, 108 Mich. 82.
[4] Renouil v. Harris, 1 Code Rep. (N. Y.) 125; Illstad v. Anderson, 2 N. D. 167.
[5] Duncan v. Erickson, 82 Wis. 128.
[6] Carson v. Smith, 5 Minn. 78 Gil. 58.
[7] Spencer v. Levering, 8 Minn. 461 Gil. 410.

Service of order.

§ 556. When an order of reference is made with written consent of the parties or in open court it is not necessary to serve it.[1] In all cases a certified copy should be served on the referee.[2]

[1] Moffat v. Judd, 1 How. Pr. (N. Y.) 193.
[2] Bonner v. McPhail, 31 Barb. (N. Y.) 106.

Oath of referee.

§ 557. By statute [1] the referee is required to take the following oath before entering on the discharge of his duties: "You do solemnly swear that you will faithfully and fairly hear and examine this action, wherein is plaintiff and defendant, and make a just and true report thereon, according to the best of your understanding and ability. So help you God." [2] He may affirm to the same effect.[3] If the record does not show the contrary, the presumption is that the referee was duly sworn.[4] Proceeding to trial without objection is a waiver of the requirement that the referee be sworn.[5]

[1] G. S. 1894 § 5634.
[2] G. S. 1894 § 5641.
[3] G. S. 1894 § 5642.
[4] Leyde v. Martin, 16 Minn. 38 Gil. 24; Young v. Young, 18 Minn. 90 Gil. 72.
[5] Garrity v. Hamburger Co. 136 Ill. 499; Supervisors v. Ehlers, 45 Wis. 281; Whalen v. Supervisors, 6 How. Pr. (N. Y.) 278.

Practice on the trial—findings.

§ 558. Where, by order of reference, the whole issues are referred, the referee is substituted for the court. The trial is to be conducted in the same manner as a trial by the court, and the referee's report stands as the decision of the court. His findings should contain just what the findings of a court should contain—nothing more and nothing less. Like the court he is not required to find upon any other facts than those necessary to cover the issues in the case, and which enter into and form the basis of the judgment to be entered upon his report. He is required to find upon the issues only, and not to re-

Digitized by Google

port the evidence, or to explain the means or process by which he arrived at his conclusions.[1] He must find upon all the material issues,[2] but must not go beyond them.[3] He need not find upon immaterial issues or facts admitted by the pleadings.[4] He must follow a stipulation of the parties as to the facts.[5] He must state his findings of fact and conclusions of law separately.[6] A finding by a referee that the party on whom the onus rests has not proved the false representations, negatives such representations.[7] When the referee directs judgment for a specified amount upon findings of fact from which the law implies damage the failure to find the amount of the damages specifically is immaterial.[8] A referee may dismiss an action on the trial for failure of proof or other cause in the same manner as the court.[9] His control over the order of proof is the same as that of a court.[10] The rules of evidence and the rules governing the examination and cross-examination of witnesses are the same as on a trial before the court.[11] Where all the issues are submitted to him the referee must report a judgment, that is, he must specify, in his conclusions of law, the exact nature of the judgment to which the successful party is entitled and order its entry.[12] The plaintiff may take a voluntary dismissal at any time before final submission.[13]

[1] Lundell v. Cheney, 50 Minn. 470, 52 N. W. 918; McMurphy v. Walker, 20 Minn. 382 Gil. 334.
[2] Bazille v. Ulman, 2 Minn. 134 Gil. 110; Bryant v. Lord, 19 Minn. 396 Gil. 342; Lundell v. Cheney, 50 Minn. 470, 52 N. W. 918; McMurphy v. Walker, 20 Minn. 382 Gil. 334.
[3] Cochrane v. Halsey, 25 Minn. 52; Lundell v. Cheney, 50 Minn. 470, 52 N. W. 918; O'Brien v. City of St. Paul, 18 Minn. 176 Gil. 163.
[4] Brainerd v. Hastings, 3 Minn. 45 Gil. 17.
[5] Hatch v. Burbank, 17 Minn. 231 Gil. 207.
[6] Bazille v. Ulman, 2 Minn. 134 Gil. 110; Baldwin v. Allison, 3 Minn. 82 Gil. 41; Califf v. Hillhouse, 3 Minn. 311 Gil. 217; McMurphy v. Walker, 20 Minn. 382 Gil. 334.
[7] McMurphy v. Walker, 20 Minn. 382 Gil. 334.
[8] Caldwell v. Arnold, 8 Minn. 265 Gil. 231.
[9] McCormick v. Miller, 19 Minn. 443 Gil. 384.
[10] Thayer v. Barney, 12 Minn. 502 Gil. 406.
[11] Id.
[12] Griffin v. Jorgenson, 22 Minn. 92.
[13] Plant v. Fleming, 20 Cal. 93.

Reopening case for further evidence.

§ 559. Where a proper foundation is laid for it, a referee may, in his discretion, re-open a case tried before him, and hear further proofs, at any time before his report is filed or delivered. Of course this can only be done upon notice to all the parties.

Cooper v. Stinson, 5 Minn. 201 Gil. 160.

Dismissal of action.

§ 560. "On a hearing before referees, the plaintiff may dismiss his action, or his action may be dismissed, in like manner as upon a

Digitized by Google

trial, at any time before the cause has been finally submitted to the referees for their decision, in which case the referees shall report according to the fact, and judgment may thereupon be perfected by the defendant."

[Rule 35, District Court]

Exceptions and objections.

§ 561. Of course it is as necessary to raise objections on a trial before a referee as on a trial before a court. It is no longer necessary to take exceptions to a ruling, order or decision of a referee. Although Laws 1901 ch. 113 is not expressly applicable to trial by referee it is wellnigh certain that the supreme court would hold it applicable by implication. Formerly the rule requiring exceptions was enforced with rigor.[1] The objection that a referee's findings of fact do not support the judgment may be made on the report without any exceptions.[2]

[1] Kumler v. Ferguson, 22 Minn. 117.

[2] Burpe v. Van Eman, 11 Minn. 327 Gil. 231.

Filing report.

§ 562. "Upon the trial of issues by a referee, such referee shall file his report in the clerk's office, upon his fees being paid or tendered by either party."

[Rule 36, District Court] See Duhrkop v. White, 13 N. Y. App. Div. 293 (as to payment of fees); Leyde v. Martin, 16 Minn. 38 Gil. 24 (as to delay in filing).

Fees of referee.

§ 563. "The fees of referees are five dollars to each, for every day spent in the business of the reference; but the parties may agree, in writing, upon any other rate of compensation, and thereupon such rate shall be allowed."[1] The agreement may be made by the attorneys and they have implied authority for that purpose.[2] An agreement for exorbitant compensation will be set aside.[3]

[1] G. S. 1894 § 5572.

[2] Mark v. Buffalo, 87 N. Y. 184.

[3] In re Haldorn, 10 Mont. 281.

Costs and disbursements.

§ 564. Our statutes are silent respecting the allowance of costs and disbursements in actions tried by referees, but provision is made for the entry of judgment "in the same manner as if the action had been tried by the court," and the whole procedure of trial by referees is so completely assimilated to trial by the court that they are undoubtedly allowable.[1] There is so much doubt as to the right to tax a stenographer's fees as a disbursement that the careful practitioner will make provision therefor by stipulation. Of course the fees of the referee are taxable.

[1] See Teller v. Bishop, 8 Minn. 226 Gil. 195.

How far findings binding on the court.

§ 565. When the referee is appointed to hear and determine all the issues and report a judgment his findings stand as the decision of

Digitized by Google

the court and judgment is entered thereon as of course.[1] When the referee is appointed to report the facts in an ordinary action his findings have the effect of a special verdict, that is, they are binding on the court until set aside for cause, but a judgment cannot be entered upon them by the clerk without an order of court.[2] When a referee is appointed to report facts under the second, third or fourth subdivision of § 547 his findings do not take the place of a special verdict and are not binding on the court until adopted by it.[3]

[1] See § 548.

[2] See §§ 548, 545.

[3] Harris v. San Francisco etc. Co. 41 Cal. 393.

Entry of judgment.

§ 566. In our practice the report of a referee appointed to try all the issues and report a judgment does not require to be confirmed by the court. It has the same force and effect as a decision of the court itself[1] and judgment may be entered thereon by the clerk as of course[2] and without notice.[3] In entering judgment the clerk must follow the report with strictness.[4] If the judgment entered by the clerk is not authorized by the report the proper remedy is an application to the court for a correction and not an appeal from the judgment.[5] Our statute makes the report of a referee a part of the judgment roll.[6]

[1] Cooper v. Breckenridge, 11 Minn. 341 Gil. 241. See § 548.

[2] Piper v. Johnston, 12 Minn. 60 Gil. 27; Leyde v. Martin, 16 Minn. 38 Gil. 24. See § 548.

[3] Id.

[4] Ramaley v. Ramaley, 69 Minn. 491, 72 N. W. 694. See Piper v. Johnston, 12 Minn. 60 Gil. 27.

[5] Piper v. Johnston, 12 Minn. 60 Gil. 27.

[6] See § 1743.

Compulsory reference.

§ 567. In so far as the statute authorizes a compulsory reference in an action of a legal nature it is an unconstitutional infringement of the right of trial by jury.[1] The statute is therefore only applicable to actions of an equitable nature and special proceedings.[2] In New York and Wisconsin a compulsory reference may be ordered in actions of a legal nature where a long account is involved.[3] The decisions of those states are therefore to be followed here with caution. Our statute regulates a power previously existing in courts of equity; restricting it in some particulars and enlarging it in others.[4] Even though the case is of an equitable nature a reference cannot be ordered unless the account to be adjusted is a long one.[5] An account will rarely be considered long which contains less than twenty-five contested items.[6] To justify a compulsory reference the accounting must be the main object of the action; it is not enough that the examination of a long account may become necessary in the course of the trial.[7] The question whether an action is referable without consent of both parties is to be determined, so far as the pleadings are concerned, from the complaint alone. If

Digitized by Google

the cause of action therein set forth is not referable without consent and the same is put in issue, the defendant is entitled to trial by jury and the action is not made referable by anything set up in the answer, as, for example, a counterclaim involving a long account.[8] If an action is non-referable a counterclaim set up in the answer cannot make it so.[9] Proof that a long account will be involved may be made by affidavit.[10] A compulsory reference cannot be ordered in an action for tort.[11]

[1] St. Paul etc. Ry. Co. v. Gardner, 19 Minn. 132 Gil. 99.
[2] St. Paul etc. Ry. Co. v. Gardner, 19 Minn. 132 Gil. 99; Fair v. Stickney Farm Co. 35 Minn. 380, 29 N. W. 49; Bond v. Welcome, 61 Minn. 43, 63 N. W. 3.
[3] Steck v. Colorado etc. Co. 142 N. Y. 236; Supervisors v. Dunning, 20 Wis. 210.
[4] Fair v. Stickney Farm Co. 35 Minn. 380, 29 N. W. 49.
[5] Thayer v. McNaughton, 117 N. Y. 111.
[6] Spence v. Simis, 137 N. Y. 616; Craig v. California Vineyard Co. 30 Or. 43; Knips v. Stefar, 50 Wis. 286; Turner v. Nachtshein, 71 Wis. 16; Sutton v. Wegner, 74 Wis. 347; Van Oss v. Synon, 85 Wis. 661; Chicago etc. Ry. Co. v. Faist, 87 Wis. 360; Crocker v. Currier, 65 Wis. 662; Priest v. Varney, 64 Wis. 500; La Coursier v. Russell, 82 Wis. 265.
[7] Camp v. Ingersoll, 86 N. Y. 433; Importers & Traders Bank v. Werner, 54 N. Y. App. Div. 435; Dolye v. Met. El. Ry. Co. 136 N. Y. 505; Cassiday v. McFarland, 139 N. Y. 201.
[8] Steck v. Colorado etc. Co. 142 N. Y. 236.
[9] Untermyer v. Beinhauer, 105 N. Y. 521.
[10] Crawford v. Canary, 28 N. Y. App. Div. 135.
[11] Stacy v. Milwaukee etc. Ry. Co. 72 Wis. 331.

§ 568. Our statute does not authorize a compulsory reference of all the issues in any cause. A compulsory referee cannot "report a judgment" and a judgment cannot be entered by the clerk upon his findings as upon the findings of a referee appointed by consent. The only issue upon which a compulsory referee can find and report is an issue as to a long account. The judgment must be ordered by the court.[1] A compulsory referee has sometimes been ordered to find on all the issues and report a judgment in our practice but the point here noted was not raised.[2]

[1] Williams v. Benton, 24 Cal. 425; Hastings v. Cunningham, 35 Cal. 549.
[2] See Fair v. Stickney Farm Co., 35 Minn. 380, 29 N. W. 49; Bond v. Welcome, 61 Minn. 43, 63 N. W. 3.

§ 569. It is only an extraordinary press of business that justifies a court of this state in ordering a compulsory reference. Our judges are paid to examine and pass upon long accounts as well as short ones, and litigants should not be put to the expense, delay and uncertainty of a trial by referee. The statute was enacted primarily to authorize a reference in actions triable by jury, for the obvious reason that a jury is an unfit tribunal to pass upon a long account.

Digitized by Google

It has been held unconstitutional as to such actions and it should therefore be regarded as a dead letter except as a means of affording the courts relief against an extraordinary press of business.

§ 570. The term "account" as used in the statute means an account in fact, kept by one party or the other; and a long account is a series of charges made at various times as the transactions occurred.[1] An action to recover unliquidated damages for breach of a contract in no sense involves an account although there may be many items of damage. There must be an account in the ordinary sense of that term. A reference cannot be ordered merely because there may be many items of damage, as, for example, in an action on an insurance policy when, in order to ascertain the amount of the loss it is necessary to examine bills of sales, inventories and accounts consisting of many items.[2] The items of the account must be denied or in issue.[4] It is no objection to a reference that the defendant denies the existence or validity of the contract upon which the account is based.[5]

[1] Druse v. Horter, 57 Wis. 644.

[2] Untermyer v. Beinhauer, 105 N. Y. 521; Johnson v. Atlantic Ave. Ry. Co. 139 N. Y. 449.

[3] Andrus v. Home Ins. Co. 73 Wis. 642.

[4] Monitor Iron Works v. Ketchum, 47 Wis. 177; Irving v. Irving, 90 Hun (N. Y.) 422; Cassidy v. McFarland, 139 N. Y. 201 (denial of knowledge and information insufficient).

[5] Briggs v. Hiles, 79 Wis. 571.

Reference on motions.

§ 571. The practice of referring questions arising on the hearing of motions to a referee for his opinion upon a question of fact should only be followed in extreme cases when large interests are involved and it is impossible to reach a conclusion upon the papers before the court. In references upon motions the proceedings before the referee do not supersede the affidavits which are before the court upon the motion; they merely afford an opportunity to cross-examine affiants and to introduce additional evidence.

Woodward v. Musgrave, 14 N. Y. App. Div. 291. See Strom v. Montana Central Ry. Co. 81 Minn. 346, 84 N. W. 46.

Remedy for formal defects—amendments.

§ 572. When the findings of a referee are informal, indefinite or incomplete the remedy is not a motion for a new trial or an appeal from the judgment. The practice heretofore has been to move the court for an order sending the report back to the referee for correction.[1] It has recently been held—to the surprise of the profession—that a referee appointed to report a judgment does not lose jurisdiction of the case by the mere fact of filing his findings of fact and conclusions of law with order for judgment; that he has authority to revise and amend his findings of fact and conclusions of law, to the same extent possessed by a trial court until judgment has been entered or until he has been removed; and that it is not

Digitized by Google

necessary to apply to the court for an order re-submitting the cause to the referee for amendment.[2] It is too late to move after an appeal has been taken.[3]

[1] Bazille v. Ulman, 2 Minn. 134 Gil. 110 (failure to find on all the issues and to state findings and conclusions separately); Baldwin v. Allison, 3 Minn. 83 Gil. 41 (failure to state findings and conclusions separately); Califf v. Hillhouse, 3 Minn. 311 Gil. 217 (Id.); Englebrecht v. Rickert, 14 Minn. 140 Gil. 108 (indefiniteness); Bryant v. Lord, 19 Minn. 396 Gil. 342 (failure to find on all the issues); McMurphy v. Walker, 20 Minn. 382 Gil. 334 (indefiniteness and failure to state findings and conclusions separately); Griffin v. Jorgenson, 22 Minn. 92 (failure to report a judgment).

[2] Kelso v. Younggren, 86 Minn. , 90 N. W. 316.

[3] McMurphy v. Walker, 20 Minn. 382 Gil. 334.

Report not justified by the evidence.

§ 573. The only way to raise the objection that the report is not justified by the evidence is a motion for a new trial addressed to the district court or an appeal from the judgment.[1] A referee has no authority to change—reverse—his report on motion after it has been filed.[2]

[1] Cooper v. Breckenridge, 11 Minn. 341 Gil. 241; Lundell v. Cheney, 50 Minn. 470, 52 N. W. 918.

[2] Sage v. Nichols, 51 Iowa 44; Headley v. Reed, 2 Cal. 322; Voorhis v. Voorhis, 50 Barb. (N. Y.) 119. See Cooper v. Stinson, 5 Minn. 201 Gil. 160; Kelso v. Younggren, 86 Minn. , 90 N. W. 316.

Conclusions not justified by the findings.

§ 574. The objection that the conclusions of law are not justified by the findings of fact is properly raised by a motion for a new trial [1] or an appeal from the judgment.[2] On an appeal from an order setting aside a judgment entered on the report of a referee but not granting a new trial the supreme court will not consider whether the conclusions of law are justified by the findings.[3]

[1] Griffin v. Jorgenson, 22 Minn. 92.

[2] Teller v. Bishop, 8 Minn. 226 Gil. 195; Thompson v. Howe, 21 Minn. 98; Griffin v. Jorgenson, 22 Minn. 92; Burpe v. Van Eman, 11 Minn. 327 Gil. 231.

[3] Griffin v. Jorgenson, 22 Minn. 92.

New trials.

§ 575. A motion for a new trial, after a trial by a referee, is addressed to the court and not the referee.[1] The grounds for granting a new trial are the same as upon a trial before the court.[2] When a report is vacated and a new trial granted the court may also set aside the judgment to give effectiveness to its decision.[3] The district court may vacate the findings and decision of a referee and grant a new trial on the ground that the decision is not justified by the evidence as in other cases.[4] Where a motion for a new trial is made

Digitized by Google

before a nisi prius judge in a cause which has been tried by a referee, he has the right, and it is his duty, to exercise the same discretion in determining whether the motion should be granted as if the cause had been tried before himself, with the qualification, however, that such discretion must be exercised entirely with reference to the evidence disclosed by the record, as he can know nothing else as to what occurred or appeared on the trial. And if he grants a new trial, the supreme court, in determining whether he did or did not abuse his discretion, will apply the rule of Hicks v. Stone, having in mind, however, that his discretion must have been exercised exclusively upon what the record discloses.[5]

[1] Thayer v. Barney, 12 Minn. 502 Gil. 406; Cochrane v. Halsey, 25 Minn. 52.

[2] See § 987.

[3] Cochrane v. Halsey, 25 Minn. 52.

[4] Koktan v. Knight, 44 Minn. 304, 46 N. W. 354.

[5] Hughley v. City of Wabasha, 69 Minn. 245, 72 N. W. 245; First Nat. Bank v. City of St. Cloud, 73 Minn. 219, 75 N. W. 1054.

§ 576. Any indiscreet action of a referee from which improper inferences can be drawn suffices to justify the court in setting aside his report and it is not necessary to prove that the referee was guilty of actual corruption.

Reynolds v. Moor, 1 N. Y. App. Div. 105. See Christianson v. Norwich Union Fire Ins. Co. 84 Minn. 526, 88 N. W. 16; Alden v. Christianson, 83 Minn. 21, 85 N. W. 21.

Effect of granting a new trial.

§ 577. The statute provides that "whenever a finding has been made, or a decision or a judgment rendered upon the finding of the referee or referees, and the said finding or decision shall be set aside, or a new trial granted in the action, the cause referred shall be placed upon the calendar for trial by the court or a jury, as the case may be, the same as though no reference had ever been made, subject, nevertheless, to the same right of reference as in the first instance."[1] That is, when a new trial is granted either by the district or supreme court, the effect is not to grant a new trial before a referee. A new reference cannot be made by the court without the consent of the parties, the original consent being limited to a single reference and trial.[2] Ordinarily, after a trial of issues of fact, a new trial is not had before the same person as referee.[3] The court may, however, send a cause back to the same referee to take further evidence and complete findings which are imperfect.[4]

[1] See § 548.

[2] Daverkosen v. Kelley, 43 Cal. 477; Smith v. Warner, 14 Mich. 152; Billings v. Vanderbreck, 15 How. Pr. (N. Y.) 295.

[3] Fairbank v. Newton, 50 Wis. 628; Billings v. Vanderbreck, 15 How. Pr. (N. Y.) 295; Sharp v. Mayor of New York, 31 Barb. (N. Y.) 578.

[4] Garczynski v. Russell, 75 Hun (N. Y.) 492; Park v. Mighell, 7 Wash. 304; Cochran v. Anglo-American Dry Dock etc. Co. 69 Hun (N. Y.) 168.

Digitized by Google

Appeal.

§ 578. No appeal lies from an order directing compulsory reference. Such an order is reviewable on an appeal from an order denying a new trial or from the judgment.[1] No appeal lies from the "decision" or "findings" of a referee or from his order for judgment.[2] On appeal from the judgment the supreme court may review the sufficiency of the evidence to justify the findings if the record contains all the evidence introduced on the trial;[3] if all the evidence is not in the record the only question reviewable is whether the findings sustain the judgment.[4] The findings of a referee have the same force on appeal as the findings of a court and they will not be disturbed, whether based on oral or written evidence, unless they are manifestly and palpably contrary to the weight of the evidence.[5] When the appeal is in a case involving a long account the supreme court will not go through a great mass of accounts and figures to ascertain whether the referee stated the account correctly. To entitle an appellant to a reversal he must be able to point out some clear and demonstrable error on the part of the referee.[6] A judgment upon the report of a referee, if such as the facts found require, will not be reversed because inconsistent with some of the referee's conclusions of law.[7]

[1] Bond v. Welcome, 61 Minn. 43, 63 N. W. 3.

[2] See § 1738.

[3] Cooper v. Breckenridge, 11 Minn. 341 Gil. 241.

[4] See § 1755.

[5] Califf v. Hillhouse, 3 Minn. 311 Gil. 217; Humphrey v. Havens, 12 Minn. 298 Gil. 196; Bryant v. Lord, 19 Minn. 396 Gil. 342; Sheffield v. Mullin, 27 Minn. 374, 7 N. W. 687; Dayton v. Buford, 18 Minn. 126 Gil. 111.

[6] Lundell v. Cheney, 50 Minn. 470, 52 N. W. 918.

[7] Piper v. Johnston, 12 Minn. 60 Gil. 27.

Digitized by Google

CHAPTER IX

RIGHT TO TRIAL BY JURY

WHEN DEMANDABLE OF RIGHT

Constitutional provision—civil cases.

§ 579. Our state constitution provides that "the right of trial by jury shall remain inviolate and shall extend to all cases at law without regard to the amount in controversy, but a jury trial may be waived by the parties in all cases in the manner prescribed by law." [1] The effect of this provision is, first, to recognize the right of trial by jury as it existed in the territory of Minnesota at the time of the adoption of the state constitution; and, secondly, to continue such right unimpaired and inviolate. It neither takes from nor adds to the right as it previously existed but adopts it unchanged. But the constitutional right is broader now than in territorial days. Then the only constitutional right was under the federal constitution and was limited to suits at common law when the amount in controversy exceeded twenty dollars. But a territorial statute gave the right in all cases at law without regard to the amount in controversy so that the constitution did not enlarge old rights or create new ones but simply conserved rights already existing and placed them beyond legislative impairment.[2] The essential elements of a trial by jury are number, impartiality and unanimity. The jury must consist of twelve men; they must be impartial and indifferent between the parties; and their verdict must be unanimous. The method of selecting the jury is subject to legislative control but the method provided must be reasonably adapted to secure an impartial jury.[3] It has been held by a divided court that our legislature may provide for a struck jury.[4] It is to be observed that the constitutional right, as distinguished from the statutory right, is limited to "cases at law." That is, it does not extend to special proceedings but is limited to the trial of issues of fact in ordinary common law actions for the recovery of money only or of specific real or personal property, and actions for divorce on the ground of adultery.[5] The right depends on the nature of the rights to be adjudicated and not on the form of the action or proceeding.[6]

[1] Const. Art. 1 § 4.

[2] Whallon v. Bancroft, 4 Minn. 109 Gil. 70; St. Paul etc. Ry. Co. v. Gardner, 19 Minn. 132 Gil. 99; Ames v. Lake Superior etc. Ry. Co. 21 Minn. 241, 292; Board of County Com'rs v. Morrison, 22 Minn. 178; Bruggerman v. True, 25 Minn. 123; In re Howes, 38 Minn. 403, 38 N. W. 104; State v. Minnesota Thresher Mfg. Co. 40 Minn. 213, 41 N. W. 1020; Schmidt v. Schmidt, 47 Minn. 451, 50 N. W. 598; Lommen v. Minneapolis

Digitized by Google

Gaslight Co. 65 Minn. 196, 68 N. W. 53; State v. Kingsley, 85 Minn. 215, 88 N. W. 742.

[2] Lommen v. Minneapolis Gaslight Co. 65 Minn. 196, 68 N. W. 53.

[4] Id.

[5] State v. Minnesota Thresher Mfg. Co. 40 Minn. 213, 41 N. W. 1020 and cases under § 585.

[6] Board of County Com'rs v. Morrison, 22 Minn. 178.

Statutory provision—civil cases.

§ 580. Our statutes provide "that an issue of fact, in an action for the recovery of money only, or of specific real or personal property, or for a divorce from the marriage contract on the ground of adultery, shall be tried by a jury, unless a jury trial is waived, as provided by law, or a reference ordered, as provided by statute relating to referees. Every other issue of fact shall be tried by the court, subject, however, to the right of the parties to consent, or of the court to order, that the whole issue, or of any specific question of fact involved therein, be tried by a jury, or referred." [1] This statutory provision was in force at the time of the adoption of the constitution.[2] Its effect is to preserve in substance the common law distinction between actions at law and suits in equity. The distinction in the forms of actions—that is, in the modes of commencing them, in the number, names, and forms of pleadings, and in those matters of practice necessary for presenting causes to the court for its determination, and for enforcing such determination—can be and has been abolished. But the distinction in the mode of trial, or rather in the tribunal which may try causes, which prevailed at common law, is preserved in code procedure, by this statute.[3]

[1] G. S. 1894 §§ 5360, 5361.

[2] State v. Minnesota Thresher Mfg. Co. 40 Minn. 213, 41 N. W. 1020.

[3] Berkey v. Judd, 14 Minn. 394 Gil. 300.

Cases where right to a jury trial.

§ 581. A party is entitled to a jury trial in an action in the nature of replevin although it involves an issue as to a secret trust; [1] one by an assignee in insolvency to recover money paid by the insolvent to a creditor as an unlawful preference; [2] in an action on a policy of insurance for the recovery of a loss; [3] in an action for conversion although it involves an account; [4] in an action by a contractor for labor and materials although a long account is involved; [5] in an action for trespass upon land; [6] in an action for money had and received; [7] in an action for the recovery of rent.[8]

[1] Blackman v. Wheaton, 13 Minn. 326 Gil. 299; Tancre v. Reynolds, 35 Minn. 476, 29 N. W. 171.

[2] Tripp v. N. W. Nat. Bank, 45 Minn. 383, 48 N. W. 4.

[3] Crich v. Williamsburg City Fire Ins. Co. 45 Minn. 441, 48 N. W. 198. See Levine v. Lancashire Ins. Co. 66 Minn. 138, 68 N. W. 855.

[4] St. Paul etc. Ry. Co. v. Gardner, 19 Minn. 132 Gil. 99. See Greenleaf v. Egan, 30 Minn. 316, 15 N. W. 254.

Digitized by Google

[5] Nordeen v. Buck, 79 Minn. 352, 82 N. W. 644.
[6] Chadbourne v. Zilsdorf, 34 Minn. 43, 24 N. W. 308.
[7] Lace v. Fixen, 39 Minn. 46, 38 N. W. 762.
[8] Peterson v. Ruhnke, 46 Minn. 115, 48 N. W. 768.

WHEN NOT DEMANDABLE OF RIGHT

Equitable actions.

§ 582. In equitable actions pure and simple, that is, in actions based on an equitable cause of action or to obtain equitable relief solely, there is no right to demand a jury trial of any of the issues.

Jordan v. White, 20 Minn. 91 Gil. 77; Garner v. Reis, 25 Minn. 475; Judd v. Dike, 30 Minn. 380, 15 N. W. 672; Fair v. Stickney Farm Co. 35 Minn. 380, 29 N. W. 49; Roussain v. Patten, 46 Minn. 308, 48 N. W. 1122; Bond v. Welcome, 61 Minn. 43, 63 N. W. 3.

Actions including both legal and equitable causes of action.

§ 583. In mixed actions based on both a legal and an equitable cause of action a party has a constitutional right to have the legal cause submitted to a jury. But he is not entitled to a jury trial of both causes and a demand for such a trial is properly denied unless it is strictly limited to the legal cause.

Greenleaf v. Egan, 30 Minn. 316, 15 N. W. 254; Judd v. Dike, 30 Minn. 380, 15 N. W. 672; Herber v. Christopherson, 30 Minn. 395, 15 N. W. 676; Chadbourne v. Zilsdorf, 34 Minn. 43, 24 N. W. 308; Lace v. Fixen, 39 Minn. 46, 38 N. W. 762; Peterson v. Ruhnke, 46 Minn. 115, 48 N. W. 768; Levine v. Lancashire Ins. Co. 66 Minn. 138, 68 N. W. 855; Butman v. James, 34 Minn. 547, 27 N. W. 66. See Marshall v. Gilman, 47 Minn. 131, 49 N. W. 688.

Actions for legal and equitable relief.

§ 584. In an action not of a strictly legal nature where the plaintiff seeks both legal and equitable relief there is no right to a jury trial.

Finch v. Green, 16 Minn. 355 Gil. 315.

Miscellaneous cases.

§ 585. In the following actions and proceedings there is no constitutional right of trial by jury: proceedings on information in the nature of quo warranto;[1] mandamus proceedings;[2] proceedings under the right of eminent domain;[3] proceedings for the assessment and collection of taxes;[4] proceedings in laying out highways;[5] proceedings to enforce a mechanic's lien;[6] proceedings under the state insolvency laws of 1881;[7] in garnishment proceedings where issues are formed by supplemental complaint;[8] proceedings for contempt;[9] in election contests;[10] in proceedings for the recommitment of a pardoned convict except on the question whether he is the same person who was convicted;[11] on appeal to the dis-

Digitized by Google

trict court in proceedings to test the validity of a will;[12] proceedings for the commitment of infants to the reform school;[13] an action to determine adverse claims;[14] an action to remove a cloud;[15] an action in the nature of a bill of peace or to prevent multiplicity of suits;[16] an action in the nature of a creditor's bill;[17] an action to foreclose a mortgage;[18] an action to have land discharged from the lien of a mortgage;[19] an action for the adjustment and settlement of mutual accounts;[20] an action for an accounting of a trustee, a partition and the appointment of a receiver;[21] an action to abate a dam and for damages;[22] an action against an agent by his principal for an accounting;[23] an action for an injunction to restrain a trespass upon land and to determine that the defendant has no interest or easement therein;[24] an action for an accounting between partners;[25] an action to reform a written lease;[26] an action to set aside an award and recover on an insurance policy;[27] an action to reform a policy of insurance;[28] an action for divorce on the ground of cruelty;[29] an action to compel specific performance;[30] an action for the cancellation of instruments;[31] an action to restrain the foreclosure of a mortgage;[32] an action for an accounting in a case where a deed absolute in form was in fact a mortgage;[33] an action for the correction of a stated account;[34] an action to restrain a trespass whereby the flow of a river is obstructed;[35] an action to have a deed absolute in form declared a mortgage.[36]

[1] State v. Minnesota Thresher Mfg. Co. 40 Minn. 213, 41 N. W. 1020.

[2] State v. Sherwood, 15 Minn. 221 Gil. 172; State v. City of Lake City, 25 Minn. 404. See G. S. 1894 § 5986; State v. Burr, 28 Minn. 40, 8 N. W. 899.

[3] Weir v. St. Paul etc. Ry. Co. 18 Minn. 155 Gil. 139; Ames v. Lake Superior etc. Ry. Co. 21 Minn. 241; City of Minneapolis v. Wilkin, 30 Minn. 140, 14 N. W. 581; City of St. Paul v. Nickl, 42 Minn. 262, 44 N. W. 59. See G. S. 1894 § 2614.

[4] Board of County Com'rs v. Morrison, 22 Minn. 178; Wade v. Drexel, 60 Minn. 164, 62 N. W. 261.

[5] Bruggerman v. True, 25 Minn. 123.

[6] Sumner v. Jones, 27 Minn. 312, 7 N. W. 265.

[7] Wendell v. Lebon, 30 Minn. 234, 15 N. W. 109; In re Howes, 38 Minn. 403, 38 N. W. 104. But see Tripp v. N. W. Nat. Bank, 45 Minn. 383, 48 N. W. 4.

[8] Weibeler v. Ford, 61 Minn. 398, 63 N. W. 1075.

[9] State v. Becht, 23 Minn. 411.

[10] Newton v. Newell, 26 Minn. 529, 6 N. W. 346; Ford v. Wright, 13 Minn. 518 Gil. 480; Whallon v. Bancroft, 4 Minn. 109 Gil. 70.

[11] State v. Wolfer, 53 Minn. 135, 54 N. W. 1065.

[12] Schmidt v. Schmidt, 47 Minn. 451, 50 N. W. 598. See Marvin v. Dutcher, 26 Minn. 321.

[13] State v. Brown, 50 Minn. 353, 52 N. W. 935.

[14] Roussain v. Patten, 46 Minn. 308, 48 N. W. 1122.

Digitized by Google

[15] Yanish v. Pioneer Fuel Co. 64 Minn. 175, 66 N. W. 198; Butman v. James, 34 Minn. 547, 27 N. W. 66; McAlpine v. Resch, 82 Minn. 523, 85 N. W. 545.
[16] State v. Kingsley, 85 Minn. 215, 88 N. W. 742.
[17] Weibeler v. Ford, 61 Minn. 398, 63 N. W. 1075.
[18] Sumner v. Jones, 27 Minn. 312, 7 N. W. 265; Herber v. Christopherson, 30 Minn. 395, 15 N. W. 676.
[19] Jordan v. White, 20 Minn. 91 Gil. 77.
[20] Garner v. Reis, 25 Minn. 475; Fair v. Stickney Farm Co. 35 Minn. 380, 29 N. W. 49; Bond v. Welcome, 61 Minn. 43, 63 N. W. 3.
[21] Judd v. Dike, 30 Minn. 380, 15 N. W. 672.
[22] Finch v. Green, 16 Minn. 355 Gil. 315.
[23] Greenleaf v. Egan, 30 Minn. 316, 15 N. W. 254.
[24] Chadbourne v. Zilsdorf, 34 Minn. 43, 24 N. W. 308.
[25] Lace v. Fixen, 39 Minn. 46, 38 N. W. 762.
[26] Peterson v. Ruhnke, 46 Minn. 115, 48 N. W. 768.
[27] Levine v. Lancashire Ins. Co. 66 Minn. 138, 68 N. W. 855.
[28] Guernsey v. American Ins. Co. 17 Minn. 104 Gil. 83.
[29] Schmitt v. Schmitt, 31 Minn. 106, 16 N. W. 543.
[30] Piper v. Packer, 20 Minn. 274, Gil. 245.
[31] Banning v. Hall, 70 Minn. 89, 72 N. W. 817; Russell v. Reed, 32 Minn. 45, 19 N. W. 86.
[32] Russell v. Reed, 32 Minn. 45, 19 N. W. 86.
[33] Sloan v. Becker, 31 Minn. 414, 18 N. W. 143.
[34] Cobb v. Cole, 44 Minn. 278, 46 N. W. 364.
[35] Pint v. Bauer, 31 Minn. 4, 16 N. W. 425.
[36] Niggeler v. Maurin, 34 Minn. 118, 39 N. W. 142.

WAIVER OF RIGHT TO TRIAL BY JURY

Under the statute.

§ 586. "Trial by jury may be waived by the several parties to an issue of fact in actions arising on contract, and with the assent of the court in other actions, in the manner following:

(1) By failing to appear at the trial.

(2) By written consent, in person or by attorney, filed with the clerk.

(3) By oral consent in open court entered in the minutes."

[G. S. 1894 § 5385]

§ 587. The waiver of a jury when a cause is called for trial is a waiver only as to issues then formed and not as to new and different issues thereafter formed under amended pleadings.[1] At the close of the evidence offered by plaintiff, each party moved that the jury be instructed to return a verdict in his favor. Without waiting for a decision on the motions, the following proceedings and agreement took place: "The jury are excused from the case, and it is agreed that it be submitted to the court for determination." This was held a submission of the case to the court on the merits.[2] A waiver of

Digitized by Google

a jury trial on the first trial of an action in ejectment is not a waiver of a second trial under the statute.[3] The court may, in its discretion, in actions other than on contract, disregard a waiver of a jury by the parties. A waiver not yet acted upon may be withdrawn with the consent of the court. A waiver agreed to with reference to the exigencies of a particular term will not be extended to a subsequent term.[4] In an action of a legal nature the parties may agree, the court consenting, that a part of the issues be tried by the court and a part by the jury.[5] The modes of waiving a jury prescribed by the statute are not exclusive. But when it is sought to base a waiver on implication from the conduct of the parties every reasonable presumption is to be indulged against a waiver. Even written stipulations of waiver are to be strictly construed. The law zealously guards the right of trial by jury and waivers are not to be lightly inferred.[6]

[1] McGeagh v. Nordberg, 53 Minn. 235, 55 N. W. 117.
[2] Chezick v. Minneapolis etc. Co. 66 Minn. 300, 68 N. W. 1093. See Poppitz v. German Ins. Co. 85 Minn. 118, 88 N. W. 438.
[3] Cochran v. Stewart, 66 Minn. 152, 68 N. W. 972.
[4] Wittenberg v. Onsgard, 78 Minn. 342, 81 N. W. 14.
[5] Lane v. Lenfest, 40 Minn. 375, 42 N. W. 84.
[6] St. Paul etc. Ry. Co. v. Gardner, 19 Minn. 132 Gil. 99; Wittenberg v. Onsgard, 78 Minn. 342, 81 N. W. 14; Poppitz v. German Ins. Co. 85 Minn. 118, 88 N. W. 438.

By conduct generally.

§ 588. A party waives all right to a jury trial by consenting, upon the call of the calendar, that the case be set down as a court case;[1] by proceeding to trial before the court without objection;[2] by consenting to a reference.[3] Whether a motion for a directed verdict constitutes a waiver of a jury trial is an open question in this state. It is not a waiver if it is coupled with a request to submit certain specified issues to the jury.[4] Bringing an action for rescission on the ground of fraud is not a waiver of the right to bring a separate action for damages and have them assessed by a jury.[5]

[1] St. Paul Distilling Co. v. Pratt, 45 Minn. 215, 47 N. W. 789.
[2] Banning v. Hall, 70 Minn. 89, 72 N. W. 817; Davis v. Smith, 7 Minn. 414 Gil. 328; Gibbens v. Thompson, 21 Minn. 398; Smith v. Barclay, 54 Minn. 47, 55 N. W. 827.
[3] St. Paul etc. Ry. Co. v. Gardner, 19 Minn. 132 Gil. 99; Deering v. McCarthy, 36 Minn. 302, 30 N. W. 302.
[4] Poppitz v. German Ins. Co. 85 Minn. 118, 88 N. W. 438. See Chezick v. Minneapolis etc. Co. 66 Minn. 300, 68 N. W. 1093.
[5] Marshall v. Gilman, 47 Minn. 131, 49 N. W. 688.

In mixed actions.

§ 589. In a mixed action, that is, in an action including both a legal and an equitable cause, if a party proceeds to trial without specifically demanding a jury trial for the legal cause he will be deemed to have waived his right to such a trial.

See cases under § 583.

Digitized by Google

CHAPTER X

TRIAL PROCEDURE

IMPANELING THE JURY

WHO ELIGIBLE AS JURORS

General statement.

§ 590. Every male elector of the state is a competent juror, generally, unless he has been convicted of a felony, or is unfit to perform the duties of a juror by reason of some mental or bodily infirmity or ignorance of the English language or has sought jury service.[1] In actions against municipalities residents therein are not incompetent.[2]

[1] G. S. 1894 §§ 5599, 7172, 7173.

[2] G. S. 1894 §§ 642, 1417; McClure v. City of Red Wing, 28 Minn. 186, 9 N. W. 767.

The following persons are exempt from jury service.

§ 591. All members, officers, clerks and employes of the legislature while in session, all United States officers, all judges of courts of record, commissioners of public buildings, auditor and treasurer of state, state librarian, clerks of courts, registers of deeds, sheriffs and their deputies, coroners, constables, attorneys and counselors-at-law, ministers of the gospel, preceptors and teachers of incorporated academies, one teacher in each common school, practicing physicians and surgeons, one miller of each grist mill, one ferryman to each licensed ferry, all acting telegraph operators, all members of companies of firemen organized according to law, all persons of more than sixty years of age, all persons not of sound mind or discretion, persons subject to any bodily infirmity amounting to disability, all persons unable to speak and understand the English language;[1] registered pharmacists;[2] volunteer soldiers of the civil war honorably discharged for wounds received on duty, having lost a limb or being otherwise permanently disabled;[3] members of the national guard during term of service, ex-members of the national guard who have received an honorable discharge after a continuous service of not less than five years;[4] all engineers actively engaged as locomotive or stationary engineers whenever their personal services are required as such engineers by their employers;[5] and persons who have been drawn for a previous term of the district court for the same year, but not persons who have served no more than twice in any three months as talesmen or as struck jurors only.[6]

[1] G. S. 1894 §§ 7173, 7172, 5599, 230, 1175.

[2] G. S. 1894 § 7938. [3] G. S. 1894 § 8040. [4] Laws 1897 ch. 118 § 97.

[5] Laws 1895 ch. 309. [6] G. S. 1894 § 674.

Digitized by Google

Exemption from jury duty not a cause for challenge.

§ 592. "An exemption from service on a jury is not a cause of challenge, but the privilege of the person exempted."

[G. S. 1894 § 7371]

Court may exclude juror on its own motion.

§ 593. The court may exclude a juror of its own motion where it appears that he has not sufficient knowledge of the English language to understand the evidence, the argument of counsel and the instructions of the court.

State v. Ring, 29 Minn. 78, 11 N. W. 233.

PRACTICE IN CIVIL CASES

Filling the jury-box.

§ 594. "When the action is called for trial by jury, the clerk shall draw from the jury-box the ballots containing the names of jurors, until the jury is completed, or the ballots are exhausted; if the ballots become exhausted before the jury is completed, the sheriff, under the direction of the court, shall summon from the bystanders or the body of the county so many qualified persons as are necessary to complete the jury."

[G. S. 1894 § 5367]

§ 595. In districts where several jury trials progress simultaneously this provision is not always followed with strictness; but no doubt parties have a right in all cases to insist on its strict observance. In Hennepin county the practice is for the judge in charge of the jury calendar to direct the clerk to draw from the jury-box 18 ballots. The 18 jurors thus selected are sent to the court-room of the judge to whom the case has been assigned. And the jury is drawn by ballot from this number.

Plaintiff required to pay jury fee.

§ 596. "Before the jury is sworn, the plaintiff shall pay to the clerk three dollars as a jury fee, which shall be immediately paid by the clerk to the treasurer of the county."

[G. S. 1894 § 5368]

§ 596a. This requirement has been held constitutional.[1] When a new trial is granted after verdict rendered a second jury fee must be paid.[2]

[1] Adams v. Corriston, 7 Minn. 456 Gil. 365.

[2] Schultz v. Bower, 66 Minn. 281, 68 N. W. 1080.

Ballots—how kept.

§ 597. "When the jury is completed and sworn, the ballots containing the names of the jurors sworn shall be laid aside till the jury so sworn is discharged, and then they shall be returned to the box; and every ballot drawn, containing the name of a juror not so sworn shall be returned to the box as soon as the jury is completed."

[G. S. 1894 § 5369]

Digitized by Google

Challenges—a matter of right.

§ 598. The right to challenge jurors is one given and secured by law, and cannot be taken away by the court. Until the challenges to which a party is entitled under the statutes are exhausted, the right extends to every juror called.

Swanson v. Mendenhall, 80 Minn. 56, 82 N. W. 1093. See § 622 as to waiver of right.

Challenges—joinder in.

§ 599. "Either party may challenge the jurors; but when there are several parties on either side, they shall join in a challenge before it can be made. The challenges are to the panel and individual jurors as in criminal actions, and the causes for challenges shall be the same as in criminal actions; provided, however, that there can be but three peremptory challenges on each side."

[G. S. 1894 § 5370]

§ 600. When actions are consolidated by the court for trial each party retains the right to three peremptory challenges.

Mutual Life Ins. Co. v. Hillman, 145 U. S. 285.

Order of challenges—discretionary.

§ 601. The order of challenges as between the parties in a civil action rests in the discretion of the trial court.

St. Anthony Falls etc. Co. v. Eastman, 20 Minn. 277 Gil. 249.

Order of challenges—rule of court.

§ 602. "In jury trials of civil actions where a full panel is called in the first instance, challenges shall be made alternately, first by the defendant, and then by the plaintiff."

[Rule 39, District Court]

Order of challenges—general practice.

§ 603. The prevailing practice in challenging jurors in civil cases is as follows: A full panel is called in the first instance. The defendant, after making a general examination of the jurors as stated in §§ 652, 653, first makes such challenges for cause as he desires in the order stated in § 610. The challenges are excepted to or denied and tried as stated in §§ 638–658. If a challenge is admitted or found true the juror challenged is at once discharged and the clerk calls another juror who takes the vacant place in the jury box and is examined and challenged in the same manner and in the same order as the other jurors. When there are twelve men in the box against whom the defendant has no challenge for cause he passes the jury to the plaintiff who in turn challenges for cause in the same manner. If any challenge of the plaintiff is found true or admitted the juror is at once discharged and another called in his place. The latter is first examined and challenged or passed for cause by the defendant. If passed for cause by the defendant he may be challenged for cause by the plaintiff. If accepted the plaintiff proceeds with his challenging for cause until there are twelve men in the box against whom he has no challenge for cause. The peremptory

Digitized by Google

challenging then begins. The clerk hands the jury list to the defendant who draws a line through the name of any single juror whom he desires to challenge peremptorily, at the same time indicating on the list that the challenge is made by the defendant. He then hands the list to the clerk who calls another juror. The latter is given a seat outside the jury box and is challenged in the same manner and in the same order as the other jurors. If he is challenged for cause by either party and the challenge found true or admitted he is discharged and another juror called. When the defendant has made one peremptory challenge the clerk hands the list to the plaintiff who in turn makes a single peremptory challenge. This process of challenging single jurors peremptorily first by the defendant and then by the plaintiff goes on until both parties have exhausted their challenges. The clerk then reads the names of those jurors who have been challenged peremptorily without stating by whom they were challenged and they are discharged. The twelve remaining jurors constitute the jury.

See Swanson v. Mendenhall, 80 Minn. 56, 82 N. W. 1093.

PRACTICE IN CRIMINAL CASES

General method of impaneling jury.

§ 604. In criminal actions a full panel is not called in the first instance. The jurors are called separately and challenged when called and the jury-box is filled gradually as each juror is accepted.[1] It is proper practice to swear each juror separately when accepted and not to wait until the jury-box is filled.[2]

[1] State v. Armington, 25 Minn. 29.

[2] State v. Brown, 12 Minn. 538 Gil. 448.

Definition and kinds of challenge.

§ 605. "A challenge is an objection made to a trial jury, and is of two kinds:

(1) To the panel.

(2) To an individual juror."

[G. S. 1894 § 7351]

Several defendants must join in challenge.

§ 606. "When several defendants are tried together, they cannot sever the challenges, but shall join therein."

[G. S. 1894 § 7352]

§ 607. This provision applies to peremptory challenges.

People v. McCalla, 8 Cal. 301.

Order of challenging as between parties.

§ 608. "All challenges to an individual juror shall be taken first by the defendant, and then by the state; and each party shall exhaust all his challenges before the other begins."

[G. S. 1894 § 7383]

§ 609. When a juror is called the defendant must exhaust all his challenges (both peremptory and for cause) to that juror and then

Digitized by Google

the state must exhaust all its challenges to him, and so on, successively, as each juror is called.

State v. Smith, 20 Minn. 376 Gil. 328; State v. Armington, 25 Minn. 29.

Order of challenges as to kind.

§ 610. "The challenges of either party need not all be taken at once; but they may be taken separately, in the following order, including in each challenge all the causes of challenge belonging to the same class:

(1) To the panel.
(2) To an individual juror, for a general disqualification.
(3) To an individual juror, for implied bias.
(4) To an individual juror, for actual bias."

[G. S. 1894 § 7384]

§ 611. Questions that are proper on a challenge for actual bias may be entirely improper on a challenge for implied bias or general disqualification. For that reason the proper practice is to dispose of each challenge in the order named in the statute and to restrict the questions asked to the particular ground of challenge.[1] The nature of the challenge, as actually made upon the trial, cannot be regarded as merely formal so that any misstatement of the ground of challenge intended may be deemed immaterial and the examination upon the trial of the challenge be referred to a different ground than the one announced.[2]

[1] State v. Hanley, 34 Minn. 430, 26 N. W. 397; State v. Davis, 14 Nev. 439 (similar statute).

[2] State v. Hanley, 34 Minn. 430, 26 N. W. 397.

CHALLENGE TO THE PANEL

Challenge to panel defined.

§ 612. "A challenge to the panel is an objection made to all the petit or trial jurors returned, and may be taken by either party."

[G. S. 1894 § 7353]

Grounds of challenge to panel.

§ 613. "A challenge to the panel can be founded only on a material departure from the forms prescribed by law, in respect to the drawing and return of the jury."

[G. S. 1894 § 7354]

§ 614. This provision is exclusive.[1] Objections to a petit jury must be made by challenge to the panel and not by motion to quash the indictment or by plea in abatement.[2] The failure of the chairman of the board of county commissioners to sign or certify the petit jury list drawn by the commissioners is a material departure from the requirements of the law and ground of challenge to the panel.[3] Putting fewer names in the box from which the jurors for the term are taken than the law requires is a material departure.[4] The law is

Digitized by Google

watchful, and properly so, of the manner in which jurors are selected.[5] The following objections have been held not good grounds of challenge to the panel: the failure to file forthwith, in the office of the clerk of the court, the list of petit jurors selected by the commissioners;[6] the fact that the sheriff, while serving a special venire endeavored to ascertain the opinions of the jurors and selected them with reference thereto;[7] that the venire describes the action as a "civil" instead of a "criminal" action, the jurors all appearing pursuant to it;[8] that the jurors were taken from among jurors summoned on two previous special venires.[9]

[1] State v. Gut, 13 Minn. 341 Gil. 315; People v. Darr, 61 Cal. 554 (similar statute); People v. Wallace, 101 Cal. 281.
[2] State v. Thomas, 19 Minn. 484 Gil. 418.
[3] State v. Greenman, 23 Minn. 209; State v. Schumm, 47 Minn. 373, 50 N. W. 362.
[4] State v. Brecht, 41 Minn. 50, 42 N. W. 602. See also, State v. Greenman, 23 Minn. 209.
[5] State v. Greenman, 23 Minn. 209.
[6] State v. Gut, 13 Minn. 341 Gil. 315.
[7] State v. McCartey, 17 Minn. 76 Gil. 54.
[8] State v. Nerbovig, 33 Minn. 480, 24 N. W. 321.
[9] Dayton v. Warren, 10 Minn. 233 Gil. 185.

When and how taken.

§ 615. "A challenge to the panel shall be taken before a jury is sworn, and shall be in writing, specifying plainly and distinctly the facts constituting the ground of challenge."

[G. S. 1894 § 7355] See Steele v. Maloney, 1 Minn. 347 Gil. 257 (in the absence of fraud or collusion in the selection of a jury objection to the panel is too late after verdict).

Exception to challenge.

§ 616. "If the sufficiency of the facts alleged as a ground of challenge is denied, the adverse party may except to the challenge; the exception need not be in writing, but shall be entered upon the minutes of the court, and thereupon the court shall proceed to try the sufficiency of the challenge, assuming the facts alleged therein to be true."

[G. S. 1894 § 7356] See State v. Durnam, 73 Minn. 150, 75 N. W. 1127.

Withdrawal of exception and denial.

§ 617. "If, on the exception, the court deems the challenge sufficient, it may, if justice requires it, permit the party excepting to withdraw his exception, and to deny the facts alleged in the challenge; if the exception is allowed, the court may, in like manner, permit an amendment of the challenge."

[G. S. 1894 § 7357]

Digitized by Google

CHALLENGE TO INDIVIDUAL JURORS

Kinds.

§ 618. "A challenge to an individual juror is either:
(1) Peremptory; or,
(2) For cause."
[G. S. 1894 § 7361]

Defendant must be informed as to time of challenge.

§ 619. "Before a juror is called, the defendant shall be informed by the court, or under its direction, that if he intends to challenge an individual juror, he shall do so when the juror appears, and before he is sworn."
[G. S. 1894 § 7360]

§ 620. The failure of the court to inform the defendant is not a ground for a new trial if it is obvious that the defendant or his counsel understood the law.
People v. Mortier, 58 Cal. 262 (similar statute); People v. Moore, 103 Cal. 508; People v. Ellsworth, 92 Cal. 594.

When taken.

§ 621. "It shall be taken when the juror appears, and before he is sworn; but the court may, for good cause, permit it to be taken after the juror is sworn, and before the jury is completed."
[G. S. 1894 § 7362]

§ 622. The defendant, in a criminal trial, who waives his right to challenge a juror peremptorily when the juror is called, has not the right to do so after the panel is completed, although the jury has not been sworn.[1] When a party challenges a juror for actual bias, but subsequently withdraws the challenge, it is discretionary with the court to allow him to renew it at any time before the jury is complete.[2] The court may permit a re-examination of a juror upon matters coming to the attention of the state or the defendant after he has been accepted and sworn as a juror and before the jury is complete and may, in the exercise of its discretion, permit a peremptory challenge to be interposed after such examination although no ground for the challenge for cause is disclosed. It is a discretion that ought to be freely exercised, especially in a criminal case.[3]

[1] State v. Armington, 25 Minn. 29; State v. Scott, 41 Minn. 365, 43 N. W. 62.
[2] State v. Dumphey, 4 Minn. 438 Gil. 340.
[3] People v. Durrant, 116 Cal. 179 (identical statute); People v. Montgomery, 53 Cal. 576; People v. Jenks, 24 Cal. 11.

Peremptory challenge defined.

§ 623. "A peremptory challenge can be taken either by the state or by the defendant, and may be oral. It is an objection to a juror for which no reason need be given, but upon which the court shall exclude him."
[G. S. 1894 § 7363]

Digitized by Google

Number of peremptory challenges allowed.

§ 624. "If the offence charged is punishable with death, or with imprisonment in the state prison for life, the state is entitled to seven peremptory challenges, and the defendant to twenty peremptory challenges. On a trial for any other offence, the state is entitled to two peremptory challenges, and the defendant to five peremptory challenges."

[G. S. 1894 § 7364]

§ 625. It is only in capital cases or cases in which a life sentence is in terms affixed by the legislature as the punishment, that the defendant is entitled to twenty challenges.[1] Of course if under the indictment the accused may, by express provision, be sentenced for life he is entitled to twenty challenges.

[1] People v. Clough, 59 Cal. 438; People v. Harris, 61 Cal. 136.

Waiver of right to peremptory challenge.

§ 626. In a criminal action a party waives the right to challenge peremptorily by failing to exercise the right when the juror appears.[1] Either party may at any time indicate to the court that he is satisfied with the jury, and, when he does so, cannot thereafter, without leave of the court, challenge peremptorily one of the jurors so accepted. But if the opposing party thereafter makes a further challenge, and a new juror is called, the right to challenge such juror remains and may be exercised unless the party has previously exhausted his peremptory challenges.[2]

[1] See § 622.

[2] Swanson v. Mendenhall, 80 Minn. 56, 82 N. W. 1093.

Who may challenge for cause.

§ 627. "A challenge for cause may be taken either by the state or by the defendant."

[G. S. 1894 § 7365]

Challenge for cause defined.

§ 628. "It is an objection to a particular juror, and is either:

(1) General, that the juror is disqualified from serving in any case; or,

(2) Particular, that he is disqualified from serving in the case on trial."

[G. S. 1894 § 7366]

General causes of challenge.

§ 629. "General causes of challenge are:

(1) A conviction for a felony.

(2) A want of any of the qualifications prescribed by the laws to render a person a competent juror.

(3) Unsoundness of mind, or such defect in the faculties of the mind, or organs of the body, as renders him incapable of performing the duties of a juror."

[G. S. 1894 § 7367]

Digitized by Google

§ 630. "Any person whose name shall have been placed on any list of jurors at the request, solicitation or suggestion, direct or indirect, of himself or any other person, except the officer or officers charged by law with the duty of preparing such jury list, shall be thereby disqualified from serving on any jury during the term or terms of court for which such list was prepared, and such disqualification may be inquired into on a challenge for cause, and if made to appear the challenge shall be allowed."

[Laws 1897 ch. 352]

Particular causes of challenge—implied bias—opinion—actual bias.

§ 631. "Particular causes of challenge are of two kinds:

(1) For such a bias, as, when the existence of the facts is ascertained, in judgment of law disqualifies the juror, and which is known in this chapter as implied bias.

(2) For the existence of a state of mind on the part of the juror, in reference to the case or to either party, which satisfies the triers, in the exercise of a sound discretion, that he cannot try the issue impartially and without prejudice to the substantial rights of the party challenging, and which is known in this statute as actual bias."

[G. S. 1894 § 7368]

Cause of challenge for actual bias.

§ 632. "A challenge for actual bias may be taken for the cause mentioned in the second subdivision of section eighteen (§ 631 supra), and for no other cause."

[G. S. 1894 § 7370]

What opinions disqualify.

§ 633. All the cases hold that a deliberate and settled opinion on the merits disqualifies a juror.[1] But "the opinion or judgment must be something more than a vague impression, formed from casual conversations with others, or from reading imperfect, abbreviated, newspaper reports. It must be such an opinion upon the merits of the question, as would be likely to bias or prevent a candid judgment, upon a full hearing of the evidence."[2] The mere fact that a juror has formed an opinion which it would require evidence to remove is not decisive.[3] But if a juror states that he has formed an opinion on the merits which it would require "strong" evidence to remove he should be held disqualified.[4] A deliberate and settled opinion disqualifies although it has never been expressed.[5] Mere casual, offhand, expressions of opinion do not disqualify.[6]

[1] Reynolds v. U. S. 98 U. S. 445; Staup v. Com. 74 Pa. St. 458.

[2] Shaw, C. J., Com. v. Webster, 5 Cush. (Mass.) 295.

[3] Gallot v. U. S. 87 Fed. 446; State v. Willis, 71 Conn. 315; State v. Lawrence, 38 Iowa 51; Hughes v. State (Wis. 1901) 85 N. W. 333.

[4] King v. State, 89 Ala. 146; Andrews v. State, 21 Fla. 598; Palmer v. State, 42 Oh. St. 596.

[5] Reynolds v. U. S. 98 U. S. 157; State v. Potter, 18 Conn. 172.

[6] John v. State, 16 Ga. 200.

Digitized by Google

Causes of challenge for implied bias.

§ 634. "A challenge for implied bias may be taken for all or any of the following causes, and for no other:[1]

(1) The consanguinity or affinity, within the ninth degree, to the person alleged to be injured by the offence, or to the person on whose complaint the prosecution was instituted, or to the defendant, or to any one of the attorneys, either for the prosecution or for the defence.[2]

(2) Standing in relation of guardian and ward, attorney and client, master and servant,[3] landlord and tenant, or being a member of the family of the defendant, or of the person alleged to be injured by the offence, or on whose complaint the prosecution was instituted, or in his employment on wages.

(3) Being a party adverse to the defendant in a civil action, or having complained against, or been accused by him, in a criminal prosecution.

(4) Having served on the grand jury which found the indictment, or on a coroner's jury which inquired into the death of the person whose death is the subject of indictment.

(5) Having served on a trial jury, which has tried another person for the offence charged in the indictment.

(6) Having been one of a jury formerly sworn to try the same indictment, and whose verdict was set aside, or which was discharged without a verdict, after the cause was submitted to it.[4]

(7) Having served as a juror in a civil action, brought against the defendant for the act charged as an offence.

(8) If the offence charged is punishable with death, the entertaining of such conscientious opinions, as would preclude his finding the defendant guilty, in which case he shall neither be permitted nor compelled to serve as a juror."[5]

[G. S. 1894 § 7360] This section is to be applied, with the necessary verbal changes, to civil actions. See § 599.

[1] State v. Hanley, 34 Minn. 430, 26 N. W. 397; State v. Thomas, 19 Minn. 484 Gil. 418 (statute exclusive).

[2] See § 635.

[3] See § 636.

[4] Williams v. McGrade, 18 Minn. 82 Gil. 65; State v. Thomas, 19 Minn. 484 Gil. 418.

[5] See § 637.

Disqualification from relationship.

§ 635. Affinity is the relationship which arises from marriage between one of the spouses and the blood-relations of the other and does not include persons related to the other simply by affinity.[1] In other words either the party or the juror must be the spouse of one related to the other by blood in order that there should be a disqualification on account of affinity. Thus, a juror is not disqualified because his brother is married to a sister of one of the parties,[2] or because his aunt is married to an uncle of a party,[3] or because his wife is a blood relation of the wife of a party.[4] Disqualification from

Digitized by Google

affinity ceases upon the death of a spouse without living issue.[5] Relationship to a stockholder of a corporation which is a party disqualifies.[6] Relationship to a party acting in a representative capacity disqualifies.[7]

[1] Chinn v. State, 47 Ohio St. 575; Paddock v. Wells, 2 Bart. Ch. (N. Y.) 333.
[2] Chase v. Jennings, 38 Me. 44.
[3] Bigelow v. Sprague, 140 Mass. 425.
[4] Tegarden v. Phillips, 14 Ind. App. 27.
[5] Bigelow v. Sprague, 140 Mass. 425.
[6] Wells-Stone Mercantile Co. v. Bowman, 59 Minn. 364, 61 N. W. 135; Quinebaug Bank v. Leavens, 20 Conn. 87.
[7] Balsbaugh v. Frazer, 19 Pa. St. 95.

Relation of master and servant.

§ 636. That one was formerly in the employ of a party does not disqualify him.[1] An employe of a stockholder of a corporation is not disqualified.[2]

[1] East Line etc. Ry. Co. v. Brinker, 68 Tex. 500.
[2] Benedict v. Penn. Coal Co. 6 Kulp (Pa.) 221.

Conscientious opinions.

§ 637. Mere opposition to the policy of capital punishment does not disqualify. There must be a conscientious belief that it is morally wrong to take human life in punishment for crime.[1] The statute applies when the crime may be punished with death.[2] The accused cannot object to a juror on this ground.[3]

[1] People v. Stewart, 7 Cal. 140.
[2] People v. Majors, 65 Cal. 138.
[3] State v. Logan, 56 Kans. 61.

Court shall determine implied bias.

§ 638. "On the trial of a challenge for implied bias, the court shall determine the law and the fact, and either allow or disallow the challenge, and direct an entry accordingly upon the minutes."

[G. S. 1894 § 7380]

How causes of challenge must be stated.

§ 639. "In a challenge for implied bias, one or more of the causes stated in section nineteen (§ 634, supra) shall be alleged; in a challenge for actual bias, the cause stated in the second subdivision of section eighteen (§ 631, supra) shall be alleged; in either case, the challenge may be oral, but shall be entered upon the minutes of the court."

[G. S. 1894 § 7372]

§ 640. A challenge for "actual bias" is sufficient; it is not necessary to state the nature of the bias or to recite § 631.[1] A challenge "for cause" [2] or "for implied bias" [3] is insufficient.

[1] State v. Durnam, 73 Minn. 150, 75 N. W. 1127.
[2] Bonney v. Cocke, 61 Iowa, 303; People v. Dick, 37 Cal. 279.
[3] People v. McGungill, 41 Cal. 429.

Digitized by Google

Exception to challenge—denial.

§ 641. "The adverse party may except to the challenge in the same manner as to a challenge to a panel, and the same proceedings shall be had thereon as prescribed in sections five, six, and seven (§§ 615, 616, 617, supra), except that if the challenge is sustained the juror shall be excluded. The adverse party may also orally deny the facts alleged as the ground of challenge."

[G. S. 1894 § 7373]

Denial of challenge.

§ 642. "If the challenge is denied, the denial may, in like manner, be oral, and shall be entered upon the minutes of the court, and the court shall proceed to try the question of fact."

[G. S. 1894 § 7358]

Evidence on trial of challenge.

§ 643. "Upon the trial of the challenge, the officers, whether judicial or ministerial, whose irregularity is complained of, as well as any other persons, may be examined to prove or disprove the facts alleged as the ground of the challenge."

[G. S. 1894 § 7359]

§ 644. It is no objection that the testimony of the officers contradicts their certificates.

State v. Gut, 13 Minn. 341 Gil. 315; State v. Brecht, 41 Minn 50, 42 N. W. 602.

Effect of admission of challenge.

§ 645. Whenever a challenge is interposed by one party and admitted by the other, there is nothing to try, and the juror must stand aside, unless the court, in its discretion, allows the challenge to be withdrawn. The challenging party has no right to examine the juror.

Morrison v. Lovejoy, 6 Minn. 319 Gil. 224; State v. Lautenschlager, 22 Minn. 514; State v. Smith, 56 Minn. 78, 57 N. W. 325.

Withdrawal of challenges.

§ 646. It is purely discretionary with the court to allow a party to withdraw a challenge.[1] A challenge for actual bias which has been withdrawn may be renewed, with permission of the court, at any time before the jury is complete.[2]

[1] State v. Dumphey, 4 Minn. 438 Gil. 340; Morrison v. Lovejoy, 6 Minn. 319 Gil. 224; State v. Lautenschlager, 22 Minn. 514; State v. Smith, 56 Minn. 78, 57 N. W. 325.

[2] State v. Dumphey, 4 Minn. 438 Gil. 340.

Challenge as to citizenship—evidence.

§ 647. "Whenever any person called as a juror is challenged on the ground that he is not a citizen of the United States, the testimony of such person shall be competent evidence of the fact of naturalization, or declaration of intention to become a citizen, with-

Digitized by Google

out the production of any records or certificates, but his testimony may be disputed by the party challenging."

[G. S. 1894 § 7378] See State v. Barrett, 40 Minn. 65, 41 N. W. 459; State v. Lawlor, 28 Minn. 216, 9 N. W. 698.

Trial of challenge—by whom.

§ 648. "If the facts are denied, the challenge shall be tried as follows:

(1) For implied bias, by the court.

(2) For actual bias, by triers, unless, in cases not capital, the parties consent to a trial by the court." [1]

[G. S. 1894 § 7374]

[1] State v. Smith, 78 Minn. 362, 81 N. W. 17 (conduct held a consent to trial by court); State v. Hanley, 34 Minn. 430, 26 N. W. 397 (two modes of trial distinct).

Triers appointed.

§ 649. "The triers shall be three impartial persons, not on the jury panel, appointed by the court. All challenges for actual bias shall be tried by the triers thus appointed, a majority of whom may decide."

[G. S. 1894 § 7375]

Triers to be sworn.

§ 650. "The triers shall be sworn generally to inquire whether or not the several persons who may be challenged, and in respect to whom the challenges are given to them in charge, are true, and to decide the same according to evidence."

[G. S. 1894 § 7376]

§ 651. Triers need not be re-sworn for the trial of each challenge. State v. Brown, 12 Minn. 538 Gil. 448.

Examination of jurors before challenge.

§ 652. It is purely discretionary with the court whether or not to allow either party to interrogate a juror as to his qualifications, without first interposing a challenge.[1] And this is so although the party has exhausted his peremptory challenges.[2] Logically, the examination should precede the challenge. Then, too, a party ought not to be compelled to prejudice a juror by challenging him unless there is a strong probability that he is disqualified.[3] For these reasons the court ought to allow a full examination before requiring a challenge if counsel acts in good faith and keeps his examination within reasonable limits. In all cases it is customary to allow a general preliminary examination as to residence, occupation, relationship to the parties and the like.

[1] State v. Lautenschlager, 22 Minn. 514.

[2] State v. Smith, 56 Minn. 78, 57 N. W. 325.

[3] People v. Backus, 5 Cal. 275; People v. Hamilton, 62 Cal. 377.

Scope of examination on voir dire.

§ 653. A party has a right, at least after challenge, to put any question to the juror properly tending to disclose his bias, prejudice,

Digitized by Google

leanings, or general qualifications. The range of such inquiry is almost wholly in the discretion of the trial court.[1] A party has a right, in good faith, to challenge a juror for cause and upon the examination to elicit information to be used in determining whether to interpose a peremptory challenge.[2] A juror cannot be compelled to answer any question tending to criminate or degrade him.[3] In a criminal action the juror may be asked, on a challenge for actual bias, if he believes the defendant guilty.[4] Questions as to what the juror would decide upon a hypothetical state of evidence should not be permitted.[5] The court has discretionary power to prevent useless iteration of questions.[6] The questions propounded, after a challenge, must be pertinent to the particular ground of challenge specified.[7]

[1] State v. Bresland, 59 Minn. 281, 61 N. W. 450; State v. Chapman, 1 S. D. 414; State v. Mann, 83 Mo. 589.
[2] State v. Bresland, 59 Minn. 281, 61 N. W. 450; State v. Foster, 91 Iowa 164; People v. Hamilton, 62 Cal. 377.
[3] Burt v. Panjaud, 99 U. S. 180; State v. Mann, 83 Mo. 589.
[4] People v. Hamilton, 62 Cal. 377.
[5] Woolen v. Wire, 110 Ind. 251; State v. Davis, 14 Nev. 439; Hughes v. State (Wis. 1901) 85 N. W. 333.
[6] State v. Frelinghuysen, 43 Minn. 265, 45 N. W. 432.
[7] State v. Hanley, 34 Minn. 430, 26 N. W. 397. See § 611.

Juror challenged may be examined.

§ 654. "Upon the trial of a challenge to an individual juror, the juror challenged may be examined as a witness, to prove or disprove the challenge, and is bound to answer every question pertinent to the inquiry therein."

[G. S. 1894 § 7377] See § 653.

Rules of evidence on trial.

§ 655. "Other witnesses may also be examined on either side; and the rules of evidence applicable to the trial of other issues shall govern the admission or exclusion of testimony on the trial of the challenge."

[G. S. 1894 § 7379]

§ 656. Whether the court will delay the trial to bring in other witnesses is purely a matter of discretion.

State v. Barrett, 40 Minn. 65, 41 N. W. 459.

Instructions to triers.

§ 657. "On the trial of a challenge for actual bias, when the evidence is concluded, the court shall instruct the triers that it is their duty to find the challenge true, if the evidence establishes the existence of a state of mind on the part of the juror in reference to the case, or to either party, which satisfies them in the exercise of a sound discretion, that he cannot try the issue impartially and without prejudice to the substantial rights of the party challenging; and that, if otherwise, they shall find the challenge not true. The court can give them no other instruction."

[G. S. 1894 § 7381]

Digitized by Google

Decision of triers final.

§ 658. "The triers shall thereupon find the challenge either true or not true, and their decision is final. If they find it true, the jurors shall be excluded."

[G. S. 1894 § 7382]

§ 659. The decision of a court upon a question of actual bias of a juror, submitted to it for determination by consent, is final.

Morrison v. Lovejoy, 6 Minn. 319 Gil. 224; State v. Mims, 26 Minn. 183, 2 N. W. 494, 683; Hawkins v. Manston, 57 Minn. 323, 59 N. W. 309; State v. Durnam, 73 Minn. 150, 75 N. W. 1127; Perry v. Miller, 61 Minn. 412, 63 N. W. 1040; Bennett v. Backus Lumber Co. 77 Minn. 198, 79 N. W. 682; State v. Feldman, 80 Minn. 314, 83 N. W. 182.

PROVINCE OF COURT AND JURY

QUESTIONS OF LAW AND FACT

General statement.

§ 660. The question what is for the court and what for the jury is often confounded in the books with the question what is a question of fact and what a question of law. The two questions are far from identical and the failure of the courts to differentiate them carefully renders this whole subject a difficult one for the student and practitioner. The only general reply which the law makes to the question what is for the court and what for the jury is the ancient maxim, ad questionem juris respondent judices, ad questionem facti respondent juratores. This, like all maxims of our law, is a mere general truth and not to be taken literally. It has never been true that all questions of fact are for the jury. If a statute makes a question one of fact it does not necessarily follow that the determination of the question is exclusively for a jury.[1]

Courts were established long before the jury became a part of our judicial system. The jury were called in to decide the questions of fact at issue between the parties in certain classes of cases, and that is their function to-day. When it is said that questions of fact are for the jury, reference is made to the facts put in issue by the parties—the issuable facts or those fundamental facts which are the basis of the rights and obligations of the parties. They are those facts which the jury must find in a special verdict to warrant a judgment. It may be laid down as a general rule that all questions of fact except the issuable facts are for the court. All issuable facts are for the jury with a few exceptions that are of ancient origin and are maintained as matter of precedent rather than principle. When the jury system was in its formative period the courts resorted to every available expedient to restrain the powers of the jury. There was need of this, for it is to be remembered that at that time the right to set aside a verdict as not justified by the evidence was not yet established and juries could return a verdict

Digitized by Google

on their own knowledge. During this period some questions of issuable fact were declared to be questions for the court. In order not to appear to violate the rule that questions of fact are for the jury the judges resorted to the usual expedient of a fiction and declared such questions of fact, questions of law. Verbal consistency with the general rule was thereby maintained. Thus malice, cooling time, provocation and probable cause were declared questions of law although they are obviously questions of fact. In this state the only issuable facts that are withdrawn from the jury under the fiction that they are questions of law are the existence of probable cause in actions for malicious prosecution and the construction of writings. The right to set aside verdicts as not justified by the evidence, which became firmly established by the beginning of the eighteenth century, worked a fundamental change in the relation of court and jury. Out of this right has grown the practice of directing a verdict or ordering a nonsuit or dismissal in all civil cases where there is only one reasonable inference to be drawn from the evidence as to the issuable facts and it would be the manifest duty of the court to set aside a contrary verdict. In this way questions of issuable fact in all civil cases become questions for the court when there is only one reasonable inference.

The general rules on this subject may be formulated thus:

(1) Questions of law are questions concerning those rules or standards of conduct which judicial tribunals are bound to apply and enforce.

(2) All other questions arising in a judicial investigation are termed questions of fact.

(3) All questions of law are for the court.[2]

(4) All questions of fact put in issue by the pleadings or treated as issuable facts on the trial are for the jury, except

(a) Intent as embodied in writings.

(b) Probable cause in actions for malicious prosecution.

(c) In all civil cases where there is only one reasonable inference.

(5) All questions of fact not in issue are for the court.

The so-called mixed questions of law and fact are really questions of fact and the use of this phrase is indefensible and misleading. A question of fact does not become a question of law simply because the jury need instructions from the court for its proper determination.[3]

[1] Hibbs v. Marpe, 84 Minn. 10, 86 N. W. 612.

[2] See G. S. 1894 § 5768 for statutory exception in case of libel.

[3] The above general statement is based on Thayer Prel. Treat. Ev. ch. 5. Id. 4 Harvard Law Review 147.

Bills and notes.

§ 661. What is a reasonable time for presentment of a non-negotiable note indorsed after maturity;[1] whether the discounting of a bill or note with the general indorsement of the holder is a sale of the paper, or a loan to the holder, secured by the paper and

Digitized by Google

indorsed as collateral;[2] whether there was an extension of a privilege of cancellation attached to a note;[3] whether a party purchased a note with notice;[4] who is the owner of a note;[5] whether a material alteration in a note was made without the consent of the makers and after it was made and delivered;[6] whether a party was negligent in signing a note and fraud in obtaining his signature;[7] are all questions of fact for the jury except when there is only one reasonable inference.

[1] Hart v. Eastman, 7 Minn. 74 Gil. 50. See Thayer, Ev. 214.
[2] Stolze v. Bank of Minnesota, 67 Minn. 172, 69 N. W. 813.
[3] Stout v. Watson, 45 Minn. 454, 48 N. W. 195.
[4] Ward v. Johnson, 57 Minn. 301, 59 N. W. 189; Drew v. Wheelihan, 75 Minn. 68, 77 N. W. 558.
[5] Cooper v. Hayward, 71 Minn. 374, 74 N. W. 152.
[6] Yellow Medicine County Bank v. Tagley, 57 Minn. 391, 59 N. W. 486.
[7] Yellow Medicine County Bank v. Wiger, 59 Minn. 384, 61 N. W. 452; Gibbons v. Bente, 51 Minn. 499, 53 N. W. 756.

Cause and effect—proximate cause.

§ 662. What is the cause of a given effect[1] and what the proximate cause[2] are questions for the jury except when there is only one reasonable inference.

[1] Hale v. Life Indemnity & Investment Co. 61 Minn. 516, 63 N. W. 1108.
[2] Ransier v. Minneapolis etc. Ry. Co. 32 Minn. 331, 20 N. W. 332; Halverson v. Minneapolis etc. Ry. Co. 32 Minn. 88, 19 N. W. 392; Alexander v. Chicago etc. Ry. Co. 41 Minn. 515, 43 N. W. 481; Schumaker v. St. Paul etc. Ry. Co. 46 Minn. 39, 48 N. W. 559; Purcell v. St. Paul City Ry. Co. 48 Minn. 134, 50 N. W. 1034; Aldrich v. Wetmore, 56 Minn. 20, 57 N. W. 221; Keegan v. Minneapolis etc. Ry. Co. 76 Minn. 90, 78 N. W. 965.

Construction of laws.

§ 663. The construction of all laws is for the court and this is so even when resort must be had to extrinsic evidence in aid of construction.[1] Where the evidence of the law of another state consists entirely of the judicial opinions of that state their construction and effect is a question for the court alone.[2] So the question whether a statute was duly passed is for the court.[3] Whether a custom[4] or municipal ordinance[5] is reasonable is for the court.

[1] Board of Supervisors v. Heenan, 2 Minn. 330 Gil. 281; Wildner v. Ferguson, 42 Minn. 112, 43 N. W. 794; Evison v. Chicago etc. Ry. Co. 45 Minn. 370, 48 N. W. 6.
[2] Thomson-Houston Electric Co. v. Palmer, 52 Minn. 174, 53 N. W. 1137.
[3] Post v. Supervisors, 105 U. S. 667; Town of South Ottawa v. Perkins, 94 U. S. 260; Board of Supervisors v. Heenan, 2 Minn. 330 Gil. 281.

Digitized by Google

[4] Minis v. Nelson, 43 Fed. 777.
[5] Evison v. Chicago etc. Ry. Co. 45 Minn. 370, 48 N. W. 6.

Construction of writings.

§ 664. At an early day, either by adoption from the Roman law or because juries at that time could not read, the rule became established that the construction of all writings is for the court.[1] This is now the universal rule when the intention of the writer is to be gained wholly from the writing.[2] But when resort to extrinsic evidence is necessary or proper in aid of construction the question should be submitted to the jury under proper instructions.[3] When a custom is sought to be attached to a written contract by extrinsic evidence the case is properly one for the jury under hypothetical instructions from the court. It is for the jury to determine the existence of the custom and whether the parties contracted with reference to it in all cases where the law does not conclusively presume that they did.[4] If a contract is partly in writing and party oral the whole question is for the jury.[5] Whether a written contract has been performed is for the jury.[6] What extrinsic facts may be considered by the jury[7] and whether separate writings taken together constitute a contract[8] are questions for the court. If the court improperly submits the construction of writings to the jury and they find as the court ought to have found it is error without prejudice.[9] A plat is a written instrument within the foregoing rules.[10] In all cases the question of intent as expressed in writings is for the court where there is only one reasonable inference.[11] When a writing comes into a case collaterally, that is, when the intention of the writer is not one of the issuable facts, the question is always for the jury.[12]

[1] Thayer, Ev. 203.
[2] Van Eman v. Stanchfield, 8 Minn. 518 Gil. 460; Dodge v. Rogers, 9 Minn. 223 Gil. 209; Donnelly v. Simonton, 13 Minn. 301 Gil. 278; Hooper v. Webb, 27 Minn. 485, 8 N. W. 589; Hanson v. Eastman, 21 Minn. 509; Downer v. St. Paul etc. Ry. Co. 23 Minn. 271; Gross v. Diller, 33 Minn. 424, 23 N. W. 837.
[3] Donnelly v. Simonton, 13 Minn. 301 Gil. 278; Engel v. Scott & Holston Lumber Co. 60 Minn. 39, 61 N. W. 825; Board of Trustees v. Brown, 66 Minn. 179, 68 N. W. 837; Goddard v. Foster, 17 Wall. (U. S.) 142; Trustees of East Hampton v. Vail, 151 N. Y. 463.
[4] St. Anthony Falls Water-Power Co. v. Eastman, 20 Minn. 277 Gil. 249; Merchant v. Howell, 53 Minn. 295, 55 N. W. 131; Eaton v. Smith, 20 Pick. (Mass.) 156; Williams v. Woods, 16 Md. 220.
[5] Downer v. St. Paul etc. Ry. Co. 23 Minn. 271. See Vaughan v. McCarthy, 63 Minn. 221, 65 N. W. 249; Goddard v. Foster, 17 Wall. (U. S.) 142.
[6] Dodge v. Rogers, 9 Minn. 223 Gil. 209.
[7] St. Anthony Falls Water-Power Co. v. Eastman, 20 Minn. 277 Gil. 249.
[8] Scanlan v. Hodges, 10 U. S. App. 352; Goddard v. Foster, 17 Wall. (U. S.) 142. See Bryant v. Lord, 19 Minn. 396 Gil. 342.

Digitized by Google

[9] Hooper v. Webb, 27 Minn. 485, 8 N. W. 589; Gross v. Diller, 33 Minn. 424, 23 N. W. 837.
[10] Hanson v. Eastman, 21 Minn. 509; Downer v. St. Paul etc. Ry. Co. 23 Minn. 271.
[11] Board of Trustees v. Brown, 66 Minn. 179, 68 N. W. 837.
[12] Goddard v. Foster, 17 Wall. (U. S.) 142; State v. Patterson, 68 Me. 475.

Credibility of witnesses.

§ 665. The jury are the sole judges of the credibility of witnesses testifying in relation to the issuable facts in a cause.[1] This general rule, however, is subject to the important qualification that the court, in passing on a motion for a nonsuit or directed verdict, is required to consider the credibility of the same witnesses.[2] And the same is true when the court passes on a motion for a new trial on the evidence.[3] Otherwise nearly every verdict would be conclusive. It is also to be noted that the jury have nothing to do with the credibility of witnesses testifying in relation to questions of fact for the determination of the court. This general subject is treated elsewhere.[4]

[1] Sumner v. Jones, 27 Minn. 312, 7 N. W. 265; State v. Hogard, 12 Minn. 293 Gil. 191; State v. Spaulding, 34 Minn. 361, 25 N. W. 793; State v. Nestaval, 72 Minn. 415, 75 N. W. 725; Harriott v. Holmes, 77 Minn. 245, 79 N. W. 1003; Levine v. Barrett & Barrett, 83 Minn. 145, 85 N. W. 942, 87 N. W. 847.
[2] See § 855. [3] See § 1062. [4] See § 894.

Dedication of land to public.

§ 666. The dedication of land to the public is a question of intention and therefore a question for the jury in the absence of a deed or plat.

Case v. Favier, 12 Minn. 89 Gil. 48; Downer v. St. Paul etc. Ry. Co. 23 Minn. 271; Morse v. Zeize, 34 Minn. 35, 24 N. W. 287; Skjeggerud v. Minneapolis etc. Ry. Co. 38 Minn. 56, 35 N. W. 572.

Implied agreements.

§ 667. Whether the law raises an implied agreement on a given state of facts is a question of law for the court [1] but whether there was an implied agreement or understanding between the parties is a question of fact for the jury.[2]

[1] Prickett v. Badger, 1 C. B. N. S. 296.
[2] Bowe v. Hyland, 44 Minn. 88, 46 N. W. 142; Fravel v. Nett, 46 Minn. 31, 48 N. W. 446; Hazlett v. Babcock, 64 Minn. 254, 66 N. W. 971.

Intent—usury—fraudulent intent—good faith.

§ 668. The question of intent, when not wholly expressed in writings, is always a question for the jury,[1] except when there is only one reasonable inference.[2] Thus the question of fraudulent intent or good faith is for the jury,[3] except when there is only one reasonable inference.[4] And the same rules apply to usury cases.[5]

Digitized by Google

[1] Hale v. Life Indemnity etc. Co. 61 Minn. 516, 63 N. W. 1108.
[2] See cases under (4) infra.
[3] Hossfeldt v. Dill, 28 Minn. 469, 10 N. W. 781; Haven v. Neal, 43 Minn. 315, 45 N. W. 612; C. Aultman & Co. v. Falkum, 47 Minn. 414, 50 N. W. 471; Yellow Medicine County Bank v. Tagley, 57 Minn. 391, 59 N. W. 486; Ward v. Johnson, 57 Minn. 301, 59 N. W. 189; Seigneuret v. Fahey, 27 Minn. 60, 6 N. W. 403; Gibbons v. Bente, 51 Minn. 500, 53 N. W. 756; Traders' Ins. Co. v. Herber, 67 Minn. 106, 69 N. W. 701; Nelson v. Johnson, 38 Minn. 255, 36 N. W. 868; Allen v. Pioneer-Press Co. 40 Minn. 117, 41 N. W. 936; O'Brien v. Findrisen, 48 Minn. 213, 50 N. W. 1035; Blakely v. Hammerel, 62 Minn. 307, 64 N. W. 821; Wilcox v. Landberg, 30 Minn. 93, 14 N. W. 365; Filley v. Register, 4 Minn. 391 Gil. 296; Lathrop v. Clayton, 45 Minn. 124, 47 N. W. 544; Vose v. Stickney, 19 Minn. 367 Gil. 312; Molm v. Barton, 27 Minn. 530, 8 N. W. 765; Mackellar v. Pillsbury, 48 Minn. 396, 51 N. W. 222; Wetherill v. Canney, 62 Minn. 341, 64 N. W. 818; Bruggermann v. Wagener, 72 Minn. 329, 75 N. W. 230; Drew v. Wheelihan, 75 Minn. 68, 77 N. W. 558; Dyer v. Rowe, 82 Minn. 223, 84 N. W. 797; McCarty v. New York Life Ins. Co. 74 Minn. 530, 77 N. W. 426.
[4] Fish v. McDonnell, 42 Minn. 519, 44 N. W. 535; Cortland Wagon Co. v. Sharvy, 52 Minn. 216, 53 N. W. 1147; Burt v. McKinstry, 4 Minn. 204 Gil. 146; Filley v. Register, 4 Minn. 391 Gil. 296; Chophard v. Bayard, 4 Minn. 533 Gil. 418; Gere v. Murray, 6 Minn. 305 Gil. 213; Merchants Nat. Bank v. Hanson, 33 Minn. 40, 21 N. W. 849; Wetherill v. Canney, 62 Minn. 341, 64 N. W. 818; Hibbs v. Marpe, 84 Minn. 10, 86 N. W. 612.
[5] Stein v. Swensen, 46 Minn. 360, 49 N. W. 55; Chase v. N. Y. Mort. Loan Co. 49 Minn. 111, 51 N. W. 816; Grieser v. Hall, 56 Minn. 155, 57 N. W. 462; Saxe v. Womack, 64 Minn. 162, 66 N. W. 269; Central Building & Loan Assoc. v. Lampson, 60 Minn. 422, 62 N. W. 544; Banning v. Hall, 70 Minn. 89, 72 N. W. 817; Egbert v. Peters, 35 Minn. 312, 29 N. W. 134; Stevens v. Staples, 64 Minn. 3, 65 N. W. 959.

Libel and slander.

§ 669. The question of libel is always a question of fact and like all other questions of fact it is for the court when there is only one reasonable inference and for the jury when different men might draw different conclusions.[1] In other words if the language used is reasonably susceptible of either a defamatory or an innocent meaning the question of libel or no libel is for the jury.[2] On the other hand if the language used is not reasonably susceptible of an innocent meaning but is manifestly defamatory the question of libel is for the court.[3] By statute, in criminal prosecutions for libel, the jury is judge both of the law and the fact.[4] The question whether the language was used with reference to the plaintiff is for the jury

Digitized by Google

unless there is only one reasonable inference.[5] So the question of privilege [6] and malice [7] are for the jury except when there is only one reasonable inference. By statute good faith on the part of a publisher of a newspaper and a full and fair retraction are a defence against all but actual damages. The question of good faith and whether the falsity of the article was due to mistake of the facts is for the jury except when there is only one reasonable inference. Whether a retraction is a full and fair one, within the meaning of the statute, is a question for the court unless resort must be had to extrinsic evidence.[8] Where one publishes a statement in a newspaper the question whether a given consequence of the publication is a "natural" consequence is ordinarily for the jury.[9] In an action for slander, if the application or meaning of the words is ambiguous, or the sense in which they were used is uncertain, but they are capable of the defamatory meaning charged, it is for the jury to determine, upon all the circumstances, whether they were applied to the plaintiff and whether used in the defamatory sense alleged.[10]

[1] See § 660.

[2] Pratt v. Pioneer Press Co. 30 Minn. 41, 14 N. W. 62; Woodling v. Knickerbocker, 31 Minn. 268, 17 N. W. 387; Zier v. Hofflin, 33 Minn. 66, 21 N. W. 862; Landon v. Watkins, 61 Minn. 137, 63 N. W. 615; Traynor v. Sielaff, 62 Minn. 420, 64 N. W. 915; Sharpe v. Larson, 67 Minn. 428, 70 N. W. 1, 554; Peterson v. Western Union Tel. Co. 65 Minn. 18, 67 N. W. 646.

[3] Smith v. Stewart, 41 Minn. 7, 42 N. W. 595; Sharpe v. Larson, 67 Minn. 428, 70 N. W. 1, 554.

[4] G. S. 1894 § 5768; Smith v. Stewart, 41 Minn. 7, 42 N. W. 595.

[5] Dressel v. Shipman, 57 Minn. 23, 58 N. W. 684; Traynor v. Sielaff, 62 Minn. 420, 64 N. W. 915.

[6] Landon v. Watkins, 61 Minn. 137, 63 N. W. 615; Brown v. Radebaugh, 84 Minn. 347, 87 N. W. 937.

[7] Simmons v. Holster, 13 Minn. 249 Gil. 232; Allen v. Pioneer Press Co. 40 Minn. 117, 41 N. W. 936; Peterson v. Western Union Tel. Co. 65 Minn. 18, 67 N. W. 646;

[8] Gray v. Times Newspaper Co. 74 Minn. 452, 77 N. W. 204; Allen v. Pioneer Press Co. 40 Minn. 117, 41 N. W. 936.

[9] Zier v. Hofflin, 33 Minn. 66, 21 N. W. 862.

[10] Blakeman v. Blakeman, 31 Minn. 396, 18 N. W. 103; St. Martin v. Desnoyer, 1 Minn. 156 Gil. 131; McCarty v. Barrett, 12 Minn. 494 Gil. 398.

Malicious prosecution.

§ 670. What facts, and whether particular facts, constitute probable cause is a question exclusively for the court. What facts exist in a particular case, where there is a dispute in reference to them, is a question exclusively for the jury. When the facts are in controversy, the subject of probable cause should be submitted to the jury, either for specific findings of the facts, or with instructions from the court as to what facts will constitute probable cause.[1]

Digitized by Google

The question of probable cause is intrinsically a pure question of fact. The reason for making it an exception and referring it to the court is historical.[2] Whether the prosecution originated in malice is for the jury, though it may be true that in some cases the evidence of want of probable cause and of intentional wrong may be so clear as to authorize the court to hold that certain undisputed facts establish a prima facie case warranting a verdict unless rebutted.[3] Whether the defendant in good faith acted upon the advice of counsel is for the jury except where there is only one reasonable inference.[4]

[1] Burton v. St. Paul etc. Ry. Co. 33 Minn. 189, 22 N. W. 300; Cole v. Curtis, 16 Minn. 182 Gil. 161; Moore v. Northern Pacific Ry. Co. 37 Minn. 147, 33 N. W. 334; Bartlett v. Hawley, 38 Minn. 308, 37 N. W. 580; Gilbertson v. Fuller, 40 Minn. 413, 42 N. W. 203; Olson v. Tvete, 46 Minn. 225, 48 N. W. 914; Smith v. Munch, 65 Minn. 256, 68 N. W. 19; Eickhoff v. Fidelity & Casualty Co. 74 Minn. 139, 76 N. W. 1030; Fiola v. McDonald, 85 Minn. 147, 88 N. W. 431.

[2] Thayer, Ev. 225–231.

[3] Bartlett v. Hawley, 38 Minn. 308, 37 N. W. 580.

[4] Cole v. Andrews, 74 Minn. 93, 76 N. W. 962.

Master and servant.

§ 671. Whether a servant was acting at a particular time within the scope of his employment;[1] whether a servant was acting at a particular time as the vice-principal of the master;[2] whether a person is a servant or an independent contractor;[3] and whether a servant assumed risks of employment are all questions for the jury,[4] except where there is only one reasonable inference.

[1] Theisen v. Porter, 56 Minn. 555, 58 N. W. 265; Voyer v. Dispatch Printing Co. 62 Minn. 393, 64 N. W. 1138.

[2] Johnson v. Minneapolis General Electric Co. 67 Minn. 141, 69 N. W. 713; Abel v. Butler-Ryan Co. 66 Minn. 16, 68 N. W. 205; Hill v. Winston, 73 Minn. 80, 75 N. W. 1030; Hess v. Adamant Mfg. Co. 66 Minn. 79, 68 N. W. 774; Birmingham v. Duluth etc. Ry. Co. 70 Minn. 474, 73 N. W. 409.

[3] Theisen v. Porter, 56 Minn. 555, 58 N. W. 265; Rait v. New England etc. Co. 66 Minn. 76, 68 N. W. 729; Whitson v. Ames, 68 Minn. 23, 70 N. W. 793.

[4] Neubauer v. Northern Pac. Ry. Co. 60 Minn. 130, 61 N. W. 912; Olmscheid v. Nelson-Tenny Lumber Co. 66 Minn. 61, 68 N. W. 605; Hill v. Winston, 73 Minn. 80, 75 N. W. 1030.

Negligence.

§ 672. The question of negligence is always a question of fact and like every other question of fact is sometimes a question for the court and sometimes for the jury.[1] It is always a question for the jury when different men might reasonably draw different conclusions from the evidence. It is always for the court when there is only one reasonable inference.[2] And it is a question for the court in the latter case, not because the law has prescribed a rule of con-

Digitized by Google

duct applicable to the facts of the case, not because it is in any true sense a question of law, but because the court has the power and it is its duty to take the case from the jury in all cases when there is only one reasonable inference.[3] The reports are full of cases in which it is said that the question of negligence is one of law under certain circumstances but this is by way of fiction and to justify the court in taking the case from the jury.[4] The fact that there is no conflict in the testimony does not make the case one for the court instead of the jury, if the evidence is for any cause inconclusive in its nature—as, for example, where different conclusions may be reasonably drawn from it, or where its credibility is doubtful.[5] The foregoing rules apply to contributory negligence.[6] Ordinarily it is only where there is an entire absence of evidence tending to establish negligence that a court can enter upon the province of the jury and order a nonsuit or direct a verdict for the defendant.[7]

[1] Dublin etc. Ry. Co. v. Slattery, 3 App. Cases 1155, 1181. See for a contrary view, Holmes, Common Law p. 120.

[2] Abbett v. Chicago etc. Ry. Co. 30 Minn. 482, 16 N. W. 266; Craver v. Christian, 34 Minn. 397, 26 N. W. 8; Bennett v. Syndicate Ins. Co. 39 Minn. 254, 39 N. W. 488; Emery v. Minneapolis Industrial Exposition, 56 Minn. 460, 57 N. W. 1132; Leonard v. Minneapolis etc. Ry. Co. 63 Minn. 489, 65 N. W. 1084.

[3] See § 660.

[4] See Thayer, Ev. 226, 250.

[5] Burud v. Great Northern Ry. Co. 62 Minn. 243, 64 N. W. 562; Abbett v. Chicago etc. Ry. Co. 30 Minn. 482, 16 N. W. 266.

[6] Abbett v. Chicago etc. Ry. Co. 30 Minn. 482, 16 N. W. 266; Leonard v. Minneapolis etc. Ry. Co. 63 Minn. 489, 65 N. W. 1084.

[7] Bennett v. Syndicate Ins. Co. 39 Minn. 254, 39 N. W. 488; Emery v. Minneapolis Industrial Exposition, 56 Minn. 460, 57 N. W. 1132.

Oral contracts.

§ 673. Whether there is an oral contract and its scope and meaning are questions for the jury except when there is only one reasonable inference.

Egan v. Faendel, 19 Minn. 231 Gil. 191; Vaughan v. McCarthy, 63 Minn. 221, 65 N. W. 249; Ganser v. Firemen's Fund Ins. Co. 38 Minn. 74, 35 N. W. 584; Walther v. Briggs, 69 Minn. 98, 71 N. W. 909; Jennison v. Thompson, 68 Minn. 333, 71 N. W. 380; First Nat. Bank v. Steele, 58 Minn. 126, 59 N. W. 959; Hazlett v. Babcock, 64 Minn. 254, 66 N. W. 971; Stout v. Watson, 45 Minn. 454, 48 N. W. 195; Fravel v. Nett, 46 Minn. 31, 48 N. W. 446; Johanke v. Schmidt, 79 Minn. 261, 82 N. W. 582; Globe Works v. Wright, 106 Mass. 216; Henderson Bridge Co. v. McGrath, 134 U. S. 275.

Digitized by Google

Partnership.

§ 674. Whether a partnership exists, there being a dispute as to the facts;[1] whether a partner in ordering goods for another in the firm name acted within the scope of his authority;[2] whether members of a non-trading firm have authority to borrow money and execute negotiable paper therefor[3] are all questions for the jury except when there is only one reasonable inference.

[1] Rosenbaum v. Howard, 69 Minn. 41, 71 N. W. 823; Seabury v. Boller, 51 N. J. L. 103.

[2] Lynch v. Hillstrom, 64 Minn. 521, 67 N. W. 636.

[3] Vetsch v. Neiss, 66 Minn. 459, 69 N. W. 315.

Principal and agent.

§ 675. Whether the relation of principal and agent exists;[1] questions as to the scope of an agent's authority;[2] and whether there has been a ratification by the principal of the unauthorized acts of an agent[3] are all questions for the jury in the absence of writings, except where there is only one reasonable inference.

[1] Comfort v. Sprague, 31 Minn. 405, 18 N. W. 108; Crevier v. Stephen, 40 Minn. 288, 41 N. W. 1039; Ferguson v. Glaspie, 38 Minn. 418, 38 N. W. 352; Pinney v. First Division etc. Ry. Co. 19 Minn. 251 Gil. 211.

[2] Drohan v. Merrill & Ring Lumber Co. 75 Minn. 251, 77 N. W. 957; Comfort v. Sprague, 31 Minn. 405, 18 N. W. 108; Dayton v. Buford, 18 Minn. 126 Gil. 111; Peerless Machine Co. v. Gates, 61 Minn. 124, 63 N. W. 260.

[3] Wright v. Vineyard M. E. Church, 72 Minn. 78, 74 N. W. 1015.

Public policy.

§ 676. Questions involving public policy are always for the court, as, for example, whether a contract is against public policy;[1] whether a custom is reasonable;[2] whether a municipal ordinance is reasonable;[3] whether a use of the highway is consistent with the public use;[4] whether a railroad regulation is reasonable;[5] whether the causes for the removal of municipal officers are reasonable.[6]

[1] Tallis v. Tallis, 1 El. & Bl. 391; Prickett v. Badger, 1 C. B. N. S. 296.

[2] Minis v. Nelson, 43 Fed. 777.

[3] Evison v. Chicago etc. Ry. Co. 45 Minn. 370, 48 N. W. 6.

[4] Newell v. Minneapolis etc. Ry. Co. 35 Minn. 112, 27 N. W. 839.

[5] Avery v. N. Y. Central etc. Ry. Co. 121 N. Y. 31. But see Christian v. First Division etc. Ry. Co. 20 Minn. 21 Gil. 12; Du Laurans v. First Division etc. Ry. Co. 15 Minn. 49 Gil. 29.

[6] State v. Common Council, 53 Minn. 238, 53 N. W. 238.

Reasonable time.

§ 677. The question of reasonable time for the performance of an act is a question for the jury,[1] except where only one reasonable inference can be drawn.[2] This general rule is applicable to the time for the performance of a contract;[3] the time for an employe to remain after giving notice of defective machinery;[4] the time for

Digitized by Google

the presentment of a non-negotiable note indorsed after maturity;[5] the time in which a consignee may take and remove goods from a common carrier;[6] the time of the continuance of a guaranty;[7] the time to keep a railway ticket office open;[8] the time for an infant to disaffirm a deed upon coming of age;[9] the time for the affirmance or repudiation by a principal of the act of his agent;[10] the time of a tenant to abandon leased premises;[11] the time for a city council to pass an ordinance in regard to bonds voted by a city;[12] the time to serve notice of loss on an insurance company;[13] the time within which fraud ought to be discovered;[14] the time within which an agent may employ a servant for his principal.[15]

[1] Cochran v. Toher, 14 Minn. 385 Gil. 293; Derosia v. Winona etc. Ry. Co. 18 Minn. 133 Gil. 119; Warder v. Bowen, 31 Minn. 335, 17 N. W. 943; Straight v. Wight, 60 Minn. 515, 63 N. W. 105. A legal standard as to reasonable time may possibly become established by repeated decisions so as to make the question one of law but this is debatable. See Hamilton v. Phœnix Ins. Co. 61 Fed. 379.

[2] Porter v. Montgomery, 26 Minn. 118, 1 N. W. 844; Stone v. Harmon, 31 Minn. 512, 19 N. W. 88; Hart v. Eastman, 7 Minn. 74 Gil. 50; Goodnow v. Empire Lumber Co. 31 Minn. 468, 18 N. W. 283; Ermentrout v. Girard Fire etc. Ins. Co. 63 Minn. 305, 65 N. W. 635; Lehigh Coal & Iron Co. v. Scallen, 61 Minn. 63, 63 N. W. 245.

[3] Porter v. Montgomery, 26 Minn. 118, 1 N. W. 844; Roberts v. Mazeppa Mill Co. 30 Minn. 413, 15 N. W. 680; Warder v. Bowen, 31 Minn. 335, 17 N. W. 943; Stone v. Harmon, 31 Minn. 512, 19 N. W. 88; Palmer v. Breen, 34 Minn. 39, 24 N. W. 322; Day v. Gravel, 72 Minn. 159, 75 N. W. 1.

[4] Rothenberger v. N. W. Consolidated Milling Co. 57 Minn. 461, 59 N. W. 531; Smith v. E. W. Backus Lumber Co. 64 Minn. 447, 67 N. W. 358.

[5] Hart v. Eastman, 7 Minn. 74 Gil. 50.

[6] Derosia v. Winona etc. Ry. Co. 18 Minn. 133 Gil. 119; Pinney v. First Division etc. Ry. Co. 19 Minn. 251 Gil. 211.

[7] Straight v. Wight, 60 Minn. 515, 63 N. W. 105.

[8] Du Laurans v. First Division etc. Ry. Co. 15 Minn. 49 Gil. 29.

[9] Goodnow v. Empire Lumber Co. 31 Minn. 468, 18 N. W. 283.

[10] Stearns v. Johnson, 19 Minn. 540 Gil. 470.

[11] Minneapolis Co-operative Co. v. Williamson, 51 Minn. 53, 52 N. W. 986.

[12] Woodbridge v. Duluth City, 57 Minn. 256, 59 N. W. 296.

[13] Ermentrout v. Girard Fire etc. Ins. Co. 63 Minn. 305, 65 N. W. 635; Fletcher v. German-American Ins. Co. 79 Minn. 337, 82 N. W. 647.

[14] McCarty v. N. Y. Life Ins. Co. 74 Minn. 530, 77 N. W. 426.

[15] Drohan v. Merrill & Ring Lumber Co. 75 Minn. 251, 77 N. W. 957.

Digitized by Google

Reasonableness generally.

§ 678. What is a reasonable use of property,[1] or rate of speed for a train crossing a city street,[2] or care in the inspection of railway fences,[3] or use of a stream;[4] or amount of credit to give on a guaranty,[5] are questions for the jury except when there is only one reasonable inference.

[1] Marsh v. Webber, 16 Minn. 418 Gil. 375.
[2] Howard v. St. Paul etc. Ry. Co. 32 Minn. 214, 20 N. W. 93; Bolinger v. St. Paul & Duluth Ry. Co. 36 Minn. 418, 31 N. W. 856.
[3] Evans v. St. Paul etc. Ry. Co. 30 Minn. 489, 16 N. W. 271.
[4] Red River Roller Mills v. Wright, 30 Minn. 249, 15 N. W. 167.
[5] Lehigh Coal & Iron Co. v. Scallen, 61 Minn. 63, 63 N. W. 245.

Sales.

§ 679. Whether there was a waiver of cash on delivery;[1] whether there was an acceptance;[2] at what time it was the intention of the parties that title should pass;[3] whether there was an acceptance sufficient to take the contract without the statute of frauds;[4] whether the discounting of a bill or note with the general indorsement of the holder is a sale of the paper or a loan to the holder, secured by the paper and indorsement as collateral;[5] necessity of a demand for a deed;[6] whether a sale by a mortgagor was with the consent of the mortgagee,[7] are all questions for the jury except when there is only one reasonable inference.

[1] Fishback v. G. N. Van Dusen & Co. 33 Minn. 111, 22 N. W. 244.
[2] St. Anthony Lumber Co. 60 Minn. 199, 62 N. W. 274.
[3] Jennison v. Thompson, 68 Minn. 333, 71 N. W. 380.
[4] Waite v. McKelvey, 71 Minn. 167, 72 N. W. 727.
[5] Stolze v. Bank of Minnesota, 67 Minn. 172, 69 N. W. 813.
[6] McNamara v. Pengilly, 58 Minn. 353, 59 N. W. 1055.
[7] Partridge v. Minnesota etc. Elevator Co. 75 Minn. 496, 78 N. W. 85.

Miscellaneous questions for jury.

§ 680. The following questions are for the jury except where there is only one reasonable inference: what are "necessaries" for a wife for whom a husband does not provide;[1] whether the description of land in tax proceedings is one by which the land is commonly known;[2] whether material was furnished for a particular job in a mechanic's lien case;[3] what is "necessary" food, provisions, etc, under the exemption laws;[4] whether a person is a "guest" or "boarder";[5] whether there has been a waiver;[6] whether there has been an acceptance taking a contract out of the statute of frauds;[7] whether property is in the possession of a party;[8] whether there has been an accord and satisfaction;[9] whether a child is legitimate;[10] whether a person was alive at a given time;[11] whether a person is "totally disabled" within the meaning of an insurance policy;[12] whether a presumption has been overcome;[13] when, by whom, and with what intent an alteration was made in a written instrument;[14] the "materiality" of representations by an insured person;[15] whether

Digitized by Google

a person is a tenant of another;[16] whether a person committed suicide;[17] whether notices were mailed by an insurance company to policy-holders;[18] whether it is necessary to make a demand of a deed before bringing suit for money paid on the purchase;[19] whether a sale by a mortgagor was with the consent of the mortgagee;[20] who is the owner of property;[21] whether the holder of a railway ticket had sufficient notice of a revocation of a practice to waive the conditions of the printed contract on the ticket;[22] the amount of credit which might be given on a guaranty;[23] to what extent a loss of business was attributable to a nuisance;[24] extent of injury to land in condemnation proceedings;[25] whether there has been a total loss within the meaning of an insurance policy;[26] whether a chattel is a fixture.[27]

[1] Bergh v. Warner, 47 Minn. 250, 50 N. W. 77.
[2] Gilfillan v. Hobart, 34 Minn. 67, 24 N. W. 342.
[3] Frankoviz v. Smith, 34 Minn. 403, 26 N. W. 225.
[4] Howard v. Rugland, 35 Minn. 388, 29 N. W. 63.
[5] Ross v. Mellin, 36 Minn. 421, 32 N. W. 172.
[6] Fishback v. Van Dusen, 33 Minn. 111, 22 N. W. 244; Mee v. Bankers' Life Assoc. 69 Minn. 210, 72 N. W. 74.
[7] Waite v. McKelvy, 71 Minn. 167, 72 N. W. 727.
[8] Ohlson v. Manderfeld, 28 Minn. 390, 10 N. W. 418.
[9] Hinkle v. Minneapolis etc. Ry. Co. 31 Minn. 434, 18 N. W. 275.
[10] Fox v. Burke, 31 Minn. 319, 17 N. W. 861.
[11] State v. Plym, 43 Minn. 385, 45 N. W. 848.
[12] Lobdill v. Laboring Men's Mutual Aid Assoc. 69 Minn. 14, 71 N. W. 696.
[13] Karsen v. Milwaukee etc. Ry. Co. 29 Minn. 12, 11 N. W. 122; Solum v. Great Northern Ry. Co. 63 Minn. 233, 65 N. W. 443; Johanke v. Schmidt, 79 Minn. 261, 82 N. W. 582.
[14] Wilson v. Hayes, 40 Minn. 531, 42 N. W. 467; Yellow Medicine County Bank v. Tagley, 57 Minn. 391, 59 N. W. 486.
[15] Caplis v. American Fire Ins. Co. 60 Minn. 376, 62 N. W. 440.
[16] Bowe v. Hyland, 44 Minn. 88, 42 N. W. 142.
[17] Hale v. Life Indemnity etc. Co. 61 Minn. 516, 63 N. W. 51, 63 N. W. 1108.
[18] Morris v. Farmers etc. Ins. Co. 63 Minn. 420, 65 N. W. 655; Thibert v. Supreme Lodge, 78 Minn. 448, 81 N. W. 220.
[19] McNamara v. Pengilly, 58 Minn. 353, 59 N. W. 1055.
[20] Partridge v. Minnesota etc. Ry. Co. 75 Minn. 496, 78 N. W. 85.
[21] Honeywell v. Norby, 61 Minn. 188, 63 N. W. 488; Cooper v. Hayward, 71 Minn. 374, 74 N. W. 152; Mueller v. Chicago etc. Ry. Co. 75 Minn. 109, 77 N. W. 566.
[22] Thompson v. Truesdale, 61 Minn. 129, 63 N. W. 259.
[23] Lehigh Coal & Iron Co. v. Scallen, 61 Minn. 63, 63 N. W. 245.
[24] Aldrich v. Wetmore, 56 Minn. 20, 57 N. W. 221.
[25] Kremer v. Chicago etc. Ry. Co. 51 Minn. 15, 52 N. W. 977.
[26] N. W. Mutual Life Ins. Co. v. Rochester German Ins. Co. 85 Minn. 48, 88 N. W. 265; Poppitz v. German Ins. Co. 85 Minn. 118, 88 N. W. 438.
[27] Capehart v. Foster, 61 Minn. 132, 63 N. W. 257.

Digitized by Google

Miscellaneous questions for the court.

§ 681. The following questions are for the court: the effect of an accord and satisfaction;[1] what damages are too speculative;[2] who is a laboring-man within the meaning of the exemption laws.[3]

[1] Washburn v. Winslow, 16 Minn. 33 Gil. 19.

[2] Mississippi etc. Co. v. Prince, 34 Minn. 71, 24 N. W. 344.

[3] Wildner v. Ferguson, 43 Minn. 112, 43 N. W. 794.

Effect of submitting questions of law to jury.

§ 682. If questions which are properly for the court are submitted to the jury and the jury find as the court ought to have found the error is without prejudice.

McArthur v. Craigie, 22 Minn. 351; Gross v. Diller, 33 Minn. 424, 23 N. W. 837.

WITNESSES

SUBPOENAS

The statute.

§ 683. "Every clerk of a court of record and every justice of the peace may issue subpœnas for witnesses in all civil cases pending before the court, or before any magistrates, arbitrators, or other persons authorized to examine witnesses, and in all contests concerning lands before the register and receiver of any land office in this state."

[G. S. 1894 § 5652]

§ 684. Subpœnas may issue in proceedings for the removal of a public officer by the governor,[1] and in condemnation proceedings.[2]

[1] State v. Peterson, 50 Minn. 239, 52 N. W. 655.

[2] City of Minneapolis v. Wilkin, 30 Minn. 140, 14 N. W. 581.

Prepayment of fees.

§ 685. "No person is obliged to attend as a witness unless the fees are paid or tendered to him which are allowed by law for one day's attendance as a witness, and for traveling to and returning from the place where he is required to attend."

[G. S. 1894 § 5548]

§ 686. And to keep a witness in attendance from day to day it is necessary to pay him his fees in advance, that is, at least, the day before.[1] A person voluntarily in court cannot be compelled to take the stand unless his per diem fees are paid or tendered.[2] But a witness on the stand cannot refuse to answer a question on the ground that his answer would be expert testimony and that he has not been summoned or paid as an expert witness.[3]

[1] Hurd v. Swan, 4 Denio (N. Y.) 75; Muscott v. Runge, 27 How. Pr. (N. Y.) 85.

[2] Kipp v. Dawson, 59 Minn. 82, 60 N. W. 845. See Beaulieu v. Parsons, 2 Minn. 37 Gil. 26.

[3] State v. Teipner, 36 Minn. 535, 32 N. W. 678.

Digitized by Google

Service of subpœna.

§ 687. "Such subpœna may be served by any person, by exhibiting and reading it to the witness, or by giving him a copy thereof, or by leaving such copy at the place of his abode."

[G. S. 1894 § 5653]

Punishment for disobedience.

§ 688. "If any person duly subpœnaed and obliged to attend as a witness fails to do so, without any reasonable excuse, he is liable to the aggrieved party for all damages occasioned by such failure, to be recovered in a civil action. Such failure to attend as a witness, if the subpœna issues out of any court of record, is a contempt of the court and may be punished by fine not exceeding two hundred and fifty dollars, or by imprisonment in jail not exceeding six months, or by both such fine and imprisonment."

[G. S. 1894 § 5654; Laws 1899 ch. 207]

Attachment for delinquent witness.

§ 689. "The court, in such case, may issue an attachment to bring such witness before it, to answer for the contempt, and also to testify as a witness in the action or proceeding in which he was subpœnaed."

[G. S. 1894 § 5656]

§ 689a. To entitle a party to an attachment against a witness he must have duly subpœnaed him. It is not enough that the opposite party had subpœnaed him, and examined him in a previous stage of the trial.[1] To entitle a party to an attachment he must make a proper showing.[2] It should be made to appear by affidavit (1) that the witness was duly subpœnaed by the moving party; (2) that his fees were duly prepaid, tendered or waived; (3) that the witness is material, it being advisable to state what the moving party expects to prove by the witness; (4) that he is wilfully absent without reasonable excuse. The whole matter, however, lies in the discretion of the court and instead of issuing an attachment in the first instance the court may allow an order to show cause.

[1] Beaulieu v. Parsons, 2 Minn. 37 Gil. 26.

[2] Barnes v. Christofferson, 62 Minn. 318, 64 N. W. 821.

Habeas corpus.

§ 690. The court is authorized to secure the attendance of a prisoner as a witness by a writ of habeas corpus.

[G. S. 1894 § 6027]

Digitized by Google

SUBPOENAS TECUM DUCES

Who may be compelled to produce papers.

§ 691. It is now well settled that a party to an action may be compelled to produce papers on a tecum duces.[1] The books and papers of a private corporation are not privileged and their production may be compelled on a tecum duces if the corporation is a party;[2] otherwise not, according to the better view.[3] Telegrams in the hands of telegraph companies are not privileged and their production may be compelled on a tecum duces.[4] A witness cannot be compelled to produce papers that might criminate him[5] or which are privileged communications under the law.[6] A public official cannot be compelled to produce public records at a distance or when public business would be inconvenienced. Resort must be had to a certified copy.[7] A court has a discretion in such cases. A federal officer may be compelled to produce public documents on a tecum duces issuing out of a state court.[8]

[1] Bonesteel v. Lynde, 8 How. Pr. (N. Y.) 226; Murray v. Elston, 23 N. J. Eq. 212; Johnson Steel St. Ry. Co. v. North Branch Steel Co. 48 Fed. 190. See Turnbull v. Crick, 63 Minn. 91, 65 N. W. 135.

[2] Wertheim v. Continental Ry. Co. 15 Fed. 716; Johnson Steel St. Ry. Co. v. North Branch Steel Co. 48 Fed. 190.

[3] Southern Ry. Co. v. N. C. Corp. Com. 104 Fed. 700.

[4] In re Storror, 63 Fed. 564; Woods v. Miller, 55 Iowa 168; Ex parte Brown, 72 Mo. 83.

[5] Boyd v. U. S. 116 U. S. 616; Byars v. Sullivan, 21 How. Pr. (N. Y.) 50.

[6] See Stokoe v. St. Paul etc. Ry. Co. 40 Minn. 545, 42 N. W. 482; Davis v. New York etc. Ry. Co. 70 Minn. 37, 72 N. W. 823.

[7] Corbett v. Gibson, 16 Blatch. 334.

[8] In re Hirsch, 74 Fed. 928.

Duty of person subpœnaed.

§ 692. A person served with a subpœna tecum duces is in all cases bound to appear and submit, or at least offer to submit, the papers designated in the writ, as it is for the court and not the witness to determine whether the papers are privileged or there is any other reason why they should not be produced and introduced in evidence.

Amey v. Long, 9 East 483; Holtz v. Schmidt, 2 J. & S. (N. Y.) 28; Chaplain v. Briscoe, 5 S. & M. (Miss.) 198; Bull v. Loveland, 10 Pick. (Mass.) 9; Southern Ry. Co. v. N. C. Corp. Com. 104 Fed. 700; In re O'Toole, 1 Tuck. (N. Y.) 39.

Specification of papers to be produced.

§ 693. The subpœna must specify with reasonable definiteness the papers which the witness is required to produce.

Ex parte Janes, 70 Cal. 638; U. S. v. Babcock, 3 Dill. (U. S.) 566; Ex parte Brown, 72 Mo. 83; In re O'Toole, 1 Tuck. (N. Y.)

Digitized by Google

39; U. S. v. Hunter, 15 Fed. 712; Murray v. Louisiana, 163 U. S. 101. See Carson v. Hawley, 82 Minn. 204, 84 N. W. 746.

Person in possession of papers.

§ 694. The person in the actual possession of papers may be compelled to produce them although the legal possession is in another.

In re Hirsch, 74 Fed. 928.

WHO COMPETENT

General statute.

§ 695. "All persons, except as hereinafter provided, having the power and faculty to perceive, and make known their perceptions to others, may be witnesses; neither parties nor other persons who have an interest in the event of an action are excluded, nor those who have been convicted of crime, nor persons on account of their religious opinions or belief; although, in every case, the credibility of the witnesses may be drawn in question. And on the trial of all indictments, complaints, and other proceedings against persons charged with the commission of crimes or offences, the person so charged shall, at his request, but not otherwise, be deemed a competent witness; nor shall the neglect or refusal to testify create any presumption against the defendant, nor shall such neglect be alluded to or commented upon by the prosecuting attorney or by the court."

[G. S. 1894 § 5658]

Accused person.

§ 696. When the defendant in a criminal action, neglects or refuses to testify in his own behalf the court has no right to allude to or comment upon the subject before the jury or to instruct them as to whether they shall consider such neglect or refusal in any manner whatever. In other words the court must maintain absolute silence with respect to the subject [1] and so must the county attorney.[2] If the defendant takes the stand his failure to explain or contradict evidence of conduct or admissions tending to criminate him may properly be commented upon before the jury and may be considered by them with reference to his credibility.[3] His interest in the result of the trial may undoubtedly be commented upon by counsel, but the court should not single out the defendant and charge as to his credibility.[4] Bastardy proceedings are not criminal and counsel may therefore comment on the failure of the defendant to take the stand.[5]

[1] State v. Pearce, 56 Minn. 226, 55 N. W. 652, 57 N. W. 1065.

[2] State v. Holmes, 65 Minn. 230, 68 N. W. 11. See State v. Ahern, 54 Minn. 195, 55 N. W. 959 (holding comment not prejudicial).

[3] State v. Spaulding, 34 Minn. 361, 25 N. W. 793; State v. Staley, 14 Minn. 105 Gil. 75.

[4] State v. Hoy, 83 Minn. 286, 86 N. W. 98. But see State v. Borgstrom, 69 Minn. 508, 72 N. W. 799, 975.

[5] State v. Snure, 29 Minn. 132, 12 N. W. 347.

Digitized by Google

Convicted person.

§ 697. A person convicted of a crime is a competent witness. See §§ 695, 772.

Accomplices.

§ 698. Accomplices and others connected with the commission of a crime are competent witnesses by virtue of the general statute,[1] but special provision is often made.[2]

[1] See § 695.

[2] See G. S. 1894 §§ 2002, 2188, 6356, 6495, 6957.

Co-defendants.

§ 699. Co-defendants jointly indicted are competent witnesses to testify, at their own request, either for or against one another, regardless of whether they are tried together or separately, or have already been discharged, acquitted or convicted.

G. S. 1894 § 5658; State v. Thaden, 43 Minn. 325, 45 N. W. 614. [Baker v. U. S. 1 Minn. 208 Gil. 181 and State v. Dumphey, 4 Minn. 438 Gil. 340 were decided prior to the amendment of 1868]

Parties in interest.

§ 700. Inhabitants of a municipality are not incompetent witnesses in an action in which the municipality is a party.[1] A married person is not to be deemed an incompetent attesting witness to a will simply because the husband or wife of such person is a beneficiary under the will.[2]

[1] G. S. 1894 §§ 5658; 642, 1191, 1417; McClure v. City of Red Wing, 28 Minn. 186, 9 N. W. 767.

[2] In re Holt's Will, 56 Minn. 33, 57 N. W. 219.

WHO INCOMPETENT

General statute.

§ 701. "The following persons are not competent to testify in any action or proceeding:

(1) Those who are of unsound mind, or intoxicated, at the time of their production for examination.

(2) Children under ten years of age, who appear incapable of receiving just impressions of the facts respecting which they are examined, or of relating them truly."

[G. S. 1894 § 5661]

§ 702. It is for the court to determine the competency of a witness.[1] A witness who understands that he is brought into court to tell the truth, that it is wrong to tell a lie, and that he will be punished if he tells a lie has, under the statute, sufficient understanding of the obligations of an oath to be competent. It is unnecessary that he should believe in a divine law of punishment.[2] A person affected with insanity or intoxication is a competent witness if he has sufficient understanding to comprehend the obligations of an oath and

Digitized by Google

to be capable of giving a correct account of the matters which he has seen or heard in reference to the questions at issue.[3]

[1] Brown v. Radebaugh, 84 Minn. 347, 87 N. W. 937. See § 826.
[2] State v. Levy, 23 Minn. 104.
[3] State v. Hayward, 62 Minn. 474, 65 N. W. 63; Cannady v. Lynch, 27 Minn. 435, 8 N. W. 164.

Grand jurors—statute.

§ 703. "Every grand juror shall keep secret whatever he himself or any other grand juror said, or in what manner he or any other grand juror voted on a matter before them. Any grand juror may, however, be required by any court to disclose the testimony of any witnesses examined before the grand jury for the purpose of ascertaining whether it is consistent with that given by the witness before the court, or to disclose the testimony given before them by any other person, upon a charge against him for perjury in giving his testimony, or upon his trial therefor."

[G. S. 1894 §§ 7215, 7216] See In re Pinney's Will, 27 Minn. 280, 6 N. W. 791, 7 N. W. 144; State v. Beebe, 17 Minn. 241 Gil. 218; Loveland v. Cooley, 59 Minn. 259, 61 N. W. 138; State v. Hawks, 56 Minn. 129, 57 N. W. 455.

When usury is set up as a defence.

§ 704. "Whenever in any action in any court the defendant shall plead or answer the defence of usury, either party to the action may be a witness in his own behalf on the trial, except in actions in which the opposite party sues or defends as administrator or personal representative of a deceased person; except, also, actions in which the opposite party claims as assignee and the original assignor is deceased."

[G. S. 1894 § 2216] See Parker v. Maxwell, 45 Minn. 1, 47 N. W. 161; Parker v. Maxwell, 51 Minn. 523, 53 N. W. 754.

PRIVILEGED COMMUNICATIONS

The statute.

§ 705. "There are particular relations in which it is the policy of the law to encourage confidence and preserve it inviolate; therefore a person cannot be examined as a witness in the following cases:

(1) A husband cannot be examined for or against his wife, without her consent; nor a wife for or against her husband, without his consent; nor can either, during the marriage, or afterward, be without the consent of the other, examined as to any communication made by one to the other during the marriage; but this exception does not apply to a civil action or proceeding by one against the other, nor to a criminal action or proceeding for a crime committed by one against the other, nor to proceedings supplementary to execution.

(2) An attorney cannot, without the consent of his client, be examined as to any communication made by the client to him or

Digitized by Google

any advice given thereon in the course of professional duty, nor can any employe of such attorney be examined without the consent of such client as to any such communication or advice.

(3) A clergyman or priest cannot, without the consent of the person making the confession, be examined as to the confession made to him in his professional character, in the course of discipline enjoined by the church to which he belongs.[1]

(4) A regular physician or surgeon cannot, without the consent of his patient, be examined, in a civil action, as to any information acquired in attending the patient, which was necessary to enable him to prescribe or act for the patient.

(5) A public officer cannot be examined as to communications made to him in official confidence, when the public interest would suffer by the disclosure." [2]

[G. S. 1894 § 5662 as amended Laws 1895 ch. 31]

[1] Hills v. State (Neb.), 85 N. W. 836.

[2] Cole v. Andrews, 74 Minn. 93, 76 N. W. 962.

Husband and wife.

§ 706. The fact that a wife refuses to allow the adverse party to examine her husband as a witness against her does not preclude her from subsequently calling him in her own behalf.[1] When one spouse calls the other as a witness the adverse party has a right of cross-examination [2] and such cross-examination is not limited to matters touched upon in the direct examination, but may extend to any matter pertinent to the issues.[3] The declarations of husband and wife are subject to the same rules of exclusion as those which govern their testimony as witnesses.[4] The mere fact that one spouse does not call the other as a witness does not authorize the court to instruct the jury that they may take that fact into consideration as tending to raise a presumption that the testimony, if given, would not be favorable.[5] A wife is not a competent witness for the state in a prosecution against her husband for a crime against her committed before their marriage.[6] A wife cannot be a witness against her husband without his consent although the action is one against a person for enticing her away and the defence is based on alleged ill-treatment of the wife by the husband.[7] A wife cannot testify against her husband on a prosecution against him for adultery,[8] but upon a prosecution against a third party for having committed adultery with one of the spouses the other spouse is competent to testify as to facts within his or her knowledge not gained through a marital communication.[9] In prosecutions for bigamy the second wife is an incompetent witness to prove her marriage until the first marriage has been proved by other evidence to the satisfaction of the court.[10] In actions against a husband and wife under the statute to have a trust declared upon a fraudulent conveyance to the wife the husband is an incompetent witness.[11] One spouse is not an incompetent witness to a will simply because the other spouse is a beneficiary under the will.[12] One spouse is not an incompetent witness against the other in supplementary proceedings against the latter.[13]

Digitized by Google

The statute excludes evidence of all private conversations between husband and wife though not confidential in their nature.[14] The fact that the husband is dead does not alter the rule.[15] The privilege is personal to husband and wife and if communications between them are overheard by third persons, even when hiding for that purpose, such third persons may disclose what they have heard.[16] If one of the spouses gives to a third person a confidential letter written to him or her by the other spouse the letter ceases to be privileged.[17] When the privilege is once lost it cannot be regained.[18] After a divorce one spouse may testify against the other but cannot disclose marital communications.[19] The dying declarations of a woman are admissible although her husband was an accomplice.[20]

[1] Wolford v. Farnham, 44 Minn. 159, 46 N. W. 295.
[2] Ballentine v. White, 77 Pa. St. 20.
[3] Nat. Ger.-Amer. Bank v. Lawrence, 77 Minn. 282, 79 N. W. 1016.
[4] Id.
[5] Id. But see McCooe v. Dighton etc. Ry. Co. 173 Mass. 117, 53 N. E. 133.
[6] State v. Frey, 76 Minn. 526, 79 N. W. 518.
[7] Huot v. Wise, 27 Minn. 68, 6 N. W. 425.
[8] State v. Armstrong, 4 Minn. 335 Gil. 251.
[9] State v. Vollander, 57 Minn. 225, 58 N. W. 878.
[10] Webber v. Virginia, 103 U. S. 304. See State v. Johnson, 12 Minn. 476 Gil. 378.
[11] Nat. Ger.-Amer. Bank v. Lawrence, 77 Minn. 282, 79 N. W. 1016. See Leonard v. Green, 30 Minn. 496, 16 N. W. 399.
[12] In re Holt's Will, 56 Minn. 33, 57 N. W. 219.
[13] Wolford v. Farnham, 44 Minn. 159, 46 N. W. 295; Nat. Ger.-Amer. Bank v. Lawrence, 77 Minn. 282, 79 N. W. 1016.
[14] Leppla v. Minnesota Tribune Co. 35 Minn. 310, 29 N. W. 127; Newstrom v. St. Paul & Duluth Ry. Co. 61 Minn. 78, 63 N. W. 253.
[15] Newstrom v. St. Paul & Duluth Ry. Co. 61 Minn. 78, 63 N. W. 253; Beckett v. N. W. Masonic Aid Assoc. 67 Minn. 298, 69 N. W. 923.
[16] People v. Hayes, 140 N. Y. 484; State v. Hoyt, 47 Conn. 518; Com. v. Griffin, 110 Mass. 181.
[17] People v. Hayes, 140 N. Y. 484.
[18] Id.
[19] Chamberlain v. People, 23 N. Y. 85; French v. Ware, 65 Vt. 338.
[20] State v. Pearce, 56 Minn. 226, 57 N. W. 652, 1065.

Attorney and client.

§ 707. The privilege belongs to the client and not to the attorney. A witness who has testified as to a given fact on direct examination may be compelled on cross-examination to state whether he has communicated the fact to his attorney.[1] It is only a communication made because of, and in the course of, the confidential relation of

Digitized by Google

client and attorney, which is privileged. A mere request by one to an attorney to become and act as his attorney, is not made because of such relation, but for the purpose of creating it and may be proved.[2] A conversation between the parties to a mortgage in the hearing of an attorney employed to draft the mortgage, not embracing any communications made to him as an attorney or for the purpose of obtaining his advice or legal opinion, is not privileged.[3] Communications from a client to an attorney obviously designed for communication to the adverse party or other person are not privileged.[4] An attorney is not obliged to produce a writing intrusted to him by his client or to disclose its contents without the client's consent, but for the purpose of authorizing the adverse party to give oral evidence of its contents he may be required to state whether he has it in his possession or not.[5] The privilege does not extend to facts or writings obtained by the attorney from other sources than his client or from third parties, whether strangers or opponents.[6] Third persons in whose presence a client has conversed with his attorney may disclose the conversation.[7] By our statute this rule is not applicable to an employe of the attorney.[8] If the client attacks the attorney he waives the privilege so far as to authorize the attorney to make a defence to the charge.[9] For certain purposes the legal adviser of a testator may disclose communications with his client upon business matters.[10] Statements regarding the commission of a crime already committed, made by the party committing it to an attorney at law when consulting him in that capacity are privileged communications, whether a fee has or has not been paid or whether litigation is pending or not.[11] But communications respecting a future crime are not privileged,[12] at least on a prosecution for that particular crime.[13] The termination of the relation of attorney and client does not authorize the attorney to disclose communications made during the existence of the relation.[14] The relation of attorney and client does not exist between the county attorney and one making a complaint for the purpose of a criminal prosecution.[15] It is not necessary, to create the confidential relation of attorney and client that a fee should be paid or a retainer given.[16] When a client authorizes his attorney to make a contract, as, for example, to settle a claim, the attorney may disclose communications constituting his authority.[17] It has been held by high authority that if, in a civil action, one of the parties insists on his right to exclude testimony which is privileged, but which would throw light upon the merits and the truth of his testimony his action is subject to comment.[18] A party may be compelled to elect in person to take advantage of the privilege.[19]

[1] State v. Tall, 43 Minn. 273, 45 N. W. 449.

[2] Eickman v. Troll, 29 Minn. 124, 12 N. W. 347.

[3] Hanson v. Bean, 51 Minn. 546, 53 N. W. 871. See David Adler etc. Co. v. Hellman, 55 Neb. 266, 75 N. W. 877.

[4] Shove v. Martine, 85 Minn. 29, 88 N. W. 412; Georges v. Niess, 70 Minn. 248, 73 N. W. 644. See Keober v. Somers, 108 Wis. 497, 84 N. W. 991.

Digitized by Google

[8] Stokoe v. St. Paul etc. Ry. Co. 40 Minn. 545, 42 N. W. 482; Davis v. New York etc. Ry. Co. 70 Minn. 37, 72 N. W. 823.
[9] Davis v. New York etc. Ry. Co. 70 Minn. 37, 72 N. W. 823.
[7] People v. Buchanan, 145 N. Y. 1; Goddard v. Gardner, 28 Conn. 172.
[8] See § 705.
[9] State v. Madigan, 66 Minn. 10, 68 N. W. 179.
[10] In re Layman's Will, 40 Minn. 371, 42 N. W. 286; Coates v. Semper, 82 Minn. 460, 85 N. W. 217. See Lodger v. Whelpley, 111 N. Y. 239.
[11] Alexander v. U. S. 138 U. S. 353.
[12] Queen v. Cox, 14 Q. B. D. 153.
[13] Alexander v. U. S. 138 U. S. 353.
[14] Struckmeyer v. Lamb, 75 Minn. 366, 77 N. W. 987.
[15] Cole v. Andrews, 74 Minn. 93, 76 N. W. 962.
[16] Bruley v. Garvin, 105 Wis. 625, 81 N. W. 1038.
[17] Koeber v. Somers, 108 Wis. 497, 84 N. W. 991.
[18] McCooe v. Dighton etc. Ry. Co. 173 Mass. 117, 53 N. E. 133. See Nat. Ger.-Amer. Bank v. Lawrence, 77 Minn. 282, 79 N. W. 1016.
[19] Id.

Physician and patient.

§ 708. The privilege extends only to information given by the patient to the physician for purposes of treatment.

Jacobs v. Cross, 19 Minn. 523 Gil. 454. See Geare v. United States Life Ins. Co. 66 Minn. 91, 68 N. W. 731; Lodger v. Whelpley, 111 N. Y. 239.

WHEN ADVERSE PARTY DEAD

The statute.

§ 709. "It shall not be competent for any party to an action, or interested in the event thereof, to give evidence therein of or concerning any conversation with or admission of, a deceased or insane party or person, relative to any matter at issue between the parties; provided, that where the testimony of the party or person, since deceased, or insane, shall have been taken prior to death or disability, either in form of a deposition or by court stenographer in court and can be had and read as the testimony of such witness; wherein such party or person shall have testified concerning any conversation with the opposite party or person or concerning admissions made to such party; upon a trial of the issues after the death or disability of such party or person as contemplated in this section, the opposite party may testify fully in reference to conversations and admissions to which the aforesaid deposition or evidence shall relate."

[G. S. 1894 § 5660 as amended by Laws 1895 ch. 27] For history of our legislation on subject see, Chadwick v. Cornish, 26 Minn. 28, 1 N. W. 55; Griswold v. Edson, 32 Minn. 436, 21

Digitized by Google

N. W. 475. The following cases arose under former statutes: Johnson v. Coles, 21 Minn. 108; Bigelow v. Ames, 18 Minn. 527 Gil. 471; McNab v. Stewart, 12 Minn. 407 Gil. 291; Foster v. Berkey, 8 Minn. 351 Gil. 310; Allen v. Baldwin, 22 Minn. 397.

Who incompetent.

§ 710. Every party to the action is incompetent however remote or contingent his interest may be.[1] On the other hand to render a person not a party incompetent on the ground that he is interested in the event of the action he must have some pecuniary, legal, certain and immediate interest in the event of the cause itself, or in the record, as an instrument of evidence for or against himself and the burden is on the party objecting to the witness to make his incompetency to appear clearly.[2] The disqualification does not extend to all parties to the record but only to such as are parties to the specific issue to which the testimony relates.[3] The disqualification does not apply to an agent of a party to the action if such agent is not himself a party and not interested in the event of the action.[4] A party or interested person is disqualified although he took no part in the conversation.[5]

[1] Towle v. Sherer, 70 Minn. 312, 73 N. W. 180.

[2] Perine v. Grand Lodge, 48 Minn. 82, 50 N. W. 1022; Marvin v. Dutcher, 26 Minn. 391, 4 N. W. 685; State v. Eisele, 37 Minn. 256, 33 N. W. 785; Bowers v. Schuler, 54 Minn. 99, 55 N. W. 817; Tretheway v. Carey, 60 Minn. 457, 62 N. W. 815; Madson v. Madson, 69 Minn. 37, 71 N. W. 824; Towle v. Sherer, 70 Minn. 312, 73 N. W. 180; Kells v. Webster, 71 Minn. 276, 73 N. W. 962; Manahan v. Halloran, 66 Minn. 483, 69 N. W. 619; Darwin v. Keigher, 45 Minn. 64, 47 N. W. 314; Harrington v. Samples, 36 Minn. 200, 30 N. W. 671; Farmers Union Elevator Co. v. Syndicate Ins. Co. 40 Minn. 152, 41 N. W. 547; Beard v. First. Nat. Bank, 39 Minn. 546, 40 N. W. 842; Beckett v. N. W. Masonic Aid Assoc. 67 Minn. 298, 69 N. W. 923; Keigher v. City of St. Paul, 73 Minn. 21, 75 N. W. 732; Allen v. Baldwin, 22 Minn. 397; Bost v. Supreme Council, 92 N. W. 337.

[3] Bowers v. Schuler, 54 Minn. 99, 55 N. W. 817; Suter v. Page, 64 Minn. 444, 67 N. W. 67.

[4] Darwin v. Keigher, 45 Minn. 64, 47 N. W. 314.

[5] Comstock v. Comstock, 76 Minn. 396, 79 N. W. 300.

Effect of conversation cannot be shown.

§ 711. The statute cannot be evaded by allowing a witness to testify as to the effect of a conversation with a deceased person or as to an inference from such conversation.[1] Nor is it permissible for a witness to testify as to what was not said in such a conversation.[2]

[1] Madson v. Madson, 69 Minn. 37, 71 N. W. 824; Robbins v. Legg, 80 Minn. 419, 83 N. W. 379; Merhoff v. Merhoff, 84 Minn. 263, 87 N. W. 781; Vandall v. St. Martin, 42 Minn. 163, 44 N. W. 525; Babcock v. Murray, 69 Minn. 199, 71 N. W. 913.

[2] Redding v. Godwin, 44 Minn. 355, 46 N. W. 563.

Digitized by Google

Written admissions and acts not excluded.

§ 712. The statute does not forbid evidence of written admissions or acts, either of the deceased or the surviving party.[1] Thus a survivor has been allowed to testify as to the fact of a payment;[2] the consideration for a note and mortgage;[3] the angry exclamations of a testator, his sanity being at issue;[4] the fact that the surviving witness got a letter from the post-office, read it to the deceased and gave it to him.[5] Evidence may be given as to the letters of a deceased person.[6]

[1] Chadwick v. Cornish, 26 Minn. 28, 1 N. W. 55.
[2] Chadwick v. Cornish, 26 Minn. 28, 1 N. W. 55; Robbins v. Legg, 80 Minn. 419, 83 N. W. 379; Merhoff v. Merhoff, 84 Minn. 263, 87 N. W. 781.
[3] Parker v. Maxwell, 51 Minn. 523, 53 N. W. 754.
[4] In re Brown, 38 Minn. 112, 35 N. W. 726.
[5] Hall v. N. W. Endow. etc. Assoc. 47 Minn. 85, 49 N. W. 524.
[6] Livingston v. Ives, 35 Minn. 55, 27 N. W. 74; Newton v. Newton, 46 Minn. 33, 48 N. W. 450; Hulett v. Carey, 66 Minn. 327, 69 N. W. 31.

Conversations with whom inadmissible.

§ 713. The word "person," as used in the statute, is not limited to parties, but includes all persons whatsoever.

Griswold v. Edson, 32 Minn. 436, 21 N. W. 475; Farmers Union Elevator Co. v. Syndicate Ins. Co. 40 Minn. 152, 41 N. W. 547; Lowe v. Lowe, 83 Minn. 206, 86 N. W. 11.

Waiving objection by cross-examination.

§ 714. When a witness who is a party to an action or interested in the event thereof is required on cross-examination to state a conversation with a person since deceased the party so cross-examining waives the protection of the statute, and on re-direct examination such witness is competent to give the whole of such conversation or to qualify or explain the same by other conversations with the deceased relating to the same transaction.[1] But a party does not waive his right to object to such evidence by merely cross-examining by way of preliminary inquiry into the competency of the witness.[2]

[1] In re Hess' Estate, 57 Minn. 282, 59 N. W. 193; Brown v. Morrill, 45 Minn. 483, 48 N. W. 328.
[2] Tretheway v. Carey, 60 Minn. 457, 62 N. W. 815.

Objection to evidence must be specific.

§ 715. To raise the point that testimony is inadmissible by reason of this statute the objection must call the attention of the court specifically to the ground of objection.

Mousseau v. Mousseau, 42 Minn. 212, 44 N. W. 193.

Waiver.

§ 716. Proof by plaintiff, an executor, of an admission by the defendant of a liability in favor of the estate does not waive the

Digitized by Google

protection of the statute so as to enable the defendant to testify as to conversations with or admissions by the deceased party.

Rhodes v. Pray, 36 Minn. 392, 32 N. W. 86.

When witness called by adverse party.

§ 717. It is an open question whether the statute is applicable when the witness is called to give evidence against his interest.

Newstrom v. St. Paul & Duluth Ry. Co. 61 Minn. 78, 63 N. W. 253.

Strict construction.

§ 718. The statute is to be strictly construed.

Chadwick v. Cornish, 26 Minn. 28, 1 N. W. 55; In re Brown, 38 Minn. 112, 35 N. W. 726; Keigher v. City of St. Paul, 73 Minn. 21, 75 N. W. 732.

Does not render witness generally incompetent.

§ 719. The effect of the statute is not to render the surviving party an incompetent witness generally but only as to conversations with or admissions of the deceased party.

Harrington v. Samples, 36 Minn. 200, 30 N. W. 671; Rhodes v. Pray, 36 Minn. 392, 32 N. W. 86.

Only applies to matters in issue.

§ 720. The statute has no application to conversations of a deceased person which do not bear upon the issues.

In re Brown, 38 Minn. 112, 35 N. W. 726.

EXAMINATION OF WITNESSES

GENERAL RULES

Order of examination.

§ 721. Witnesses examined in open court must be first examined in chief, then cross-examined and then re-examined. The court may in all cases permit a witness to be recalled either for further examination in chief, or for further cross-examination,[1] and if it does so the parties have the right of further cross-examination and further re-examination respectively. The examination and cross-examination must relate to facts in issue or relevant thereto, and the cross-examination, except as stated in § 769, must be confined to the facts to which the witness testified on his examination in chief.[2] The re-examination must be directed to the explanation of matters referred to in cross-examination.[3] And if new matter is by permission of the court introduced in the re-examination, the adverse party may further cross-examine upon that matter.[4] Questions suggesting the answer which the person putting the question wishes or expects to receive, or suggesting disputed facts as to which the witness is to testify, must not, if objected to by the adverse party, be asked in any examination in chief or in re-examination, except with the permission of the court,[5] but such questions may be asked in cross-examination.

Digitized by Google

[Stephen, Ev. §§ 126–128 (in substance)]
[1] See § 832. [2] See § 722. [3] See § 724. [4] See § 724. [5] See § 828.

Scope of cross-examination on the merits.

§ 722. The cross-examination on the merits must generally be confined to the facts to which the witness testified on his examination in chief.[1] But it is competent to call out not only any fact contradicting, explaining, or qualifying any particular facts stated on the examination in chief,[2] but also any fact tending to rebut or modify any conclusion or inference from such facts.[3] If a witness on the direct examination testifies to one part or phase of a transaction he may be questioned on cross-examination as to every part or phase of the same transaction.[4] When the issue is one of fraud the widest latitude is allowable, especially if the witness is the party charged with the fraud, and objections on the ground of materiality are disfavored. In such cases the cross-examination need not be confined to matters touched upon in the direct examination.[5] It is the general rule that a party cannot make out his case by means of cross-examination,[6] but it is discretionary with the court to permit him to do so.[7] If a party makes the witnesses of his adversary his own by the extent of the cross-examination his adversary may cross-examine and offer evidence in rebuttal.[8]

[1] Jaspers v. Lano, 17 Minn. 296 Gil. 273; Beaulieu v. Parsons, 2 Minn. 37 Gil. 26.

[2] Kelly v. Erie etc. Co. 34 Minn. 321, 25 N. W. 706; Ransier v. Minneapolis etc. Ry. Co. 30 Minn. 215, 14 N. W. 883; Ladd v. Newell, 34 Minn. 107, 24 N. W. 366; Sigafoos v. Minneapolis etc. Ry. Co. 39 Minn. 8, 38 N. W. 627; Laramee v. Tanner, 69 Minn. 156, 71 N. W. 1028; State v. Worthingham, 23 Minn. 529.

[3] Wilson v. Wagar, 26 Mich. 452; State v. Klitzke, 46 Minn. 343, 49 N. W. 54; State v. Worthingham, 23 Minn. 529; Melby v. D. M. Osborne & Co. 33 Minn. 492, 24 N. W. 253; Mix v. Ege, 67 Minn. 116, 69 N. W. 703.

[4] McCormick v. Miller, 19 Minn. 443 Gil. 384; Dodge v. Chandler, 13 Minn. 114 Gil. 105; Lamprey v. Munch, 21 Minn. 379; Laramee v. Tanner, 69 Minn. 156, 71 N. W. 1028; Bowers v. Mayo, 32 Minn. 241, 20 N. W. 186; Lynch v. Free, 64 Minn. 277, 66 N. W. 973; Lukens v. Hazlett, 37 Minn. 441, 35 N. W. 265.

[5] Cohen v. Goldberg, 65 Minn. 473, 67 N. W. 1149; Nicolay v. Mallery, 62 Minn. 119, 64 N. W. 108; Pfefferkorn v. Seefield, 66 Minn. 223, 68 N. W. 1072; Allen v. Fortier, 37 Minn. 218, 34 N. W. 21; Bowers v. Mayo, 32 Minn. 241, 20 N. W. 186; Ladd v. Newell, 34 Minn. 107, 24 N. W. 366; Homberger v. Brandenberg, 35 Minn. 401, 29 N. W. 123; Riddell v. Munro, 49 Minn. 532, 52 N. W. 141; Tunell v. Larson, 39 Minn. 269, 39 N. W. 628; Ewing v. Clark, 65 Minn. 71, 67 N. W. 669; Manwaring v. O'Brien, 75 Minn. 542, 78 N. W. 1; Nat. Ger. Amer. Bank v. Lawrence, 77 Minn. 282, 79 N. W. 1016; Christian v. Klein, 77 Minn. 116, 79 N. W. 602.

Digitized by Google

[6] Sterling v. Bock, 37 Minn. 29, 32 N. W. 865; Schmidt v. Schmidt, 47 Minn. 451, 50 N. W. 598; Stebbins v. Hall, 53 Minn. 169, 54 N. W. 1110.

[7] Hannem v. Pence, 40 Minn. 127, 41 N. W. 657.

[8] Lukens v. Hazlett, 37 Minn. 441, 35 N. W. 265.

Scope of cross-examination discretionary with court.

§ 723. The latitude to be allowed in cross-examination on the merits is largely within the discretion of the trial court and its action will not be reversed on appeal except for a gross and oppressive abuse of discretion.[1] But this rule does not apply to the exclusion of evidence. A party has a right to cross-examine and his cross-examination cannot be restricted in the mere discretion of the court.

[1] Lukens v. Hazlett, 37 Minn. 441, 35 N. W. 265; Murphy v. Backer, 67 Minn. 510, 70 N. W. 799.

Re-direct examination.

§ 724. It is the general rule that re-direct examination must be confined to matters tending to develop, explain, modify or rebut any new matter brought out on the cross-examination.[1] On re-examination a witness may be examined fully as to all matters brought out on the cross-examination although such matters were improperly admitted.[2] When part of a conversation is brought out on cross-examination the remainder of the conversation may be brought out on the re-direct examination if it tends to qualify or explain the part disclosed on the cross-examination, otherwise not.[3] It is discretionary with the court to allow the re-direct examination to extend to new matter not touched on in the cross-examination.[4] If new matter is brought out on the re-direct examination the adverse party has a right to a further cross-examination.[5]

[1] Backus v. A. H. Barber & Co. 75 Minn. 262, 77 N. W. 959; Hathaway v. Brown, 18 Minn. 414 Gil. 373; Mix v. Ege, 67 Minn. 116, 69 N. W. 703; Smith v. Miller, 58 Minn. 482, 59 N. W. 1076; Moratzky v. Wirth, 74 Minn. 146, 76 N. W. 1032.

[2] People v. Buchanan, 145 N. Y. 1; Vaughan v. McCarthy, 63 Minn. 221, 65 N. W. 249; Weber v. Winona etc. Ry. Co. 63 Minn. 66, 65 N. W. 93; Christie v. Chicago etc. Ry. Co. 61 Minn. 161, 63 N. W. 482.

[3] Hathaway v. Brown, 18 Minn. 414 Gil. 373; Rouse v. Whited, 25 N. Y. 170; People v. Beach, 87 N. Y. 508.

[4] Lynd v. Picket, 7 Minn. 184 Gil. 128; First Nat. Bank v. Strait, 75 Minn. 396, 78 N. W. 101.

[5] Butler v. Bohn, 31 Minn. 325, 17 N. W. 862.

Cross-examination of a party on the merits.

§ 725. The general rule limiting cross-examination to matters touched upon in the direct examination is not strictly enforced when the witness is a party.

Rea v. Missouri, 17 Wall. (U. S.) 542; Cohen v. Goldberg, 65 Minn. 473, 67 N. W. 1149.

Digitized by Google

Examination of hostile witness.

§ 726. It is in the discretion of the court to permit a party who is surprised by the adverse testimony of a witness whom he has called to examine him as if upon cross-examination.[1] He may ask the witness if the latter has not previously stated the facts contrary to his testimony.[2] And it is discretionary with the court to allow him to contradict the witness, the proper foundation being laid.[3]

[1] Adamson v. Sundby, 51 Minn. 460, 53 N. W. 761; Hahn v. Penney, 60 Minn. 487, 62 N. W. 1129; Suter v. Page, 64 Minn. 444, 67 N. W. 67. See Putnam v. U. S. 162 U. S. 687.

[2] State v. Johnson, 12 Minn. 476 Gil. 378; Trunkey v. Crosby, 33 Minn. 464, 23 N. W. 846; State v. Tall, 43 Minn. 273, 45 N. W. 449; Moratzky v. Wirth, 74 Minn. 146, 76 N. W. 1032. See Putnam v. U. S. 162 U. S. 687.

[3] Selover v. Bryant, 54 Minn. 434, 56 N. W. 58.

EXAMINATION OF ADVERSE PARTY UNDER STATUTE

The statute.

§ 727. "A party to the record of any civil action or proceeding, or a person for whose immediate benefit such action or proceeding is prosecuted or defended, or the directors, officers, superintendent or managing agents of any corporation which is a party to the record in such action or proceeding, may be examined upon the trial thereof as if under cross-examination at the instance of the adverse party or parties or any of them, and for that purpose may be compelled in the same manner and subject to the same rules for examination as any other witness to testify, but the party calling for such examination shall not be concluded thereby, but may rebut it by counter testimony."

[G. S. 1894 § 5659]

Object and effect of statute.

§ 728. The object of the statute is to permit a party to call his adversary at the trial, without making him his own witness, and elicit from him, if possible, material facts within his knowledge by a cross-examination, precisely as if he had already been examined on his own behalf in chief.[1] It was not intended to permit a plaintiff to make one of his own witnesses a nominal party to the record, and then call and cross-examine him, not as an adverse party, but as a witness against the actual adverse defendants.[2] The statute was not designed to affect the competency of witnesses,[3] or the order of trial,[4] or the rule which forbids a party to make out his case by cross-examining the witnesses of the adverse party.[5]

[1] Suter v. Page, 64 Minn. 444, 67 N. W. 67; In re Brown, 38 Minn. 112, 35 N. W. 726.

[2] Suter v. Page, 64 Minn. 444, 67 N. W. 67.

[3] Wolford v. Farnham, 44 Minn. 159, 46 N. W. 295; Nat. Ger. Amer. Bank v. Lawrence, 77 Minn. 282, 79 N. W. 1016.

Digitized by Google

[4] Schmidt v. Schmidt, 47 Minn. 451, 50 N. W. 598.
[5] Id.

Who may be called.

§ 729. A merely nominal party cannot be called. There must be a real issue to be tried between the party calling and the party called. A party cannot make one of his own witnesses a nominal party and then call him under the statute.[1] A person for whose immediate benefit the action is brought or defended may be called.[2] Any officer, superintendent or agent of a corporation having supervision or control of the work or act of the corporation involved in the case may be called whether he is a general or subordinate officer.[3]

[1] Suter v. Page, 64 Minn. 444, 67 N. W. 67; Pipestone County Bank v. Ward, 81 Minn. 263, 83 N. W. 991; Bachmeier v. Bachmeier, 69 Minn. 472, 72 N. W. 710; Ames-Brooks Co. v. Aetna Ins. Co. 83 Minn. 346, 86 N. W. 344; Wheaton v. Berg, 50 Minn. 525, 52 N. W. 926.
[2] Pipestone County Bank v. Ward, 81 Minn. 263, 83 N. W. 991; Charles P. Kellogg Co. v. Holm, 82 Minn. 416, 85 N. W. 159.
[3] Bennett v. Backus Lumber Co. 77 Minn. 198, 79 N. W. 682.

In what actions or proceedings.

§ 730. The statute applies to the trial of any civil action involving an issue of fact and to any proceeding involving such an issue which the parties, as a matter of right, are entitled to have heard on oral testimony. A party is not entitled, as a matter of right, to have a motion involving an issue of fact heard on oral testimony, and to call his adversary for cross-examination. Ordinarily such testimony ought not to be received on the hearing of such motion, but the trial court in exceptional cases may, in its discretion, permit the hearing of a motion on oral testimony and in such cases permit the examination of an adverse party under the statute.[1] In probate proceedings the proponent of a will may be examined by a contestant.[2]

[1] Strom v. Montana Central Ry. Co. 81 Minn. 346, 84 N. W. 46.
[2] In re Brown, 38 Minn. 112, 35 N. W. 726.

Scope of examination.

§ 731. The widest and freest scope is to be given the examination. Leading questions may be put and any admissible evidence which would tend to weaken the case of the witness or strengthen that of the party calling him may be drawn out. The whole case in all its phases may be thoroughly and minutely investigated. Objections on the ground of materiality should be disfavored.

Pfefferkorn v. Seefield, 66 Minn. 223, 68 N. W. 1072; In re Brown, 38 Minn. 112, 35 N. W. 726; Couch v. Steele, 63 Minn. 504, 65 N. W. 946; Brubaker v. Taylor, 76 Pa. St. 82.

Contradiction and impeachment of witness.

§ 732. The party calling the witness is not concluded by the testimony but may refute it on the argument or contradict it by means

Digitized by Google

of other witnesses.[1] The witness may be impeached by evidence of contradictory statements out of court even without laying any foundation, for such statements would be admissions.[2]

[1] Schmidt v. Durnam, 50 Minn. 96, 52 N. W. 277; Pfefferkorn v. Seefield, 66 Minn. 223, 68 N. W. 1072.

[2] Brubaker v. Taylor, 76 Pa. St. 82.

Order of examination.

§ 733. The time when a party examined under the statute shall be examined by his own counsel is discretionary with the trial court. Logically this examination should be reserved until the opening of his own case.

Jones v. Bradford, 79 Minn. 396, 82 N. W. 651.

Construction.

§ 734. The statute must be given a reasonable construction and one in accord with its manifest purpose.[1] In some particulars it has received a liberal construction.[2]

[1] Suter v. Page, 64 Minn. 444, 67 N. W. 67.

[2] Bennett v. Backus Lumber Co. 77 Minn. 198, 79 N. W. 682; Strom v. Montana Central Ry. Co. 81 Minn. 346, 84 N. W. 46.

Deposition.

§ 735. Whether the statute is applicable to the deposition of a party is an open question.

Couch v. Steele, 63 Minn. 504, 65 N. W. 946.

EXAMINATION OF EXPERTS

General statement.

§ 736. The testimony of experts is based on an hypothetical question, or upon the evidence in the case which he has heard, or upon facts in his knowledge acquired out of court.

Form of hypothetical questions.

§ 737. An hypothetical question must be based on facts admitted or established or which, if controverted, might reasonably be found by the jury from the evidence. That is, it must be framed in accordance with some theory which the evidence reasonably tends to support. It should embody all the facts relating to the subject upon which the opinion of the witness is asked.[1] It is improper if it assumes a material fact which is not supported by any evidence.[2] The facts are assumed only for the purpose of the question and the opinion of the witness is based wholly on the facts assumed. It follows that if the jury do not find the facts as assumed the opinion of the expert is entitled to no weight[3] and it is the duty of the court to instruct the jury to disregard it.[4] In an hypothetical question embodying a person's assumed symptoms and condition it is proper to ask a medical expert as to the probability of recovery.[5]

[1] Wittenberg v. Onsgard, 78 Minn. 342, 81 N. W. 14; Peterson v. Chicago etc. Ry. Co. 38 Minn. 511, 39 N. W. 485; Cooper

Digitized by Google

v. St. Paul City Ry. Co. 54 Minn. 379, 56 N. W. 42; Donnelly v. St. Paul City Ry. Co. 70 Minn. 278, 73 N. W. 157.

[2] State v. Stokely, 16 Minn. 282 Gil. 249; State v. Hanley, 34 Minn. 430, 26 N. W. 397; State v. Scott, 41 Minn. 365, 43 N. W. 62.

[3] Peterson v. Chicago etc. Ry. Co. 38 Minn. 511, 39 N. W. 485.

[4] Loucks v. Chicago etc. Ry. Co. 31 Minn. 526, 18 N. W. 651.

[5] Peterson v. Chicago etc. Ry. Co. 38 Minn. 511, 39 N. W. 485; Donnelly v. St. Paul City Ry. Co. 70 Minn. 278, 73 N. W. 157.

Opinions based on the evidence.

§ 738. The trial court may permit a question to an expert witness, calling for his opinion, to refer him to the testimony in the case, if he has heard it, instead of stating the facts which it tends to prove. But such a question must require the witness to assume the testimony to be true.[1] This mode of examining an expert is ordinarily preferable to the use of hypothetical questions.[2]

[1] Jones v. Chicago etc. Ry. Co. 43 Minn. 279, 45 N. W. 444; Getchell v. Hill, 21 Minn. 464; State v. Lautenschlager, 22 Minn. 514; In re Storer's Will, 28 Minn. 9, 8 N. W. 827; Beardsley v. Minneapolis Street Ry. Co. 54 Minn. 504, 56 N. W. 176; Cooper v. St. Paul City Ry. Co. 54 Minn. 379, 56 N. W. 42.

[2] Beardsley v. Minneapolis Street Ry. Co. 54 Minn. 504, 56 N. W. 176.

Opinions based on knowledge acquired out of court.

§ 739. A medical expert may be asked his opinion of the condition of a person whom he has examined out of court.[1] This opinion may be based on statements made by the patient to the expert in the course of an examination for treatment[2]—statements concerning both past[3] and present feelings and bodily states—but on the direct examination the expert cannot be asked to give such statements when they related, at the time they were made, to past feelings and bodily states.[4] Nor can he be asked as to statements made to him by the patient concerning the cause of the injury or disease.[5] A medical expert cannot be asked his opinion based on information obtained by him out of court from persons other than the patient.[6] A physician may be asked his opinion of the sanity of a person whom he has observed out of court.[7] It may be stated generally that an expert who has become acquainted with the facts of the case out of court, directly and not through hearsay, may be asked his opinion based on such knowledge.[8]

[1] Jones v. Chicago etc. Ry. Co. 43 Minn. 279, 45 N. W. 444; Johnson v. Northern Pacific Ry. Co. 47 Minn. 430, 50 N. W. 473; Brusch v. St. Paul City Ry. Co. 52 Minn. 512, 55 N. W. 57; Cooper v. St. Paul City Ry. Co. 54 Minn. 379, 56 N. W. 42; Firkins v. Chicago etc. Ry. Co. 61 Minn. 31, 63 N. W. 172; Miller v. St. Paul City Ry. Co. 62 Minn. 216, 64 N. W. 554; Williams v. Great Northern Ry. Co. 68 Minn. 55, 70 N. W. 860;

Digitized by Google

Edlund v. St. Paul City Ry. Co. 78 Minn. 434, 81 N. W. 214; Weber v. St. Paul City Ry. Co. 67 Minn. 155, 69 N. W. 716.

[2] Id.; Davidson v. Cornell, 132 N. Y. 228.

[3] To hold otherwise would be absurd, as every competent physician investigates the history of a case, and interrogates his patient to that end. See Fulmore v. St. Paul City Ry. Co. 72 Minn. 448, 75 N. W. 589.

[4] Williams v. Great Northern Ry. Co. 68 Minn. 55, 70 N. W. 860 and cases supra. This rule seems absurd. An opinion is admitted without the facts on which it is based.

[5] Weber v. St. Paul City Ry. Co. 67 Minn. 155, 69 N. W. 716; Roosa v. Boston Loan Co. 132 Mass. 439.

[6] Miller v. St. Paul City Ry. Co. 62 Minn. 216, 64 N. W. 554.

[7] People v. Strait, 148 N. Y. 566; People v. Nino, 149 N. Y. 317; People v. Hoch, 150 N. Y. 291.

[8] Hayward v. Knapp, 23 Minn. 430; Shriver v. Sioux City etc. Ry. Co. 24 Minn. 506; Armstrong v. Chicago etc. Ry. Co. 45 Minn. 85, 47 N. W. 459; Brown v. Huford, 69 Mo. 305; Bellefontaine etc. Ry. Co. v. Bailey, 11 Ohio St. 337; Pullman v. Corning, 9 N. Y. 93.

Scope of examination.

§ 740. When a witness is called as an expert to give his opinion upon a matter in a case which is a proper subject for expert testimony he cannot be asked to give his opinion on other matters in the case which are not proper subjects for expert testimony.[1] Under the guise of giving the reasons for his opinions an expert cannot, on the direct examination, give evidence bearing on the issues which would otherwise be inadmissible.[2]

[1] City of Winona v. Minnesota Ry. Const. Co. 27 Minn. 415, 6 N. W. 795, 8 N. W. 148; Briggs v. Minneapolis Street Ry. Co. 52 Minn. 36, 53 N. W. 1019.

[2] Hunt v. City of Boston, 152 Mass. 168; People v. Hawkins, 109 N. Y. 408.

Use of professional treatises.

§ 741. Although an expert witness may use a professional treatise to refresh his memory he is not permitted to read from it though he agrees with the opinion of the author.[1] On the direct examination counsel cannot read a professional treatise and then ask the expert if he agrees with it.[2]

[1] Com. v. Sturtivant, 117 Mass. 139; People v. Wheeler, 60 Cal. 585.

[2] Marshall v. Brown, 50 Mich. 148.

Cross-examination of experts.

§ 742. Under general rules of cross-examination an expert may be asked any question the answer to which might tend to qualify, explain or render improbable the opinion expressed on the direct examination.[1] While on the direct examination hypothetical questions unsupported by the evidence are forbidden, on the cross-exami-

Digitized by Google

nation counsel is at liberty, for the purpose of testing the skill and accuracy of the witness, to ask him hypothetical questions, pertinent to the inquiry, whether the facts assumed in such questions are in evidence or not. The range of such examination is within the discretion of the trial court.[2] But under the guise of testing the professional skill and knowledge of the expert counsel cannot call out the opinion of the witness upon the issues by means of hypothetical questions unsupported by the evidence.[3] To test the value of the opinion a searching cross-examination as to the facts upon which it is based is permissible.[4] The exclusion of a question which assumes the existence of facts which the jury find do not exist is not a ground for a new trial.[5] The impeachment of experts is considered elsewhere.[6]

[1] Kelly v. Erie Telegraph etc. Co. 34 Minn. 321, 25 N. W. 706; Sigafoos v. Minneapolis etc. Ry. Co. 39 Minn. 8, 38 N. W. 627; Minnesota Belt Line Ry. Co. v. Gluek, 45 Minn. 463, 48 N. W. 194.

[2] Williams v. Great Northern Ry. Co. 68 Minn. 55, 70 N. W. 860; Dilleber v. Home Life Ins. Co. 87 N. Y. 79; People v. Augsbury, 97 N. Y. 501.

[3] State v. Stokely, 16 Minn. 282 Gil. 249; State v. Hanley, 34 Minn. 430, 26 N. W. 397.

[4] In re Mullin, 110 Cal. 252; Minnesota Belt Line etc. Co. v. Gluek, 45 Minn. 463, 48 N. W. 194.

[5] Hayward v. Knapp, 23 Minn. 430.

[6] See § 803.

Re-direct examination.

§ 743. On re-direct examination it is discretionary with the court to allow the witness to be asked if he did not on a former trial testify differently.

Moratzky v. Wirth, 74 Minn. 146, 76 N. W. 1032.

EXAMINATION OF AN ACCUSED PERSON

§ 744. To what extent an accused person who takes the stand in his own behalf may be cross-examined in matters relevant to the issue is an open question in this state. Of course he may be questioned fully as to every matter brought out on the direct examination.[1] Our statute, unlike many similar statutes, does not restrict the cross-examination to matters brought out on the direct examination, so that our supreme court is free to adopt the sensible rule that the cross-examination may extend to any matter having any legitimate bearing on the question of guilt. Such is the prevailing view in the absence of restrictive statutes.[2] The only argument in favor of a narrower construction is that in the absence of express provision the legislature must have intended that the rule of cross-examination applicable to ordinary witnesses should apply, but it is submitted that no such intention can properly be attributed because the reason which underlies the ordinary rule of cross-examination fails when a defendant takes the stand. There is little enough reason, at best,

Digitized by Google

for the American rule restricting cross-examination in civil cases to matters brought out on the direct examination, but it is entirely wanting in the case of an accused person. The reason for that rule is supposed to be that orderly procedure is best subserved by compelling a party to make out his case by his own witnesses, instead of experimenting with the witnesses of his adversary on cross-examination, and that if he wishes to use the witnesses of his adversary he should be compelled to call and accredit them. But in the case of an accused person the state cannot call him and for that reason the American rule has no proper application.

[1] State v. Klitzke, 46 Minn. 343, 49 N. W. 54.

[2] Com. v. Smith, 163 Mass. 411; People v. Tice, 131 N. Y. 651; Nat. Ger.-Amer. Bank v. Lawrence, 77 Minn. 282, 79 N. W. 1016.

USE OF MEMORANDA

General rule.

§ 745. "A witness may, while under examination, refresh his memory by referring to any writing made by himself at the time of the transaction concerning which he is questioned, or so soon afterwards that the judge considers it likely that the transaction was at that time fresh in his memory. The witness may also refer to any such writing made by any other person, and read by the witness within the time aforesaid, if when he read it he knew it to be correct. An expert may refresh his memory by reference to professional treatises."

[Stephen, Ev., Art. 136]

Necessity for use—discretion of court.

§ 746. Before a witness is allowed to use memoranda it should be made to appear that there is a real necessity for such aid.[1] But there is no hard and fast rule as to the manner in which this necessity shall be made to appear. The matter lies almost wholly in the discretion of the trial court.[2]

[1] Livingston v. Ives, 35 Minn. 55, 27 N. W. 74; Stickney v. Bronson, 5 Minn. 215 Gil. 172; Beebe v. Wilkinson, 30 Minn. 548, 16 N. W. 450; Howe v. Cochran, 47 Minn. 403, 50 N. W. 368.

[2] Madigan v. De Graff, 17 Minn. 52 Gil. 34; Stahl v. City of Duluth, 71 Minn. 341, 74 N. W. 143.

When admissible in evidence.

§ 747. When, from the use of a memorandum, the memory of the witness is quickened and he is able to testify fully from actual recollection of the facts, the memorandum is inadmissible.[1] But if, upon reading the memorandum, the witness is unable to recollect the transaction or is only able to do so in part, but recognizes the memorandum as having been made by him and is willing to swear to its truthfulness, it may be introduced as substantive evidence, provided it is an original entry made at the time of the transaction and in accordance with the customary official, business or professional prac-

Digitized by Google

tice of the witness—that is, if it is such an entry as would be admissible if the witness were dead or beyond the jurisdiction of the court;[2] and provided, further, that it is first made to appear that the witness is unable to speak from memory or that the memorandum does not enable him to speak freely from memory.[3] According to the better view memoranda not made in accordance with the customary official, business or professional practice of the witness are not admissible as substantive evidence except as provided by statute.[4] The question is perhaps still an open one in this state but our court has gone far towards adopting that view.[5] All the cases agree that a memorandum made by a witness from statements made to him by another person, although communicated in the course of duty, is inadmissible as substantive evidence.[6] Whether a memorandum was made under circumstances rendering it admissible as substantive evidence is a preliminary question for the court and its action will not be reversed on appeal unless clearly wrong.[7]

[1] Paine v. Sherwood, 19 Minn. 315 Gil. 270; Nat. Bank of Commerce v. Meader, 40 Minn. 325, 41 N. W. 1043; Hoffman v. Chicago etc. Ry. Co. 40 Minn. 60, 41 N. W. 301; Com. v. Jeffs, 132 Mass. 5; Vicksburg etc. Ry. Co. v. O'Brien, 119 U. S. 99.

[2] Newell v. Houlton, 22 Minn. 19; Singer v. Brockamp, 33 Minn. 501, 24 N. W. 189; Carlton v. Carey, 83 Minn. 232, 86 N. W. 85; Costello v. Crowell, 133 Mass. 355; Bates v. Preble, 151 U. S. 149. See as to account books under statute: Webb v. Michener, 32 Minn. 48, 19 N. W. 82; Branch v. Dawson, 36 Minn. 193, 30 N. W. 545; Levine v. Lancashire Ins. Co. 66 Minn. 138, 68 N. W. 855; Carlton v. Carey, 83 Minn. 232, 86 N. W. 85.

[3] Stickney v. Bronson, 5 Minn. 215 Gil. 172; Beebe v. Wilkinson, 30 Minn. 548, 16 N. W. 450; Howe v. Cochran, 47 Minn. 403, 50 N. W. 368.

[4] Bates v. Preble, 151 U. S. 149; Donovan v. Boston etc. Ry. Co. 158 Mass. 450; Riley v. Boehm, 167 Mass. 183; Smith Leading Cases, vol. 1, Pt. 1, p. 573 (8th Amer. Ed.).

[5] Granning v. Swenson, 49 Minn. 381, 52 N. W. 30; Carlton v. Carey, 83 Minn. 232, 86 N. W. 85; Hoffman v. Chicago etc. Ry. Co. 40 Minn. 60, 41 N. W. 301.

[6] Carlton v. Carey, 83 Minn. 232, 86 N. W. 85; Stickney v. Bronson, 5 Minn. 215 Gil. 172; Chicago Lumbering Co. v. Hewitt, 64 Fed. 314.

[7] Carlton v. Carey, 83 Minn. 232, 86 N. W. 85.

§ 748. If entries properly admissible are in a book with other entries bearing on the issues, but not admissible, the pages containing the latter entries should be sealed before the book is delivered to the jury. It is not enough to instruct the jury to disregard the inadmissible entries.

Bates v. Preble, 151 U. S. 149.

Digitized by Google

When made.

§ 749. To render a memorandum admissible as substantive evidence it must have been made at the time of the transaction, so as to be a part of it—substantially contemporaneous with the transaction.[1] Entries made a day or two after the transaction from "slips" made at the time are admissible.[2] But when the memorandum is used merely to refresh the memory and it is not sought to introduce it as substantive evidence it may be made at any time when the transaction was fresh in the memory as stated in § 745.[3]

[1] Chaffee v. U. S. 18 Wall. (U. S.) 516; Putnam v. U. S. 162 U. S. 695.

[2] Webb v. Michener, 32 Minn. 48, 19 N. W. 82; Paine v. Sherwood, 21 Minn. 225; Levine v. Lancashire, 66 Minn. 138, 68 N. W. 855.

[3] Putnam v. U. S. 162 U. S. 695; Maxwell v. Wilkinson, 113 U. S. 656.

By whom made.

§ 750. A witness may refresh his memory by reference to a memorandum made by another person, either under his supervision or independently, provided he first swears that he saw it while the transaction was fresh in his mind and that he then recognized it as true.[1] Following an unguarded statement in Greenleaf § 436, some ill-considered cases hold that it is sufficient if such a memorandum refreshes the memory of the witness although he did not see it while the transaction was fresh in his mind and the syllabus in one of our cases [2] goes to that length; but the only question before the court was whether a witness could in any case use a memorandum made by another person. We do not consider that case as committing the court to a rule that would permit a witness to use a memorandum prepared by counsel for the trial or a mere newspaper account which he had never seen until put in his hands on the trial. Allowing a witness to use a memorandum prepared by another person is dangerous practice at best and the restriction stated above is an obviously wise safeguard.[3]

[1] Culver v. Scott & Wolston Lumber Co. 53 Minn. 360, 55 N. W. 552; Douglas v. Leighton, 57 Minn. 81, 58 N. W. 827; Eder v. Reilly, 48 Minn. 437, 51 N. W. 226.

[2] Culver v. Scott & Wolston Lumber Co. 53 Minn. 360, 55 N. W. 552.

[3] See Coffin v. Vincent, 12 Cush. (Mass.) 98.

Cannot be used to gain information.

§ 751. All the cases hold that it should be clear that the witness is using the memorandum to refresh his memory and not to gain original information.

Madigan v. De Graff, 17 Minn. 52 Gil. 34; Eder v. Reilly, 48 Minn. 437, 51 N. W. 226; Culver v. Scott & Wolston Lumber Co. 53 Minn. 360, 55 N. W. 552; Erie Preserving Co. v. Miller, 52 Conn. 444.

Digitized by Google

Form.

§ 752. When a memorandum is used solely to refresh the memory it may be in any form and a copy or a copy of a copy may be used without accounting for the original.[1] But when it is sought to introduce a memorandum as substantive evidence the original must be produced or its loss satisfactorily explained.[2]

[1] Paine v. Sherwood, 19 Minn. 315 Gil. 270; Douglas v. Leighton, 57 Minn. 81, 58 N. W. 827; Com. v. Ford, 130 Mass. 64; Erie Preserving Co. v. Miller, 52 Conn. 444.

[2] Paine v. Sherwood, 19 Minn. 315 Gil. 270; Amor v. Stoeckele, 76 Minn. 180, 78 N. W. 1046; Erie Preserving Co. v. Miller, 52 Conn. 444.

Witness may refresh his memory out of court.

§ 753. A witness may refresh his memory out of court, but it is discretionary with the court to compel the production of papers used for that purpose.

Com. v. Lannan, 13 Allen (Mass.) 563; Davenport v. McKee, 94 N. E. 326; Hamilton v. Rice, 15 Tex. 382.

Manner of using.

§ 754. The manner in which a witness shall be allowed to refresh his recollection by reference to a writing must be left to some extent to the discretion of the presiding judge—a discretion to be exercised with reference to the circumstances of the case and sometimes with reference to the conduct and bearing of the witness on the stand.

Johnson v. Coles, 21 Minn. 108.

Verification.

§ 755. A witness cannot, for the purpose of refreshing his recollection, refer to a writing which is not verified as correct.

Eder v. Reilly, 48 Minn. 437, 51 N. W. 226; Douglas v. Leighton, 57 Minn. 81, 58 N. W. 827; Stickney v. Bronson, 5 Minn. 215 Gil. 172.

Inspection by adverse party.

§ 756. When a witness is permitted to examine a paper to refresh his memory the adverse party has a right to inspect it for the purpose of cross-examination[1] and it may be exhibited to the jury to show that it could not refresh his memory.[2]

[1] Chute v. State, 19 Minn. 271 Gil. 230.

[2] Com. v. Jeffs, 132 Mass. 5.

RULE AGAINST SELF-INCRIMINATION

General rule.

§ 757. No one is bound in any proceeding to answer any question if the answer thereto would, in the opinion of the judge, have a tendency to expose the witness to any criminal charge or to any penalty or forfeiture.

Stephen Ev. Art. 120; Const. Minn. Art. 1 § 7; State v. Froiseth,

Digitized by Google

16 Minn. 296 Gil. 260; State v. Hawks, 56 Minn. 129, 57 N. W. 455; Brown v. Walker, 161 U. S. 591; Brahm v. U. S. 168 U. S. 544; Boyd v. U. S. 116 U. S. 616. For the history of this rule the student should consult Prof. Wigmore, 15 Harvard Law Review 610.

Who to judge of danger.

§ 758. To entitle a person to the privilege of silence the court must see, from all the circumstances of the case and the nature of the evidence which the witness is called on to give, that there is reasonable ground to apprehend that the evidence may tend to criminate him if he is compelled to answer. The danger to be apprehended must be real and appreciable with reference to the ordinary course of things, and not imaginary or unsubstantial, or a mere remote and naked possibility. But when such reasonable apprehension of danger appears, then, inasmuch as the witness alone knows the nature of the answer he would give, he alone must decide whether it would criminate him.

State v. Thaden, 43 Minn. 253, 45 N. W. 447; State v. Tall, 43 Minn. 273, 45 N. W. 449; Simmons v. Holster, 13 Minn. 249 Gil. 232.

Scope and meaning of privilege.

§ 759. The meaning of the constitutional provision is not merely that a person shall not be compelled to be a witness against himself in a criminal prosecution against himself; but its object is to insure that a person shall not be compelled when acting as a witness in any judicial or legislative investigation to give testimony which may tend to show that he himself has committed a crime. It is a reasonable construction of the constitutional provision that the witness is protected from being compelled to disclose the circumstances of his offence, or the source from which, or the means by which, evidence of its commission or his connection with it, may be obtained or made effectual for his conviction, without using his answers as direct admissions against him.

Emery's Case, 107 Mass. 172; Counselman v. Hitchcock, 142 U. S. 547; People v. Forbes, 143 N. Y. 219; State v. Thaden, 43 Minn. 253, 45 N. W. 447; Simmons v. Holster, 13 Minn. 249 Gil. 232; State v. Gardiner, 92 N. W. ——.

Papers of the citizen protected.

§ 760. No person can be compelled in any way by any legal process to give up or disclose the contents of his private papers to be used against him in any criminal proceeding or in any proceedings to impose a fine or enforce a forfeiture.

Boyd v. U. S. 116 U. S. 616.

Actions to impose a fine or enforce forfeiture.

§ 761. Actions to impose a penalty or enforce a forfeiture, though civil in form are criminal in nature, and the defendant cannot be compelled to testify against himself.

Lees v. U. S. 150 U. S. 476.

Digitized by Google

Duty of court to warn witness.

§ 762. It is the duty of the court to inform the witness of his privilege, and if it is claimed, subsequent questions of a similar nature may be ruled out by the court without submission to the witness.

State v. Bilansky, 3 Minn. 246 Gil. 169; Simmons v. Holster, 13 Minn. 249 Gil. 232 See Emery v. State, 101 Wis. 627, 78 N. W. 145.

Statutes granting immunity.

§ 763. No statute which leaves the party or witness subject to prosecution after he answers criminating questions put to him can have the effect of supplanting the privilege conferred by the constitution. To be effectual such a statute must afford absolute immunity against future prosecution for the offence to which the question relates. It is not enough that it provides that his testimony shall not be used against him in any criminal prosecution.

Counselman v. Hitchcock, 142 U S 547; Brown v. Walker, 161 U. S. 591.

Exceptions.

§ 764. If the crime concerning which the witness is interrogated is barred by the statute of limitations, or the witness has received a pardon, or the answer would merely have a tendency to disgrace the witness he cannot refuse to answer.

Brown v. Walker, 161 U. S 591.

Waiving the privilege.

§ 765. If an accused person takes the stand in his own behalf he waives his privilege as respects the crime charged and connected crimes but not as to unconnected crimes.[1] When a witness on the direct examination testifies voluntarily to a transaction of such a nature that he must foresee that a full disclosure would compel him to criminate himself he may be required on cross-examination to make a full disclosure.[2] Waiver at one trial is not a waiver at another.[3]

[1] State v. Wetham, 72 Me. 531; Com. v. Smith, 163 Mass. 431; Brown v. Walker, 161 U. S. 591.

[2] State v. Klitzke, 46 Minn 343, 49 N. W. 54; State v. Nichols, 29 Minn. 357, 13 N. W. 153; Brown v. Walker, 161 U. S. 591

[3] Emory v. State, 101 Wis. 627, 78 N. W. 145.

Privilege belongs to witness alone.

§ 766. The privilege belongs solely to the witness and if he waives it or the court disregards it a party, unless he is himself the witness, cannot complain.

State v. Bilansky, 3 Minn. 246 Gil. 169; Morgan v. Halberstadt, 20 U. S. App. 417.

Effect of refusal to testify.

§ 767. If a witness not a party refuses to answer a criminating question no inference can be drawn therefrom as to the truth of the

Digitized by Google

fact inquired into.[1] But if a party to a civil action refuses to answer such a question his refusal may be considered as evidence, though not conclusive, against him.[2] The rule is otherwise in a criminal action.[3]

[1] Phelin v. Kenderdine, 20 Pa. St. 354.
[2] Andrews v. Frye, 104 Mass. 234.
[3] See § 696.

Indirect incrimination by acts.

§ 768. An accused person cannot be compelled to perform any act which would, directly or indirectly, afford evidence against him. He cannot be compelled to try on shoes for the purpose of determining whether tracks near the scene of the crime were his;[1] or to exhibit his person;[2] or to put his foot into clay for identification.[3] But he may be compelled to stand and exhibit himself to a witness on the stand for the purpose of identification.[4]

[1] People v Mead, 50 Mich. 228.
[2] Blackwell v. State, 67 Ga. 76.
[3] Stokes v. State, 5 Bax. (Tenn.) 619.
[4] People v. Gardner, 144 N. Y. 119.

IMPEACHMENT OF WITNESSES

MODES OF IMPEACHMENT

(1) Cross-examination to credit, §§ 769–773.
(2) Proof of conviction, §§ 774, 775.
(3) Proof of bias, § 776.
(4) Proof of contradictory statements, §§ 777–786.
(5) Proof of contradictory or inconsistent conduct, § 787.
(6) Proof of bad reputation for veracity, §§ 788–797.
(7) Proof of abnormal mental condition, § 798.

CROSS-EXAMINATION TO CREDIT

General statement.

§ 769. A witness may be asked on cross-examination any question tending to test his accuracy, veracity, credibility or impartiality, or to shake his credit by injuring his character.[1] He may be asked if he has not made threats or expressed ill-feeling against the adverse party and his language may be called out.[2] When it is sought to show ill-will the inquiry should be limited to facts which are themselves expressions of ill-will and not extend to facts from which ill-will might be inferred.[3] Any fact tending to show that he has a pecuniary motive for testifying in a particular way may be elicited.[4] He may be asked if he has not been convicted of a crime, either a felony or a misdemeanor, and if he denies it he may be contradicted.[5] Whether he admits or denies it the particulars of the crime cannot be gone into.[6] He cannot be asked if he has been indicted,[7] or arrested.[8]

Digitized by Google

[1] Stephen, Ev. Art. 129.
[2] State v. Dee, 14 Minn. 45 Gil. 27.
[3] State v. Bilansky, 3 Minn. 246 Gil. 169; Wischstadt v. Wischstadt, 47 Minn. 358, 50 N. W. 225.
[4] State v. Tosney, 26 Minn. 262, 3 N. W. 345; Alward v. Oakes, 63 Minn. 190, 65 N. W. 270.
[5] See § 772.
[6] See Com. v. Galligan, 155 Mass. 54.
[7] Van Bokkelen v. Berdell, 130 N. Y. 141.
[8] State v. Renswick, 85 Minn. 19, 88 N. W. 22.

Scope of examination discretionary.

§ 770. The extent to which cross-examination on collateral matters shall be allowed for the purpose of discrediting a witness is a matter resting largely in the discretion of the trial court and its action will not be reversed on appeal except for abuse of discretion.

State v. McCartey, 17 Minn. 76 Gil. 54; Blakeman v. Blakeman, 31 Minn. 396, 18 N. W. 103; Allen v. Coates, 29 Minn. 46, 11 N. W. 132; Gardner v. Kellogg, 23 Minn. 463; Alward v. Oakes, 63 Minn. 190, 65 N. W. 270; Matthews v. Hershey Lumber Co. 65 Minn. 372, 67 N. W. 1008; Murphy v. Backer, 67 Minn. 510, 70 N. W. 799; State v. Tosney, 26 Minn. 262, 3 N. W. 345; People v. McArron, 121 Mich. 1, 79 N. W. 944; Sullivan v. O'Leary, 146 Mass. 322; Phillips v. Inhabitants of Marblehead, 148 Mass. 329.

Limit to discretion.

§ 771. The discretion exercised in regard to cross-examination to credit should not ordinarily go so far as to permit the introduction of evidence which has no legitimate relation to any of the issues on trial and which is at the same time of such a character as to be likely to be applied to them by the jury and improperly to affect the verdict.

Sullivan v. O'Leary, 146 Mass. 322; People v. McArron, 121 Mich. 1, 79 N. W. 944; Hoberg v. State, 3 Minn. 262 Gil. 181; State v. Renswick, 85 Minn. 19, 88 N. W. 22.

Witness cannot be contradicted.

§ 772. A witness cannot be impeached by contradicting his answers on cross-examination in relation to matters irrelevant to the issues;[1] except,

(1) If he is asked whether he has previously been convicted of a felony or misdemeanor and denies or does not admit it, or refuses to answer, evidence of the conviction is admissible.[2]

(2) If he is asked any question tending to show that he is not impartial and answers it by denying the facts suggested, he may be contradicted.[3]

[1] Derby v. Gallup, 5 Minn. 119 Gil. 85; State v. Staley, 14 Minn. 105 Gil. 75; Goodell v. Ward, 17 Minn. 17 Gil. 1; State v. Spaulding, 34 Minn. 361, 25 N. W. 793; Paddock v. Kappahan, 41 Minn. 528, 43 N. W. 393; Murphy v. Backer, 67 Minn. 510, 70 N. W. 799; Towle v. Sherer, 70 Minn. 312, 73 N. W. 180.

Digitized by Google

[2] G. S. 1894, § 6841; State v. Sauer, 42 Minn. 258, 44 N. W. 115; State v. Curtis, 39 Minn. 357, 40 N. W. 263; State v. Adamson, 43 Minn. 196, 45 N. W. 152; Harding v. Great Northern Ry. Co. 77 Minn. 417, 80 N. W. 358; State v. Renswick, 85 Minn. 19, 88 N. W. 22.

[3] Alward v. Oakes, 63 Minn. 190, 65 N. W. 270; Swett v. Shumway, 102 Mass. 365; Johnson v. Wiley, 74 Ind. 233; Beardsley v. Wildman, 41 Conn. 515; Grary v. People, 22 Mich. 220; People v. Murray, 85 Cal. 350.

Witness may be sustained.

§ 773. According to the better view, when a witness has been asked questions on the cross-examination concerning collateral matters tending to disgrace him he may be sustained by evidence of good reputation for truthfulness.

People v. Ah Fat, 48 Cal. 61; George v. Pilcher, 28 Grat. (Va.) 318; Paine v. Tilden, 20 Vt. 554.

PROOF OF CONVICTION OF CRIME

Statute.

§ 774. "A person heretofore or hereafter convicted of any crime is, notwithstanding, a competent witness, in any case or proceeding, civil or criminal, but the conviction may be proved for the purpose of affecting the weight of his testimony, either by the record or by his cross-examination, upon which he must answer any proper question relevant to that inquiry; and the party cross-examining is not concluded by the answer to such question."

[G. S. 1894 § 6841] See cases under § 772.

Witness may be sustained.

§ 775. When it has been shown on cross-examination or by independent proof that a witness has been convicted of a crime his character for truthfulness is so far put in issue that he may be sustained by evidence of good reputation for truthfulness.

Gertz v. Fitchburg Ry. Co. 137 Mass. 77.

PROOF OF ACTUAL BIAS

General statement.

§ 776. While the bias of a witness is generally exposed by means of cross-examination, it is always relevant and material, and may be proved by documentary evidence or by independent witnesses and without any preliminary examination of the impeached witness.[1] Statements of a witness indicative of bias may be proved by impeaching witnesses without first calling the attention of the impeached witness to such statements on cross-examination. In other words it is never necessary to lay a foundation for proof of bias in a witness.[2]

[1] Alward v. Oakes, 63 Minn. 190, 65 N. W. 270; State v. Tall, 43 Minn. 273, 45 N. W. 449.

Digitized by Google

[2] People v. Brooks, 131 N. Y. 321; People v. Webster, 139 N. Y. 85; Martin v. Barnes, 7 Wis. 239.

PROOF OF CONTRADICTORY STATEMENTS

General rule.

§ 777. Every witness under cross-examination in any proceeding, civil or criminal, may be asked whether he has made any former statement relative to the subject matter of the action and inconsistent with his present testimony, the circumstances of the supposed statement being referred to sufficiently to designate the particular occasion, and if he does not distinctly admit that he has made such a statement, proof may be given that he did in fact make it.[1] To exclude the contradictory statement the admission of having made it must be unequivocal. It may be admitted if the witness "thinks" he did not make it,[2] or does not "recollect."[3] There can be contradiction only as to material matters.[4] The impartiality of the witness is material within the meaning of the rule.[5] If the witness admits the contradictory statements they are inadmissible.[6]

[1] Stephen, Ev. Art. 131; Scott v. King, 7 Minn. 494 Gil. 401; Tunell v. Larson, 37 Minn. 258, 34 N. W. 29; Hoye v. Chicago etc. Ry. Co. 46 Minn. 269, 48 N. W. 1117; Smith v. Library Board, 58 Minn. 108, 59 N. W. 979; Swift v. Withers, 63 Minn. 17, 65 N. W. 85; Smith v. Standard Life etc. Ins. Co. 80 Minn. 291, 83 N. W. 342; Le May v. Brett, 81 Minn. 506, 84 N. W. 339; Wommer v. Segelbaum, 78 Minn. 182, 80 N. W. 952.

[2] Ray v. Bell, 24 Ill. 444.

[3] Nute v. Nute, 41 N. H. 60.

[4] Hicks v. Stone, 13 Minn. 434 Gil. 398; State v. Lawlor, 28 Minn. 216, 9 N. W. 698; State v. Barrett, 40 Minn. 65, 41 N. W. 459; Paddock v. Kappahan, 41 Minn. 528, 43 N. W. 393; Murphy v. Backer, 67 Minn. 510, 70 N. W. 799; State v. Staley, 14 Minn. 105 Gil. 75; State v. Spaulding, 34 Minn. 361, 25 N. W. 793.

[5] See § 776.

[6] Scott v. King, 7 Minn. 494 Gil. 401.

Laying foundation.

§ 778. "When it is sought to impeach the credit of a witness by self-contradictory statements made out of court, it is the rule, in justice to the witness and to enable him to give his best recollection of the subject under inquiry, when the alleged statements are oral, to lay the proper foundation by first directing his attention to the time, place, person or other material fact connected with the supposed contradictory statements and giving him an opportunity to explain. When the impeaching evidence is contained in a letter or other writing of the witness, the writing must be produced and shown to him, and upon the issue of his credibility its production is not excused because of any outside admission of its contents which may have been made by the party calling him. If the paper is lost, this fact must first be established before secondary evidence can be received." [1]

Digitized by Google

The sufficiency of the foundation ought to be left somewhat to the discretion of the trial court. No foundation is necessary when the witness is a party testifying in his own behalf,[2] or an agent whose admissions are binding on the party,[3] or when it is sought to show bias in the witness.[4] The contradictory statements to be admissible must be responsive to the foundation.[5]

[1] Horton v. Chadbourn, 31 Minn. 322, 17 N. W. 865. To same effect: Castner v. Gunther, 6 Minn. 119 Gil. 63; Scott v. King, 7 Minn. 494 Gil. 405; State v. Hoyt, 13 Minn. 132 Gil. 128; State v. Staley, 14 Minn. 105 Gil. 75; Jaspers v. Lano, 17 Minn. 296 Gil. 273; Tunell v. Larson, 37 Minn. 258, 34 N. W. 29; Watson v. St. Paul City Ry. Co. 42 Minn. 46, 43 N. W. 904; Hammond v. Dike, 42 Minn. 273, 44 N. W. 61; Granning v. Swenson, 49 Minn. 381, 52 N. W. 30; Armstead v. Mendenhall, 83 Minn. 136, 85 N. W. 929; Le May v. Brett, 81 Minn. 506, 84 N. W. 339 (sufficiency of offer of writings as a foundation).

[2] Wisconsin Planing Mill Co. v. Schude, 72 Wis. 277; Kreiter v. Bomberger, 82 Pa. St. 59; Blossom v. Barrett, 37 N. Y. 434; State v. Chingren, 105 Iowa 169, 74 N. W. 946.

[3] Stone v. N. W. Sleigh Co. 70 Wis. 585; Louisville etc. Ry. Co. v. Lawson, 88 Ky. 496.

[4] See § 776.

[5] Armstead v. Mendenhall, 83 Minn. 136, 85 N. W. 929; Scott v. King, 7 Minn. 494 Gil. 401; State v. Staley, 14 Minn. 105 Gil. 75.

Necessary degree of variance.

§ 779. The admissibility of such contradictory statements does not depend on the degree of variance between such former statements and his evidence on the trial. If they differ in any material particular it is for the jury to determine the effect the variance shall have on the credit of the witness.

Tinklepaugh v. Rounds, 24 Minn. 298; In re Hess' Estate, 57 Minn. 282, 59 N. W. 193. See Ganser v. Fireman's Fund Ins. Co. 38 Minn. 74, 35 N. W. 74.

When the statements are confessions.

§ 780. If contradictory statements are confessions the court should first pass upon their admissibility precisely as if impeachment of the witness were not involved.

State v. Barrett, 40 Minn. 65, 41 N. W. 459.

Explanation by impeached witness.

§ 781. The impeached witness may be recalled to explain the circumstances under which the inconsistent statements were made and to reconcile them with his testimony.

Jaspers v. Lano, 17 Minn. 296 Gil. 273; Yale v. Edgerton, 14 Minn. 194 Gil. 144.

Digitized by Google

Impeachment of impeaching witness.

§ 782. A witness called to contradict another witness by showing contradictory statements out of court may himself be contradicted in like manner.

State v. Lawlor, 28 Minn. 216, 9 N. W. 698.

Effect of impeaching evidence.

§ 783. Evidence in contradiction goes only to the credit of the witness and the court should instruct the jury that it has no bearing on the main issues.[1] Its effect on the credibility of the witness is for the jury.[2]

[1] Lundberg v. N. W. Elevator Co. 42 Minn. 37, 43 N. W. 685; Rosted v. Great Northern Ry. Co. 76 Minn. 123, 78 N. W. 971.

[2] In re Hess' Estate, 57 Minn. 282, 59 N. W. 193; Hahn v. Bettingen, 84 Minn. 512, 88 N. W. 10.

Effect of death.

§ 784. When death precludes explanation by the witness contradictory statements cannot be shown.[1] But when dying declarations are admitted prior inconsistent statements may be shown.[2]

[1] Ayers v. Watson, 132 U. S. 394; Mattox v. U. S. 156 U. S. 237.

[2] Carver v. U. S. 164 U. S. 694.

Impeached witness cannot be corroborated.

§ 785. The impeached witness cannot be corroborated by proof that he has made prior similar statements. In such cases the witness is discredited by reason of the contradictory statements at different times, and it is no restoration of his credit to show that at still other times he has made statements in accordance with his testimony.[1] Nor can he, according to the better view, be corroborated by evidence of good reputation for truthfulness. This is so because such impeaching evidence does not go to the general credibility of the witness but only to his credibility respecting the particular matter raised. His contradictory statements respecting a single transaction do not establish general untrustworthiness. They may have been due to forgetfulness and not deceit.[2]

[1] Hewett v. Corey, 150 Mass. 445; Dufresne v. Weise, 46 Wis. 298.

[2] Gertz v. Fitchburg Ry. Co. 137 Mass. 77; Frost v. McCargar, 29 Barb. (N. Y.) 617.

Testimony at former trial.

§ 786. Contradictory statements of a witness at a former trial may be proved by the official stenographer's notes duly verified,[1] or by the testimony of the stenographer, using his notes to refresh his memory,[2] or by a case duly settled and allowed,[3] or by the report of a referee,[4] or by the testimony of any competent witness who heard them.[5]

[1] Bennett v. Syndicate Ins. Co. 43 Minn. 45, 44 N. W. 794.

[2] Amor v. Stoeckele, 76 Minn. 180, 78 N. W. 1046; Stahl v. City of Duluth, 71 Minn. 341, 74 N. W. 146; State v. George, 60 Minn. 503, 63 N. W. 100.

Digitized by Google

[3] Slingerland v. Slingerland, 46 Minn. 100, 48 N. W. 605.
[4] Brown v. Eaton, 21 Minn. 411.
[5] Costigan v. Lunt, 127 Mass. 354.

PROOF OF CONTRADICTORY CONDUCT

§ 787. A witness may be impeached by evidence of conduct inconsistent with his testimony and no foundation need be laid.

Ladd v. Newell, 34 Minn. 107, 24 N. W. 366; State v. Connelly, 57 Minn. 482, 59 N. W. 479; Handy v. Canning, 166 Mass. 107.

PROOF OF BAD REPUTATION FOR TRUTHFULNESS

General rule.

§ 788. The credit of any witness may be impeached by the testimony of witnesses who swear that his reputation for truthfulness in the community in which he lives is bad and that they would not believe him upon his oath. The reputation proved must be limited to reputation for truthfulness. Particular instances of falsehood or particular acts of immorality cannot be shown.

Rudsdill v. Slingerland, 18 Minn. 380 Gil. 342; Moreland v. Lawrence, 23 Minn. 84; Horton v. Chadbourn, 31 Minn. 322, 17 N. W. 865; Warner v. Lockerby, 31 Minn. 421, 18 N. W. 145; State v. Barrett, 40 Minn. 65, 41 N. W. 459; Higgins v. Wren, 79 Minn. 462, 82 N. W. 859; Swanson v. Andrus, 84 Minn. 168, 87 N. W. 363, 88 N. W. 252.

Questions asked.

§ 789. The impeaching witness should first be asked if he is acquainted with the reputation of the witness, as to truthfulness, in the community in which the latter resides and if he is not he should not be allowed to testify further.[1] If he is, he should next be asked as to what that reputation is,[2] and, finally, if he answers that it is bad, he should be asked whether, from his knowledge of such reputation, he would believe the witness under oath.[3] The only object of introducing evidence of the reputation of the witness is to learn whether he can be believed on oath and if his reputation is not so bad as to lead reasonable men to discredit his testimony it is immaterial. The only way to learn whether his reputation is bad to that degree is to ask the third question.[4]

[1] Carlson v. Winterson, 147 N. Y. 652; Wetherbee v. Norris, 103 Mass. 566; Teese v. Huntingdon, 23 How. (U. S.) 13.
[2] Doner v. People, 92 Ill. App. 43.
[3] Rudsdill v. Slingerland, 18 Minn. 380 Gil. 342; Wilson v. State, 3 Wis. 798; State v. Johnson, 40 Kans. 266 and cases cited; Doner v. People, 92 Ill. App. 43.
[4] Hamilton v. People, 29 Mich. 173.

Digitized by Google

Extrajudicial opinions.

§ 790. The character of a witness for truthfulness cannot be impeached by evidence of the individual opinions of the party calling him or other persons expressed out of court.

Horton v. Chadbourn, 31 Minn. 322, 17 N. W. 865.

Cross-examination of impeaching witnesses.

§ 791. On cross-examination an impeaching witness may be subjected to a searching examination as to the source and extent of his knowledge. He may be compelled to give the names of the persons whom he has heard speak disparagingly of the impeached witness and to state particularly what they said.[1] Contradiction of matters brought out on such examination is not permissible.[2]

[1] People v. Annis, 13 Mich. 517; People v. Mather, 4 Wend. (N. Y.) 232; Bates v. Barber, 4 Cush. (Mass.) 107; Hutts v. Hutts, 62 Ind. 240; Weeks v. Hull, 19 Conn. 376.

[2] Robbins v. Spencer, 121 Ind. 594.

Impeachment of impeaching witnesses.

§ 792. Testimony that impeaching witnesses belong to a village faction opposed to that to which the impeached witness belongs is too vague and remote.

Holston v. Boyle, 46 Minn. 432, 49 N. W. 203.

Impeached witness may be sustained.

§ 793. The impeached witness may be sustained by evidence that his reputation for truthfulness is good, but such evidence cannot descend to particulars.

Com. v. O'Brien, 119 Mass. 342.

Limiting number of witnesses.

§ 794. It is discretionary with the court to limit the number of impeaching and rebutting witnesses.

Bunnell v. Butler, 23 Conn. 65; Com. v. Ryan, 134 Mass. 224.

Limit of time as to reputation.

§ 795. There is no inflexible rule confining the reputation to such as exists at or near the time of the trial. The matter lies in the discretion of the trial court.

Buse v. Page, 32 Minn. 111, 19 N. W. 736, 20 N. W. 95 (four years held not too remote).

Impeachment of witnesses not called.

§ 796. If statements of a person not called as a witness are introduced he may be impeached in the same manner as if called.

Simmons v. Holster, 13 Minn. 249 Gil. 232.

Effect of impeachment.

§ 797. The testimony of a witness whose reputation for truthfulness is shown to be bad is not necessarily destroyed, but should be considered, and given such weight as, under all the circumstances, the jury believe it entitled to. It should be disregarded if the jury believe it entitled to no weight.

Higgins v. Wren, 79 Minn. 462, 82 N. W. 859.

Digitized by Google

PROOF OF ABNORMAL MENTAL CONDITION

General statement.

§ 798. The credibility of witnesses is always material and competent evidence tending to prove that a witness is not to be believed or that his testimony is to be received with caution may generally be admitted without any preliminary cross-examination. Thus it may be shown that at the time of the transaction with respect to which he testified the witness was mentally incapable of receiving or retaining accurate impressions, as, for example, that he was drunk,[1] or insane,[2] or imbecile,[3] or laboring under a delusion,[4] or was under the influence of opium or other narcotic,[5] or that his memory is seriously impaired.[6]

[1] Fleming v. State, 5 Humph. (Tenn.) 564; Tuttle v. Russell, 2 Day (Conn.) 201.

[2] State v. Hayward, 62 Minn. 474, 65 N. W. 63; McGuirl v. McGuirl, 12 Ill. App. 624; Holcomb v. Holcomb, 28 Conn. 177.

[3] Rivara v. Ghio, 3 E. D. Smith (N. Y.) 264; Alleman v. Stepp, 52 Iowa 626; Fairchild v. Bascomb, 35 Vt. 398.

[4] State v. Kelley, 57 N. H. 549.

[5] People v. Webster, 139 N. W. 73.

[6] Isler v. Dewey, 75 N. C. 466.

IMPEACHMENT OF ONE'S OWN WITNESS

By proof of bad reputation for truthfulness.

§ 799. It is a universal rule without exception that a party cannot impeach a witness whom he has called for any purpose by proof that his reputation for truthfulness is bad.[1] This rule applies when the witness is the adverse party,[2] when he is called from necessity,[3] and when he is subsequently called by the adverse party.[4]

[1] Selover v. Bryant, 54 Minn. 434, 56 N. W. 58, 21 L. R. A. 150.

[2] Bowman v. Ash, 143 Ill. 650; Cross v. Cross, 108 N. Y. 628.

[3] Whitaker v. Salisbury, 15 Pick. (Mass.) 544.

[4] Coulter v. American etc. Co. 56 N. Y. 585.

By proof of contradictory statements.

§ 800. It is the general rule that a party cannot impeach a witness whom he has called by proof of contradictory statements out of court.[1] The rule applies when the witness is subsequently called by the adverse party;[2] when after cross-examination a party calls in his own behalf a witness of the adverse party;[3] when a party makes an adverse witness his own by the extent of his cross-examination.[4] The general rule is subject to the following exceptions:

(1) If a party calls a witness from necessity,[5] as, for example, to prove the execution of an instrument,[6] he may impeach him by contradictory statements.

(2) If a party calls a witness but does not interrogate him as to any material point, he may likewise impeach him.[7]

(3) If a party is surprised by the adverse testimony of his own wit-

Digitized by Google

ness he may be permitted by the court, in the exercise of its discretion, to impeach the witness by proof of contradictory statements, a proper foundation being laid.[6]

(4) If a party calls his adversary he may impeach him by proof of contradictory statements in all cases and without laying any foundations for such statements are admissions.[7]

[1] Fall-Brook Coal Co. v. Hewson, 158 N. Y. 150; Selover v. Bryant, 54 Minn. 434, 56 N. W. 58, 21 L. R. A. 150.

[2] Coulter v. American etc. Co. 56 N. Y. 585; Smith v. Provident etc. Assoc. 65 Fed. 765.

[3] Richards v. State, 82 Wis. 172.

[4] See § 722.

[5] Morris v. Guffey, 188 Pa. St. 534.

[6] Dennett v. Dow, 17 Me. 19; Cowden v. Reynolds, 12 S. & R. (Pa.) 281; Thornton v. Thornton, 39 Vt. 122; Brown v. Bellows, 4 Pick. (Mass.) 179.

[7] Fall-Brook Coal Co. v. Hewson, 158 N. Y. 150.

[8] Selover v. Bryant, 54 Minn. 434, 56 N. W. 58, 21 L. R. A. 150 (extensive note).

[9] See § 778.

Indirect impeachment.

§ 801. A party may always discredit his own witnesses indirectly by proving through other witnesses facts inconsistent with the testimony of the former witnesses.[1] And a party who takes the stand in his own behalf may prove by other witnesses facts inconsistent with his own testimony.[2]

[1] Selover v. Bryant, 54 Minn. 434, 56 N. W. 58, 21 L. R. A. 150; Olmstead v. Winsted Bank, 32 Conn. 278; Whitney v. Easton Ry. Co. 9 Allen (Mass.) 364.

[2] Hill v. West End Street Ry. Co. 158 Mass. 458. See In re Hess' Estate, 57 Minn. 282, 59 N. W. 193.

IMPEACHMENT OF ACCUSED

General statement.

§ 802. When an accused person takes the stand in his own behalf he renders himself liable to impeachment in the same manner and to the same extent as an ordinary witness. It may be shown on cross-examination or by record evidence that he has been convicted of a crime.[1] He may be impeached by evidence of contradictory statements[2] and by evidence of bad reputation for truthfulness.[3] The extent to which he may be impeached by disclosing his bad character on cross-examination rests in the discretion of the trial court, but it is a discretion which should not go so far as to admit evidence of the commission of other unconnected crimes. The statute permitting an accused person to testify in his own behalf was never designed to break down the ancient and humane rule of the common law excluding evidence of unconnected crimes. Such evidence is always prejudicial notwithstanding instructions from the court limiting its effect

Digitized by Google

to the credibility of the witness. A strong impression of the mind cannot be readily effaced by an exertion of the will and juries invariably apply such evidence to the main issues. Of course evidence tending to degrade the accused is admissible, but the court ought to exercise its discretion in keeping it within narrow limits. The general rule stated elsewhere, that no evidence should be admitted on cross-examination to credit of a character likely to prejudice the jury on the main issues is peculiarly applicable to the cross-examination of an accused person. It should be constantly borne in mind by a trial judge that it is more important to keep the jury free from prejudice than to break down the credibility of the accused.[4]

[1] See §§ 772, 774.

[2] Com. v. Smith, 163 Mass. 411; Woods v. State, 63 Ind. 353.

[3] Mershon v. State, 51 Ind. 14.

[4] Hoberg v. State, 3 Minn. 262 Gil. 181; State v. Austin, 74 Minn. 463, 77 N. W. 301; People v. Crapo, 76 N. Y. 288; People v. Tice, 131 N. Y. 657; People v. McCormick, 135 N. Y. 663; People v. Webster, 139 N. Y. 73.

IMPEACHMENT OF EXPERTS

General statement.

§ 803. The usual means of impeaching an expert is by cross-examining him as to his qualifications[1] and the reasons for his opinion.[2] He may also be discredited by evidence of contradictory opinions expressed out of court.[3] He cannot be impeached by the opinions of other experts as to his professional skill or knowledge,[4] nor by professional treatises to which he has not referred.[5] If he refers to such treatises and professes to base his opinion on them they may be introduced to show that they do not sustain him.[6] A medical expert, having in his evidence in chief diagnosed the injury to the plaintiff as a dislocation of the cervical vertebræ, complicated with a fracture, and having testified, without qualification or limitation, that the accepted treatment of a dislocation of cervical vertebræ, as laid down by the medical authorities, was a reduction of the dislocation, may be asked on cross-examination whether a certain work admitted by him to be a standard authority, did not lay it down that, where the dislocation was complicated with a fracture, no physician would be justified in attempting to reduce the dislocation.[7]

[1] Finch v. Chicago etc. Ry. Co. 46 Minn. 250, 48 N. W. 915.

[2] See § 742.

[3] Smith v. Standard Life etc. Ins. Co. 80 Minn. 291, 83 N. W. 342; Sanderson v. Nashua, 44 N. H. 492; People v. Donovan, 43 Cal. 162.

[4] Tullis v. Kidd, 12 Ala. 648. See Martin v. Courtney, 75 Minn. 255, 77 N. W. 813.

[5] Forest City Ins. Co. v. Morgan, 22 Ill. App. 198; Hall v. Murdock, 114 Mich. 233, 72 N. W. 150.

Digitized by Google

[6] Gallagher v. Market St. Ry. Co. 67 Cal. 13; Pinney v. Cahill, 48 Mich. 584; City of Ripon v. Bittel, 30 Wis. 614.
[7] Wittenberg v. Onsgard, 78 Minn. 342, 81 N. W. 14.

CORROBORATION

By proof of similar statements.

§ 804. It is the general that a party cannot corroborate his own witness by proof that the latter has made prior statements out of court similar to his statements on the stand.[1] But such confirmatory evidence is competent when a witness is sought to be impeached by evidence tending to show that at the time of giving his evidence he is under a strong bias, or in such a situation as to put him under a sort of moral duress to testify in a particular way or when an attempt is made to impeach the credit of a witness by showing that he formerly withheld or concealed the fact to which he now testifies.[2] And when it is sought to show that a witness is actuated by a strong motive impelling him to a false statement, or that his story is of recent concoction, the party producing the witness may corroborate him by showing that he made similar statements before any such motive existed or before he could have foreseen the necessity of fabricating a story for use on the trial.[3]

[1] Fredin v. Richards, 66 Minn. 46, 68 N. W. 402.
[2] Hewitt v. Corey, 150 Mass. 445.
[3] In re Hesdra's Will, 119 N. Y. 615; Hester v. Com. 85 Pa. St. 139; Stolp v. Blair, 68 Ill. 541; People v. Doyell, 48 Cal. 85.

BURDEN OF PROOF

General statement.

§ 805. Proof means either the establishment of a fact or the means of doing so; either the result of evidence in producing affirmative belief or the evidence itself.[1] The phrase burden of proof is likewise used in two senses—it denotes either (1) the duty of creating an affirmative belief on the part of the tribunal in the existence of the fact or facts in issue or (2) the duty of introducing the evidence necessary to establish facts which produce or prevent such affirmative belief. In the first sense of the phrase the burden never shifts but remains throughout the trial on the party affirming the facts in issue. A party must establish his allegations. He who affirms must prove. Where the burden in this sense rests is determined by the pleadings. The plaintiff must prove all the essential allegations of his complaint denied in the answer and the defendant must prove all the allegations of "new matter" in his answer denied by the plaintiff. Each carries this burden throughout the trial. In the second and usual sense of the phrase the burden frequently shifts in the course of the trial.[2]

[1] Karsen v. Milwaukee etc. Ry. Co. 29 Minn. 12, 17 N. W. 122; Perry v. Dubuque etc. Ry. Co. 36 Iowa 102.
[2] See, on the general subject: Thayer, Ev. ch. 9; 1 Taylor Ev. 9th

Digitized by Google

Am. Ed. (Cham.) 276; Scott v. Wood, 81 Cal. 398; Stokes v. Stokes, 155 N. Y. 581; Heinemann v. Heard, 62 N. Y. 455; Farmers etc. Co. v. Siefke, 144 N. Y. 354; Sartell v. Royal Neighbors, 85 Minn. 369, 88 N. W. 985.

Burden of establishing allegations.

§ 806. "Whoever desires any court to give judgment as to any legal right or liability dependent on the existence or non-existence of facts which he asserts or denies to exist, must prove that those facts do or do not exist."[1] He must prove a negative fact when it is an essential fact.[2] This burden never shifts.[3]

[1] Stephen, Ev. Art. 93. To same effect: Willett v. Rich, 142 Mass. 356; Karsen v. Milwaukee etc. Ry. Co. 29 Minn. 12, 11 N. W. 122; Stearns v. Johnson, 17 Minn. 142 Gil. 116; Chicago etc. Ry. Co. v. Porter, 43 Minn. 527, 46 N. W. 75; Youn v. Lamont, 56 Minn. 216, 57 N. W. 478; Dietel v. Home etc. Assoc. 59 Minn. 211, 60 N. W. 1100; Day v. Raguet, 14 Minn. 273 Gil. 203; Swing v. H. C. Akeley Lumber Co. 62 Minn. 169, 64 N. W. 97; St. Barnabas Hospital v. Minneapolis etc. Electric Co. 68 Minn. 254, 70 N. W. 1126; Sartell v. Royal Neighbors, 85 Minn. 369, 88 N. W. 369.

[2] Brown v. Farnham, 58 Minn. 499, 60 N. W. 344.

[3] Stokes v. Stokes, 155 N. Y. 581; Farmers etc. Co. v. Siefke, 144 N. Y. 354.

Burden of adducing evidence.

§ 807. "The burden of proof in any proceeding lies at first on that party against whom the judgment of the court would be given if no evidence at all were produced on either side, regard being had to any presumption which may appear upon the pleadings.[1] As the proceeding goes on, the burden of proof may be shifted from the party on whom it rested at first by his proving facts which raise a presumption in his favor. When there are conflicting presumptions the case is the same as if there were conflicting evidence." [2]

"The test, therefore, as to the burden of proof or onus of proof, whichever term is used, is simply this: To ask oneself which party will be successful if no evidence is given, or if no more evidence is given than has been given at a particular point of the case, for it is obvious that as the controversy involved in the litigation travels on, the parties from moment to moment may reach points at which the onus of proof shifts, and at which the tribunal will have to say that if the case stops there, it must be decided in a particular manner. The test being such as I have stated, it is not a burden that goes on for ever resting on the shoulders of the person upon whom it is first cast. As soon as he brings evidence which, until it is answered, rebuts the evidence against which he is contending, then the balance descends on the other side and the burden rolls over until again there is evidence which once more turns the scale. That being so, the question as to onus of proof is only a rule for deciding on whom the obligation rests of going further if he wishes to win." [3]

[1] Stephen, Ev. Art. 95; Paine v. Smith, 33 Minn. 495, 24 N. W.

Digitized by Google

305; Karsen v. Milwaukee etc. Ry. Co. 29 Minn. 12, 11 N. W. 122.

[2] Mills v. Barber, 1 M. & W. 425.

[3] Bowen, L. J. Abrath v. N. E. Ry. Co. L. R. Q. B. D. 456.

Burden of rendering evidence admissible.

§ 808. "The burden of proving any fact necessary to be proved in order to enable any person to give evidence of any other fact is on the person who wishes to give such evidence."

[Stephen, Ev. Art. 97]

DEGREE OF PROOF REQUIRED IN CIVIL CASES

General statement.

§ 809. Proof is made out in ordinary civil cases by a fair preponderance of the evidence.[1] This rule applies to civil actions involving a charge of crime,[2] to usury cases,[3] and to controversies between a wife and her husband's creditors.[4] A thing is said to be proved when that weight of evidence is produced which ordinarily satisfies an unprejudiced mind of its existence.[5] Something more than a fair preponderance of evidence is necessary in actions to set aside written instruments on the ground of fraud;[6] to reform written instruments;[7] to have a deed absolute on its face declared a mortgage;[8] to set aside a judgment for want of service of summons;[9] to overcome the statutory authentication by which proof of deeds is established.[10]

[1] Martin v. Hill, 41 Minn. 337, 43 N. W. 337; Lindsley v. Chicago etc. Ry. Co. 36 Minn. 539, 33 N. W. 7; Fairchild v. Rogers, 32 Minn. 269, 20 N. W. 191.

[2] Burr v. Willson, 22 Minn. 206; Thoreson v. N. W. Nat. Ins. Co. 29 Minn. 107, 12 N. W. 154; State v. Nichols, 29 Minn. 357, 13 N. W. 153.

[3] Lukens v. Hazlett, 37 Minn. 441, 35 N. W. 265; Phelps v. Montgomery, 60 Minn. 303, 62 N. W. 260; Yellow Medicine County Bank v. Cook, 61 Minn. 452, 63 N. W. 1093.

[4] Laib v. Brandenburg, 34 Minn. 367, 25 N. W. 803.

[5] Karsen v. Milwaukee etc. Ry. Co. 29 Minn. 12, 11 N. W. 122.

[6] Cummings v. Baars, 36 Minn. 350, 31 N. W. 449; McCall v. Bushnell, 41 Minn. 37, 42 N. W. 545; Maxfield v. Schwartz, 45 Minn. 150, 47 N. W. 448; Michaud v. Eisenmenger, 46 Minn. 405, 49 N. W. 202; Minneapolis etc. Ry. Co. v. Chisholm, 55 Minn. 374, 57 N. W. 63; Oxford v. Nichols & Shepherd Co. 57 Minn. 206, 58 N. W. 865; Dart v. Minnesota Loan etc. Co. 74 Minn. 426, 77 N. W. 288.

[7] Guernsey v. American Ins. Co. 17 Minn. 104 Gil. 83; Layman v. Minneapolis Realty Co. 60 Minn. 136, 62 N. W. 113.

[8] Sloan v. Becker, 34 Minn. 491, 26 N. W. 730; Wakefield v. Day, 41 Minn. 344, 43 N. W. 71.

[9] Vaule v. Miller, 69 Minn. 440, 72 N. W. 452.

[10] Goulet v. Dubreuille, 84 Minn. 72, 86 N. W. 779.

Digitized by Google

SUPERVISORY POWER OF COURT OVER TRIAL

General statement.

§ 810. It is the duty of the court to supervise and within proper limits to control the trial of causes before it to the end that justice may be administered in reality as well as in form.[1] It is the duty of the court to keep the parties to a trial and the jury within the bounds of reason. This duty, as well as that of preserving discipline and order, belongs to the judge in his mere capacity of presiding officer in the exercise of judicature. Reason is not so much a part of the law, as it is the element wherein it lives and works and it is the duty of the court to steady, direct, and control the trial by making it conform, at every step, to the requirements of right reason.[2] The court has inherent power, where no limitation is imposed, to so direct the procedure in all causes before it that the legal and constitutional rights of parties may be maintained.[3] Our supreme court has expressed the unanimous opinion that nothing would "go further to redeem the institution of trial by jury from the popular and professional disrepute into which it has in some degree fallen, and to restore it, in some measure at least, to its ancient reputation, than a judicious assumption of responsibility in regulating and controlling the action of juries by the trial courts."[4] As to modes of procedure on the trial it is competent for the court to make and alter its rules as the ends of justice may require in the absence of statutory regulation.[5] But there is this important limitation to be observed. The court has no power to compel a party to do any affirmative act in the progress of a cause relating to the progress of the same. Where the duty is clear, and the other party is interested in its performance, the court may always command it to be done under penalty of being turned out of court, if it is the plaintiff, and by allowing the plaintiff to proceed to judgment, if it is the defendant, who disobeys. But a party is never in contempt for failure to prosecute his cause.[6]

[1] State v. Ring, 29 Minn. 78, 11 N. W. 233.
[2] Thayer, Ev. 207, 208.
[3] Weston v. Loyhed, 30 Minn. 221, 14 N. W. 892.
[4] Woodward v. Glidden, 33 Minn. 108, 22 N. W. 127.
[5] State v. Parrant, 16 Minn. 178 Gil. 157.
[6] Sherrerd v. Frazer, 6 Minn. 572 Gil. 406; Perrin v. Oliver, 1 Minn. 203 Gil. 176.

PRESERVATION OF ORDER—CONTEMPT OF COURT

General statement.

§ 811. To the end that order in the court room and respect for the court and the dignity of judicial proceedings may be maintained every court of superior jurisdiction has inherent power to punish in a summary manner for contempt committed in its presence.[1] The matter, however, is regulated by statute in this state.[2] Within ill defined limits a court of superior jurisdiction has power to punish, but

Digitized by Google

not in a summary manner, for contempt of its writs, orders and judgments.[2] The fact that an act is a criminal offence and punishable as such does not deprive the court of jurisdiction to punish for it summarily as for contempt.[4] The writs, orders and judgments of a superior court must be obeyed although they are irregular or erroneous if they are not absolutely void.[5] To bring a party into contempt an order must be personally served.[6]

[1] State v. Ives, 60 Minn. 478, 62 N. W. 831; State v. Leftwich, 41 Minn. 42, 42 N. W. 598. For an exhaustive discussion of this general subject see Hovey v. Elliott, 167 U. S. 409.

[2] See G. S. 1894 §§ 6155–6171, 4810, 5487, 5494, 5655, 5328, 5284, 7179–7184, 391, 48, 788, 6407.

[3] State v. District Court, 52 Minn. 283, 53 N. W. 1157; State v. District Court, 78 Minn. 464, 81 N. W. 323; State v. Wilcox, 24 Minn. 143; State v. Becht, 23 Minn. 411; State v. Probate Court, 66 Minn. 246, 68 N. W. 1063.

[4] State v. District Court, 52 Minn. 283, 53 N. W. 1157.

[5] State v. Jamison, 69 Minn. 427, 72 N. W. 451; State v. District Court, 71 Minn. 383, 73 N. W. 1092.

[6] State v. District Court, 42 Minn. 40, 43 N. W. 686.

Direct contempt.

§ 812. When the contempt is committed in the immediate presence of the court it may be punished summarily, without trial or the submission of evidence. The court simply makes an order reciting the facts as occurring in its immediate view and presence and adjudging that the person proceeded against is thereby guilty of a contempt and that he be punished as therein described. This is an arbitrary power, born of necessity, which must be exercised with great prudence and always limited to cases of direct contempt. But the supreme court will rarely reverse the action of the trial court.

G. S. 1894 § 6157; State v. Ives, 60 Minn. 478, 62 N. W. 831; State v. Leftwich, 41 Minn. 42, 42 N. W. 598.

Constructive contempt.

§ 813. When the contempt does not occur in the immediate presence of the court there is no power to punish summarily. Upon being informed by affidavit or otherwise of the facts constituting the contempt the court should cite the party to be proceeded against by order to show cause, or issue its warrant to bring him before the court to answer to the charge. When the accused is brought before the court, or appears in response to the order, the court must proceed without a jury to investigate the charges by examining him and the witnesses for and against him; and on the evidence so adduced and on such evidence alone the court must determine whether the accused is guilty of the contempt charged. The court cannot act upon facts within its own knowledge not in evidence, nor upon information obtained outside of the orderly course of trial nor upon the affidavit on which the order to show cause or warrant issued. An adjournment of the proceedings may be had from time to time.[1] In cases of strictly criminal contempt the rules of evidence and presumptions

Digitized by Google

of law applied in criminal cases must be observed.[2] The warrant must specify whether the accused shall be let to bail or detained in custody and if he may be bailed the amount in which he may be let to bail.[3] The judgment must be responsive to the order to show cause.[4]

[1] G. S. 1894 §§ 6158, 6165, 6166; State v. Ives, 60 Minn. 478, 62 N. W. 831; State v. Willis, 61 Minn. 120, 63 N. W. 169; State v. District Court, 65 Minn. 146, 67 N. W. 796; State v. District Court, 71 Minn. 383, 73 N. W. 1092.

[2] State v. District Court, 65 Minn. 146, 67 N. W. 796.

[3] G. S. 1894 § 6160; Papke v. Papke, 30 Minn. 260, 15 N. W. 117.

[4] State v. Willis, 61 Minn. 120, 63 N. W. 169.

Extent and mode of punishment.

§ 814. In the case of contempt committed in the immediate presence of the court—direct contempt—the court cannot punish the offender by imprisonment nor by a fine exceeding fifty dollars unless it appear that the right or remedy of a party to an action or special proceeding was defeated or prejudiced by the contempt.[1] If a party is prejudiced a fine of not exceeding two hundred and fifty dollars or an imprisonment not exceeding six months or both may be inflicted.[2] In the case of constructive contempt the fine or imprisonment or both may be imposed without proof of prejudice.[3] A person may be imprisoned for contempt in refusing to pay over money as ordered by the court and such imprisonment does not violate the constitutional provision against imprisonment for debt.[4]

[1] G. S. 1894 §§ 6156, 6166.

[2] G. S. 1894 § 6166.

[3] Id.

[4] State v. Becht, 23 Minn. 411; In re Burt, 56 Minn. 397, 57 N. W. 940; Hurd v. Hurd, 63 Minn. 443, 65 N. W. 728.

Cases.

§ 815. A party may be punished for contempt for refusing to pay alimony;[1] for disobeying an injunction;[2] for refusing to turn over assets in insolvency proceedings;[3] for persisting in a certain course of examining witnesses contrary to the orders of the court;[4] for refusing to obey an order in supplementary proceedings;[5] for entering judgment notwithstanding a stay;[6] for refusing to pay over money to a receiver.[7]

[1] Semrow v. Semrow, 26 Minn. 9; Papke v. Papke, 30 Minn. 260, 15 N. W. 117; Wagner v. Wagner, 39 Minn. 394, 40 N. W. 360; In re Fanning, 40 Minn. 4, 41 N. W. 1076; State v. District Court, 42 Minn. 40, 43 N. W. 686; Hurd v. Hurd, 63 Minn. 443, 65 N. W. 728; State v. Jamison, 69 Minn. 427, 72 N. W. 451; State v. Willis, 61 Minn. 120, 63 N. W. 169.

[2] Bass v. City of Shakopee, 27 Minn. 250, 4 N. W. 619, 6 N. W. 776; State v. District Court, 52 Minn. 283, 53 N. W. 1157; State v. District Court, 78 Minn. 464, 81 N. W. 323; State v. District Court, 71 Minn. 383, 73 N. W. 1092.

[3] In re Burt, 56 Minn. 397, 57 N. W. 940.

[4] State v. Leftwich, 41 Minn. 42, 42 N. W. 598.

Digitized by Google

[5] State v. Becht, 23 Minn. 411; Menage v. Lustfield, 30 Minn. 487, 16 N. W. 398.
[6] St. Paul etc. Ry. Co. v. Village of Hinckley, 53 Minn. 102, 54 N. W. 940.
[7] State v. District Court, 71 Minn. 383, 73 N. W. 1092.

§ 816. A party cannot be punished for contempt for failure to perform an act not in his power;[1] for failing to plead;[2] for merely reading an affidavit for change of venue for prejudice of judge.[3]

[1] Register v. State, 8 Minn. 214 Gil. 185; Hurd v. Hurd, 63 Minn. 443, 65 N. W. 728.
[2] Perrin v. Oliver, 1 Minn. 203 Gil. 176.
[3] Ex parte Curtis, 3 Minn. 274 Gil. 188.

SEPARATE TRIALS

The statute.

§ 817. "A separate trial between the plaintiff and any of several defendants may be allowed by the court, whenever in its opinion, justice will be thereby promoted."

[G. S. 1894 § 5365] A similar statute is found in all the code states.

§ 818. The allowance of a separate trial under this section is a matter lying almost wholly in the discretion of the trial court and its action will rarely be reversed on appeal.[1] Parties do not acquire a right to separate trials merely by answering separately,[2] nor do they lose it by answering jointly.[3] Separate trials of issues of law are not allowed.[4] There is less reason for granting separate trials in an action triable by the court than in an action triable by jury.[5] In an action for the recovery of land, brought against many defendants holding separate portions thereof and having no common interest, and who rely upon different sources of title, separate trials should be granted.[6] It is proper to grant separate trials to avoid delay as to some of the defendants.[7] The fact that important evidence admissible against some of the defendants is inadmissible and seriously prejudicial as to the others is a good reason for granting separate trials.[8]

[1] Kilbourne v. Jennings, 40 Iowa 473.
[2] Walton v. Payne, 18 Tex. 60.
[3] Clay County Land Co. v. Wood, 71 Tex. 460.
[4] George v. Grant, 56 How. Pr. (N. Y.) 244.
[5] Rice v. Lloyd, 26 Kans. 164.
[6] Judson v. Malloy, 40 Cal. 299.
[7] Reed v. Lane, 96 Iowa 454.
[8] Nat. Exchange Bank v. McLarlan, 13 N. Y. Supp. 202.

Digitized by Google

GENERAL ORDER OF THE TRIAL

The statute.

§ 819. "When the jury is completed and sworn, the trial shall proceed in the following order, unless the court, for special reasons, otherwise directs:

(1) The plaintiff, after stating the issue, shall open the case, and produce the evidence on his part.

(2) The defendant may then open his defence, and offer his evidence in support thereof.

(3) The parties may then respectively offer rebutting evidence only, unless the court, for good reason, in furtherance of justice, permit them to offer evidence upon their original case.

(4) When the evidence is concluded, unless the case is submitted to the jury on either side, or on both sides, without argument, the defendant shall commence, and the plaintiff conclude, the argument to the jury.

(5) If several defendants, having separate defences, appear by different counsel, the court shall determine their relative order in the evidence and argument.

(6) The court may then charge the jury."

[G. S. 1894 § 5371]

Rule of court.

§ 820. "On the trial of actions before the court, but one counsel on each side shall examine or cross-examine a witness, and one counsel only on each side shall sum up the case to the jury, unless the judge who holds the court shall otherwise order.

Upon interlocutory questions, the party moving the court, or objecting to the testimony, shall be heard first; the respondent may then reply by one counsel, and the mover rejoin, confining his remarks to the points first stated and a pertinent answer to the respondent's argument.

Discussion on the question shall then be closed, unless the court requests further argument.

At the hearing of causes before the court, no more than one counsel shall be heard on each side, unless by permission of the court.

The defendant, in opening his case to the jury, shall confine himself to stating the facts which he proposes to prove.

In cases where the affirmative of the issue to be tried is upon the defendant, the defendant's counsel shall open the case to the jury and have the closing argument, as though his client were the plaintiff."

[Rule 40, District Court]

Discretion of court—right to open.

§ 821. It is the general rule that the party having the affirmative, that is, the party against whom judgment would go if no evidence were introduced, is entitled to open and close. This order should not be changed by the trial court except for special reasons. The matter rests, however, in the discretion of the trial court and its action will

Digitized by Google

not be reversed on appeal except for abuse of discretion manifestly prejudicial to the complainant.[1] In actions for unliquidated damages and on contract in which the defendant claims a setoff by way of recoupment the plaintiff is entitled to open and close.[2] When the defendant in his answer admits the facts alleged in the complaint but seeks to avoid them by new matter he is entitled to open and close.[3] Thus the defendant is entitled to open and close if he admits or does not deny the facts alleged in the complaint and sets up one or more of the following defences: want of consideration;[4] payment;[5] duress;[6] alteration;[7] want of capacity to contract;[8] want of capacity to sue;[9] usury;[10] a counterclaim.[11] The plaintiff is entitled to the opening and close where the defendant pleads a general or special denial and also new matter;[12] where there are several defendants and any one of them pleads a denial although the others confess and avoid;[13] where there are several issues and he has the burden of proof as to any one of them;[14] where he confesses and avoids new matter in the answer.[15] Upon an appeal to the district court from the award of commissioners in condemnation proceedings the land-owner assumes the position of plaintiff and is entitled to the opening and close.[16] Any doubt as to who is entitled to the opening should be resolved in favor of the plaintiff.[17] The right is to be determined by the state of the pleadings at the commencement of the trial.[18] A party who is erroneously given the opening and close cannot complain.[19]

[1] Minnesota Valley Ry. Co. v. Doran, 17 Minn. 188 Gil. 162; Paine v. Smith, 33 Minn. 495, 24 N. W. 305; C. Aultman & Co. v. Falkum, 47 Minn. 414, 50 N. W. 471; Gran v. Spangenberg, 53 Minn. 42, 54 N. W. 933; Sartell v. Royal Neighbors, 85 Minn. 3, 69, 88 N. W. 985.

[2] Minnesota Valley Ry. Co. v. Doran, 17 Minn. 188 Gil. 162.

[3] Huntington v. Conkey, 33 Barb. (N. Y.) 218; Ayer v. Austin, 6 Pick. (Mass.) 224.

[4] Hoxie v. Greene, 37 How. (N. Y.) 97.

[5] Gran v. Spangenberg, 53 Minn. 42, 54 N. W. 933.

[6] Hoxie v. Greene, 37 How. (N. Y.) 97.

[7] Barker v. Malcolm, 7 C. & P. (N. Y.) 101.

[8] Cannam v. Farmer, 3 Exch. 698.

[9] Hoxie v. Greene, 37 How. (N. Y.) 97.

[10] Huntington v. Conkey, 33 Barb. (N. Y.) 218.

[11] C. Aultman & Co. v. Falkum, 47 Minn. 414, 50 N. W. 471; Bonnell v. Jacobs, 36 Wis. 59; Bowen v. Spears, 20 Ind. 146.

[12] Ayer v. Austin, 6 Pick. (Mass.) 224; Dahlman v. Hammel, 45 Wis. 466.

[13] Kirkpatrick v. Armstrong, 79 Ind. 384.

[14] Central Bank v. St. John, 17 Wis. 157; Shaw v. Barnhart, 17 Ind. 183.

[15] French v. Howard, 10 Ind. 339.

[16] Minnesota Valley Ry. Co. v. Doran, 17 Minn. 188 Gil. 162; St. Paul etc. Ry. Co. v. Murphy, 19 Minn. 500 Gil. 433.

[17] Claflin v. Baere, 28 Hun (N. Y.) 204; Johnson v. Maxwell, 87 N. C. 18.

Digitized by Google

[18] Lake Ontario Nat. Bank v. Judson, 122 N. Y. 278; Dahlman v. Hammel, 45 Wis. 466.

[19] Paine v. Smith, 33 Minn. 495, 24 N. W. 305.

Scope and effect of opening.

§ 822. The object of an opening is to state briefly the nature of the action, the substance of the pleadings, the points in issue, the facts and circumstances of the case, and the substance of the evidence to be adduced in its support. The counsel for the plaintiff should not be allowed to state the facts which he expects to prove in reply to the defence set up in the answer, nor to anticipate the opening of the counsel for the defendant by giving the details of the defence.[1] The counsel for the defendant, in opening his case, must confine himself to stating the facts which he proposes to prove.[2] A statement made by counsel in his opening to the jury is not a binding admission obviating the necessity of proof of the fact by the adverse party.[3] Proof on the trial is not restricted to the proof referred to in the opening.[4]

[1] Ayrault v. Chamberlain, 33 Barb. (N. Y.) 229; Kley v. Healy, 127 N. Y. 555.

[2] See § 820.

[3] Ferson v. Wilcox, 19 Minn. 449 Gil. 388.

[4] Nearing v. Bell, 5 Hill (N. Y.) 291.

ORDER OF PROOF

General statement.

§ 823. The order in which proof shall be made out is a matter lying almost wholly in the discretion of the trial court.[1] Thus the court may admit declarations of an alleged agent before proof of the agency;[2] or evidence of the contents of a lost instrument before proof of its loss is fully made out;[3] or declarations of alleged conspirators before proof that all the defendants were united in the conspiracy;[4] or evidence in rebuttal which should have been introduced in chief.[5] When a party seeks to introduce evidence out of order the court may impose conditions.[6]

[1] Foster v. Berkey, 8 Minn. 351 Gil. 310; Griffiths v. Wolfram, 22 Minn. 185; Crandall v. McIlrath, 24 Minn. 127; McDonald v. Peacock, 37 Minn. 512, 35 N. W. 370; Hannem v. Pence, 40 Minn. 127, 41 N. W. 657; Romer v. Conter, 53 Minn. 171, 54 N. W. 1052; State v. Hayward, 62 Minn. 474, 65 N. W. 63; Hale v. Life Indemnity etc. Co. 65 Minn. 548, 68 N. W. 182; West v. Sibley, 76 Minn. 167, 78 N. W. 961.

[2] Woodbury v. Larned, 5 Minn. 339 Gil. 271.

[3] Groff v. Ramsey, 19 Minn. 44 Gil. 24.

[4] St. Paul Distilling Co. v. Pratt, 45 Minn. 215, 47 N. W. 789. See Com. v. Smith, 163 Mass. 411.

[5] Lynd v. Picket, 7 Minn. 184 Gil. 128; State v. Staley, 14 Minn. 105 Gil. 75; Plummer v. Mold, 22 Minn. 15; State v. Cantieny,

Digitized by Google

34 Minn. 1, 24 N. W. 458; Rosquist v. D. M. Gilmore Co. 50 Minn. 192, 52 N. W. 385.

[6] Plummer v. Mold, 22 Minn. 15.

Re-opening case.

§ 824. It is discretionary with the court to allow a party to re-open his case after resting.

Beaulieu v. Parsons, 2 Minn. 37 Gil. 26; Cooper v. Stinson, 5 Minn. 201 Gil. 160; Baze v. Arper, 6 Minn. 220 Gil. 142; Caldwell v. Bruggerman, 8 Minn. 286 Gil. 252; McDonald v. Peacock, 37 Minn. 512, 35 N. W. 370; Hart v. Kessler, 53 Minn. 546, 55 N. W. 742; Nelson v. Finseth, 55 Minn. 417, 57 N. W. 141; Johnson v. City of Stillwater, 62 Minn. 60, 64 N. W. 95; Sunvold v. Melby, 82 Minn. 544, 85 N. W. 549.

CONTROL OF COURT OVER EXAMINATION OF WITNESSES

Preliminary questions as to admissibility of evidence.

§ 825. When evidence is sought to be introduced the determination of its admissibility is a preliminary question for the court and all matters of fact essential to the proper determination of such question must be passed upon by the court.[1] When the facts necessarily passed upon by the court in such preliminary inquiry are likewise facts which the jury must pass upon in determining the main issues the determination of the court is not binding on the jury. There may be sufficient evidence of such facts to warrant the court in admitting the evidence but insufficient to warrant the jury in finding them true for the purposes of a verdict.[2] In passing on such preliminary questions the court is not restricted to such evidence as would be admissible under the general rules of evidence.[3] In criminal actions the court need not find such preliminary facts true beyond a reasonable doubt.[4] The hearing of witnesses and the scope of the inquiry must necessarily rest almost wholly in the discretion of the trial court.[5]

[1] Gorton v. Hadsell, 9 Cush. (Mass.) 508; State v. Holden, 42 Minn. 350, 44 N. W. 123.

[2] Com. v. Robinson, 146 Mass. 581.

[3] King v. McCarthy, 54 Minn. 190, 55 N. W. 960; Hill v. Winston, 73 Minn. 80, 75 N. W. 1030; Taylor, Ev. (9th Ed.) p. 391 (32).

[4] Com. v. Robinson, 146 Mass. 581.

[5] See State v. Barrett, 40 Minn. 65, 41 N. W. 459.

Determining the competency of witnesses.

§ 826. When a witness is called the determination of his competency is for the court.[1] "The court before whom an infant, or a person apparently of weak intellect, is produced as a witness, may examine such person to ascertain his capacity, and whether he understands the nature and obligations of an oath; and any court may inquire of any person, what are the peculiar ceremonies ob-

Digitized by Google

served by him in swearing, which he deems most obligatory."[2] The court need not examine a witness as to his fitness to testify unless, when he is offered, it sees some indication of his unfitness.[3] Whether a witness offered as an expert possesses the requisite qualifications is a question of fact to be decided by the trial court and its determination will not be reversed on appeal unless it clearly appears that it was not justified by the evidence or was based on some erroneous view of legal principles.[4] The court may hear witnesses on this preliminary inquiry and the number of such witnesses and the mode of their examination are matters lying wholly in its discretion. The character of the evidence adduced need not be governed by the same strict rules of evidence that control the introduction of evidence on the main issues.[5] Though the court may, in its discretion, allow the adverse party to cross-examine an expert witness as to his qualifications before permitting him to give his opinion such preliminary cross-examination is not a matter of right.[6] But when the incompetency of a witness depends upon the character of the evidence which he is called to give the adverse party has a right to first interrogate him for the purpose of showing that the evidence offered is incompetent, but not to show matters in avoidance.[7]

[1] State v. Barrett, 40 Minn. 65, 41 N. W. 459; Cannady v. Lynch, 27 Minn. 435, 8 N. W. 164; State v. Levy, 23 Minn. 104; Kalz v. Winona etc. Ry. Co. 76 Minn. 351, 79 N. W. 310; Brown v. Radebaugh, 84 Minn. 347, 87 N. W. 957.

[2] G. S. 1894 § 5666.

[3] Cannady v. Lynch, 27 Minn. 435, 8 N. W. 164. See Kalz v. Winona etc. Ry. Co. 76 Minn. 351, 79 N. W. 310.

[4] Stevens v. City of Minneapolis, 42 Minn. 136, 43 N. W. 842; Krippner v. Biebl, 28 Minn. 139, 9 N. W. 671; Berg v. Spink, 24 Minn. 138; Peteler Portable Ry. Mfg. Co. v. N. W. Adamant Mfg. Co. 60 Minn. 127, 61 N. W. 1024; Blondel v. St. Paul City Ry. Co. 66 Minn. 284, 68 N. W. 1079; Papooshek v. Winona etc. Ry. Co. 44 Minn. 195, 46 N. W. 329; Crich v. Williamsburg City Fire Ins. Co. 45 Minn. 441, 443, 48 N. W. 198; Beckett v. N. W. Masonic Aid Assoc. 67 Minn. 298, 69 N. W. 923; Martin v. Courtney, 75 Minn. 255, 77 N. W. 813; Sneda v. Libera, 65 Minn. 337, 68 N. W. 36; Sloniker v. Great Northern Ry. Co. 76 Minn. 306, 79 N. W. 168; Fonda v. St. Paul City Ry. Co. 77 Minn. 336, 79 N. W. 1043; Backus v. Ames, 79 Minn. 145, 81 N. W. 766; Fossum v. Chicago etc. Ry. Co. 80 Minn. 9, 82 N. W. 979; Yorks v. Mooberg, 84 Minn. 502, 87 N. W. 1115; Lewis v. Willoughby, 43 Minn. 307, 45 N. W. 439.

[5] See King v. McCarthy, 54 Minn. 190, 55 N. W. 960; Hill v. Winston, 73 Minn. 80, 75 N. W. 1030.

[6] Finch v. Chicago etc. Ry. Co. 46 Minn. 250, 48 N. W. 915.

[7] Lautenschlager v. Hunter, 22 Minn. 267; Tretheway v. Carey, 60 Minn. 457, 62 N. W. 815.

Digitized by Google

Putting questions to witnesses.

§ 827. It is the unquestioned right and often the duty of the court to put such questions to witnesses on the stand as may be necessary to bring out any relevant and material evidence without regard to its effect upon the interests of either party.[1] But it is a discretion to be sparingly and cautiously exercised, especially in a criminal action.[2]

[1] Long v. State, 95 Ind. 481; Sparks v. State, 59 Ala. 82.

[2] Fager v. State, 22 Neb. 332.

Allowing leading questions in direct examination.

§ 828. Permitting a party to ask his own witness leading questions is a matter resting almost wholly in the discretion of the trial court. There is probably not a case in the books where a new trial was granted for error in this regard.

Couch v. Steele, 63 Minn. 504, 65 N. W. 946; Blakeman v. Blakeman, 31 Minn. 396, 18 N. W. 396; Tapley v. Tapley, 10 Minn. 448 Gil. 360; State v. Staley, 14 Minn. 105 Gil. 75; D. M. Osborne & Co. v. Williams, 37 Minn. 507, 35 N. W. 371.

Allowing rebuttal of inadmissible evidence.

§ 829. By failing to object to inadmissible evidence a party cannot secure the right to introduce similar evidence in rebuttal.[1] But when inadmissible evidence has been received without objection it is discretionary with the court to permit the adverse party to introduce evidence in rebuttal and it should ordinarily be allowed if the evidence admitted is material and likely to affect the minds of the jury.[2] If inadmissible evidence is admitted over objection the adverse party has an absolute right to introduce evidence in rebuttal if the evidence erroneously admitted is material and likely to affect the minds of the jury.[3]

[1] Parker v Dudley, 118 Mass. 602; Stringer v. Young, 3 Pet. (U. S.) 337.

[2] Bogk v. Gassert, 149 U. S. 17; Wallis v. Randall, 81 N. Y. 167.

[3] Ward v. Washington Ins. Co. 6 Bos. (N. Y.) 229.

Admitting evidence on assurance of counsel.

§ 830. It is discretionary with the court to admit evidence on the assurance of counsel that it will subsequently be made to appear relevant and admissible.

First Unitarian Society v. Faulkner, 91 U. S. 415; Follansbee v. Johnson, 28 Minn. 311, 9 N. W. 882.

Allowing party to follow up inadmissible evidence.

§ 831. If a party has introduced inadmissible evidence without objection it is discretionary with the court to refuse to allow him to follow it up with like evidence even for purposes of qualification or explanation.

Lyons v. Teal, 28 La. Ann. 592. See Beard v. First Nat. Bank, 41 Minn. 153, 43 N. W. 7.

Digitized by Google

Allowing witness to be recalled.

§ 832. When a witness has been examined, cross-examined and dismissed from the stand, he can be recalled for further examination only by the indulgence of the court; and when permitted to be so recalled the court is entitled to exercise a large discretion as to the manner and the extent to which the favor granted shall be made use of.

Cummings v. Taylor, 24 Minn. 429; Keating v. Brown, 30 Minn. 9, 13 N. W. 909; Merriman v. Ames, 26 Minn. 384, 4 N. W. 620.

Limiting number of witnesses.

§ 833. The court has a discretionary power to limit the number of witnesses to the same fact. Thus the court may limit the number as to value, the number of impeaching and rebutting witnesses, and the number of experts.

Sheldon v. Minneapolis etc. Ry. Co. 29 Minn. 318, 13 N. W. 134.

Preventing useless examination or argument.

§ 834. When, in the progress of a trial, it appears obvious that a party, either in the examination of witnesses or in argument, is consuming time unnecessarily, the court may arrest the examination or argument to prevent a waste of time and the distraction of the jury.

Hamilton v. Hulett, 51 Minn. 208, 53 N. W. 364; Rosser v. McColly, 9 Ind. 587.

Requiring witness to perform a physical act.

§ 835. In an action for personal injuries the court has a discretionary power to compel the plaintiff, when he takes the stand in his own behalf, to perform a physical act in the presence of the jury calculated to show the nature and extent of his injuries.

Hatfield v. St. Paul etc. Ry. Co. 33 Minn. 130, 22 N. W. 176; Adams v. City of Thief River Falls, 84 Minn. 30, 86 N. W. 767.

MISCELLANEOUS DISCRETIONARY MATTERS

Allowing experiments.

§ 836. The allowance of experiments in the presence of the jury is a matter resting almost wholly in the discretion of the trial court.[1] It is a discretion which ought to be exercised cautiously and sparingly in view of the misleading nature of such evidence and the possibility of deception.

[1] Smith v. St. Paul City Ry. Co. 32 Minn. 1, 18 N. W. 827. See Beckett v. N. W. Masonic Aid Assoc. 67 Minn. 298, 69 N. W. 923; Thiel v. Kennedy, 82 Minn. 142, 84 N. W. 657; Adams v. City of Thief River Falls, 84 Minn. 30, 86 N. W. 767.

Holding court on a holiday.

§ 837. Whether an action shall be tried on a holiday other than Sunday is a matter for the determination of the trial court and its decision is final.

State v. Sorenson, 32 Minn. 118, 19 N. W. 738.

Digitized by Google

Granting a view—statute.

§ 838. "Whenever, in the opinion of the court, it is proper that the jury should have a view of real property which is the subject of the litigation, or of the place in which any material fact occurred, it may order the jury to be conducted in a body, in the custody of proper officers, to the place, which will be shown to them by the judge, or by a person appointed by the court for that purpose; while the jury are thus absent, no person, other than the judge or person so appointed, shall speak to them on any subject connected with the trial."

[G. S. 1894 § 5372]

§ 839. The theory of jury trials is that all the evidence must be submitted to the jury in open court so that the court may exclude inadmissible evidence and determine whether the verdict is justified by the evidence admitted and the parties have an opportunity to explain or rebut.[1] It is a corollary of this fundamental principle of jury trials that a view cannot furnish evidence on which to base a verdict. The object of a view is not to furnish evidence upon which to base a verdict but to enable the jury better to understand and apply the evidence submitted in open court. An instruction that gives the jury to understand that they may take into consideration the knowledge obtained on the view in arriving at their verdict is erroneous and ground for a new trial.[2] Misconduct of the jurors or parties on the view is a ground for a new trial.[3] The objection that only eleven jurors attended the view is waived unless raised as soon as discovered.[4] When a view is ordered it is proper practice for the court to instruct the jury as to the object of the view and their conduct while on the view but this is not indispensable. If a party wishes such instructions given he should make a timely request.[5] The matter of granting a view lies in the discretion of the trial court.[6] A view is not generally allowed if there has been a material change in the place.[7]

[1] Aldrich v. Wetmore, 52 Minn. 164, 53 N. W. 1072; Chute v. State, 19 Minn. 271 Gil. 230.

[2] Chute v. State, 19 Minn. 271 Gil. 230; Brakken v. Minneapolis etc. Ry. Co. 29 Minn. 41, 11 N. W. 124; Schutz v. Bower, 57 Minn. 493, 59 N. W. 631; N. W. Mutual Life Ins. Co. v. Sun Ins. Office, 85 Minn. 65, 88 N. W. 272.

[3] Hayward v. Knapp, 22 Minn. 5; Oswald v. Minneapolis etc. Ry. Co. 29 Minn. 5, 11 N. W. 112; Gurney v. Minneapolis etc. Ry. Co. 41 Minn. 223, 43 N. W. 2.

[4] Gurney v. Minneapolis etc. Ry. Co. 41 Minn. 223, 43 N. W. 2.

[5] Chute v. State, 19 Minn. 271 Gil. 230.

[6] Id.; Brown v. Kohout, 61 Minn. 113, 63 N. W. 248; N. W. Mutual Life Ins. Co. v. Sun Ins. Office, 85 Minn. 65, 88 N. W. 272.

[7] N. W. Mutual Life Ins. Co. v. Sun Ins. Office, 85 Minn. 65, 88 N. W. 272.

Digitized by Google

Sequestration of witnesses.

§ 840. It is at least discretionary with the court to order that the witnesses be examined out of the hearing of each other. According to the better view a party has an absolute right to such an order, but a majority of the cases make it a matter of discretion. It would be an extraordinary thing for a court to deny a request for such an order.[1] An exception is made in the case of experts. "As they are to be examined as to opinions based on facts testified to by other witnesses, they should be allowed to remain in court and hear the evidence relating to the facts. But when the testimony as to the facts is closed and the expert testimony commences, the judge may, in his discretion, order a separation of the expert witnesses."[2] Another exception is made in the case of parties and their agents.[3] But it is proper for the court when it sequesters other witnesses to compel a party to take the stand first. The proper practice is for the party demanding the sequestration to submit to the court a written list of the witnesses to be separated or to request a general order notifying all prospective witnesses to withdraw from the court-room. The witnesses should be placed in a room separate from the court-room under charge of an officer directed by the court to restrain their departure and prohibit conversation. Counsel cannot confer with a sequestered witness without leave and this leave should only be granted on condition that the conversation be in the presence and hearing of an officer of the court. The cases are conflicting as to the effect of disobedience on the qualification of the witness. If the disobedience is with the connivance of the party the witness is generally disqualified. If the disobedience is wilful but not with the connivance of the party the court, according to the better view, has discretionary power to exclude the witness, but it is a discretion to be rarely exercised.[4]

[1] Prof. Wigmore, 14 Harvard Law Review 475.

[2] Rogers, Expert Testimony § 39.

[3] Chester v. Bowen, 55 Cal. 46; Ryan v. Couch, 66 Ala. 244, 248.

[4] For a valuable collection of cases on this subject see 14 Harvard Law Review 475. See also, Holder v. U. S. 150 U. S. 91; Com. v. Crowley, 168 Mass. 121.

DISMISSAL FOR FAILURE OF PLAINTIFF TO PROVE A CAUSE OF ACTION—INVOLUNTARY NONSUIT

General rule.

§ 841. Our statute provides that an action may be dismissed by the court where, upon the trial, the plaintiff fails to substantiate or establish his claim, or cause of action, or right to recover.[1] This is a mere statutory confirmation of the right to grant an involuntary nonsuit which prevailed before the adoption of the code. The practice is the same whether the cause is being tried by a court, referee, or jury.[2] It does not violate the constitutional right of trial by jury.[3]

Digitized by Google

It is frequently said that this right to grant a nonsuit is grounded on the fact that the question whether the plaintiff has made out a case is always a question of law and therefore a question for the court. This justification of the right is not at all satisfactory. It originated from a desire of the courts not to appear to violate the general rule that questions of fact are for the jury and questions of law for the court. And so they resorted to a fiction and declared the question presented on a motion for a nonsuit a question of law. Frequently it is, but quite as frequently it is not. The question whether the evidence adduced is sufficient to sustain a verdict is often a pure question of fact and it confuses the whole subject to call it, by way of fiction, a question of law. It is far better to regard the right as a corollary of the right to grant a new trial. If it is perfectly obvious that the court could not permit a verdict for the plaintiff to stand there is no good reason for giving the jury an opportunity to find such a verdict. Hence the right to take the case from the jury and dispose of it summarily by a dismissal.[4] The right to order a dismissal involves the duty to do so. A motion for a dismissal is not addressed to the discretion of the court.[5]

[1] G. S. 1894 § 5408.

[2] Merriman v. Ames, 26 Minn. 384, 4 N. W. 620; Miller v. Miller, 47 Minn. 546, 50 N. W. 612; McCormick v. Miller, 19 Minn. 443 Gil. 384; Volmer v. Stagerman, 24 Minn. 434; Berkey v. Judd, 22 Minn. 287; Sloan v. Becker, 31 Minn. 414, 18 N. W. 143; Tharalson v. Wyman, 58 Minn. 233, 59 N. W. 1009.

[3] Coughran v. Bigelow, 164 U. S. 301.

[4] See Giermann v. St. Paul etc. Ry. Co. 42 Minn. 5, 43 N. W. 483.

[5] Blexrud v. Kuster, 62 Minn. 455, 64 N. W. 1140. See Scheiber v. Chicago etc. Ry. Co. 61 Minn. 499, 63 N. W. 1034.

Dismissal and directed verdict distinguished.

§ 842. The courts of this state sometimes improperly direct a verdict for the defendant when they ought to dismiss the action. It is the clear intent of our statute that upon the failure of the plaintiff to prove a cause of action a dismissal should be ordered rather than a verdict directed. The latter course should be followed only after defendant rests and there has been an actual contest on the merits.

Andrews v. School District, 35 Minn. 70, 27 N. W. 303; Briggs v. Waldron, 83 N. Y. 582; Hanson v. Crawley, 51 Ga. 528.

When nonsuit should be ordered.

§ 843. It is the right and the duty of the trial court to order a dismissal:

(1) When the evidence discloses some fact which, as a matter of law, defeats plaintiff's right to recover, as, for example, that the action has been prematurely brought;[1] that the plaintiff was guilty of contributory negligence;[2] that the action is barred by the statute of limitations;[3] that the plaintiff is guilty of laches; that the contract sued upon is illegal; that the plaintiff is estopped from main-

Digitized by Google

taining the action or there is any other legal obstacle to a verdict for the plaintiff.

(2) When the plaintiff fails to produce any evidence of some fact essential to his cause of action.[4]

(3) When the plaintiff fails to prove any or all the essential facts of his cause of action by evidence which could reasonably satisfy the jury and it would consequently be the obvious duty of the court to set aside a verdict in his favor as not justified by the evidence.[5]

(4) When the evidence in favor of the defendant so manifestly preponderates that it would be the obvious duty of the court to set aside a verdict for the plaintiff as not justified by the evidence.[6]

(5) When there is a fatal variance.[7] But the relief sought is no part of the cause of action and does not determine its character. That must be determined by the facts alleged in the complaint and not by plaintiff's understanding of it as evidenced by his prayer for relief or his attempt at proof on the trial. If the plaintiff makes out a good cause of action, either legal or equitable, within the allegations of his complaint, he cannot be nonsuited.[8]

[1] Iselin v. Simon, 62 Minn. 128, 64 N. W. 143.

[2] La Riviere v. Pemberton, 46 Minn. 5, 48 N. W. 406; Rutherford v. Chicago etc. Ry. Co. 57 Minn. 237, 59 N. W. 302; Rogstad v. St. Paul etc. Ry. Co. 31 Minn. 208, 17 N. W. 287; Marty v. Chicago etc. Ry. Co. 38 Minn. 108, 35 N. W. 670.

[3] Kerwin v. Sabin, 50 Minn. 320, 52 N. W. 642. See Hardwick v. Ickler, 71 Minn. 25, 73 N. W. 519.

[4] Merriman v. Ames, 26 Minn. 384, 4 N. W. 620; Greene v. Dwyer, 33 Minn. 403, 23 N. W. 546; McCormick v. Miller, 19 Minn. 443 Gil. 384; Volmer v. Stagerman, 24 Minn. 434.

[5] McCormick v. Miller, 19 Minn. 443 Gil. 384; Searles v. Thompson, 18 Minn. 316 Gil. 285; Merriman v. Ames, 26 Minn. 384, 4 N. W. 620; Abbett v. Chicago etc. Ry. Co. 30 Minn. 482, 16 N. W. 266; Larson v. St. Paul etc. Ry. Co. 43 Minn. 488, 45 N. W. 1096; Briggs v. Minneapolis Street Ry. Co. 52 Minn. 36, 53 N. W. 1019; Blexrud v. Kuster, 62 Minn. 455, 64 N. W. 1140; Wemple v. Northern Dakota Elevator Co. 67 Minn. 87, 69 N. W. 478; Rogstad v. St. Paul etc. Ry. Co. 31 Minn. 208, 17 N. W. 287; Marty v. Chicago etc. Ry. Co. 38 Minn. 108, 35 N. W. 670.

[6] Farrell v. St. Paul etc. Ry. Co. 38 Minn. 394, 38 N. W. 100; Searles v. Thompson, 18 Minn. 316 Gil. 285; Gould, Pl. (Heard) 557.

[7] Cowles v. Warner, 22 Minn. 449; Irish-American Bank v. Bader, 59 Minn. 329, 61 N. W. 328; Gaar, Scott & Co. v. Fritz, 60 Minn. 346, 62 N. W. 391. See Dunnell, Minn. Pl. §§ 678–680.

[8] Greenleaf v. Egan, 30 Minn. 316, 15 N. W. 254; Canty v. Latterner, 31 Minn. 239, 17 N. W. 385.

Improper when more than one reasonable inference.

§ 844. If there is some evidence tending to prove all the essential facts of a cause of action and upon all the evidence adduced the court or jury might reasonably find either for the plaintiff or the

Digitized by Google

defendant it is error to dismiss the case when plaintiff rests.[1] The mere fact that there is a preponderance of evidence in favor of the defendant does not authorize a dismissal.[2] Although, as we have seen,[3] the right to dismiss an action for failure of proof is a corollary of the right to grant a new trial the test is not whether the court might in the exercise of its discretion grant a new trial. An action can be dismissed for failure of proof only in those unequivocal cases where it clearly appears to the court on the trial that it would be its manifest duty to set aside a verdict for the plaintiff as not justified by the evidence or as contrary to the law applicable to the case.[4]

[1] Keene v. Masterman, 66 Minn. 72, 68 N. W. 771; Tharalson v. Wyman, 58 Minn. 233, 59 N. W. 1009; Bennett v. Syndicate Ins. Co. 39 Minn. 254, 39 N. W. 488; Emery v. Minneapolis Industrial Exposition, 56 Minn. 460, 57 N. W. 1132; Roebel v. Chicago etc. Ry. Co. 35 Minn. 84, 27 N. W. 305; Herrick v. Barnes, 78 Minn. 475, 81 N. W. 526; Hamm Realty Co. v. New Hampshire Fire Ins. Co. 80 Minn. 139, 83 N. W. 41; Sexton v. Steele, 60 Minn. 336, 62 N. W. 392; Craver v. Christian, 34 Minn. 397, 26 N. W. 8; Whitson v. Ames, 68 Minn. 23, 70 N. W. 793; Burton v. St. Paul etc. Ry. Co. 33 Minn. 189, 22 N. W. 300; Olson v. Tvete, 46 Minn. 225, 48 N. W. 914.

[2] Farrell v. St. Paul etc. Ry. Co. 38 Minn. 394, 38 N. W. 100.

[3] See § 841.

[4] Abbett v. Chicago etc. Ry. Co. 30 Minn. 482, 16 N. W. 266; Thompson v. Pioneer-Press Co. 37 Minn. 285, 33 N. W. 856; Colt v. Sixth Ave. Ry. Co. 49 N. Y. 671.

Effect of evidence on motion.

§ 845. Upon a motion to dismiss for failure of proof it is to be assumed that the evidence adduced in favor of the plaintiff proves all that it ends to prove,[1] and this is so although it is controverted by the testimony of defendant's witnesses.[2] The plaintiff must be given the benefit of every reasonable inference that might be drawn from the evidence.[3] Where evidence, upon which a right to recover depends, has been received, and subsequently stricken out on motion of the defendant, a nonsuit may be ordered notwithstanding such evidence.[4] A motion for a nonsuit is an admission, for the purposes of the motion, of the truth of all the evidence introduced by the plaintiff.[5] Evidence erroneously admitted must be given full weight.[6]

[1] Warner v. Rogers, 23 Minn. 34; Blexrud v. Kuster, 62 Minn. 455, 64 N. W. 1140.

[2] Ernst v. Hudson River Ry. Co. 35 N. Y. 9, 25.

[3] Merriman v. Ames, 26 Minn. 384, 4 N. W. 620; Emery v. Minneapolis Industrial Exposition, 56 Minn. 460, 57 N. W. 464; Imhoff v. Chicago etc. Ry. Co. 22 Wis. 684.

[4] Bryant v. Bryant, 42 N. Y. 11.

[5] Butler v. Hyland, 89 Cal. 575.

[6] Wright v. Roseberry, 81 Cal. 87; Jacobsen v. Siddal, 12 Or. 280.

Digitized by Google

When there is a counterclaim.

§ 846. If, when the plaintiff rests, he has failed to prove a cause of action, the defendant may move to have the action dismissed on that ground, notwithstanding that he has set up a counterclaim in his answer.

Slocum v. Minneapolis Millers' Assoc. 33 Minn. 438, 23 N. W. 862.

Improper when right to nominal damages.

§ 847. When the plaintiff has established a cause of action for nominal damages it is error to dismiss the case where the recovery of nominal damages would carry costs.

Potter v. Mellen, 36 Minn. 122, 30 N. W. 438; Harris v. Kerr, 37 Minn. 537, 35 N. W. 379; Farmer v. Crosby, 43 Minn. 459, 45 N. W. 866. But see U. S. Express Co. v. Koerner, 65 Minn. 540, 68 N. W. 181.

Admitting additional evidence.

§ 848. It is discretionary with the court to allow the plaintiff to introduce additional evidence, after a motion for a dismissal, to supply deficiencies in his proof. It should ordinarily be allowed as a matter of course.

Caldwell v. Bruggerman, 8 Minn. 286 Gil. 259; Johnson v. City of Stillwater, 62 Minn. 60, 64 N. W. 95; Ullman v. Lion, 8 Minn. 381 Gil. 338.

When motion may be made.

§ 849. The usual time of making the motion for a nonsuit is when the plaintiff rests. It may, however, be made earlier and even upon the opening address of counsel if it unequivocally appears that the plaintiff has no cause of action that could be made out by the introduction of further evidence.[1] This rarely happens except when some legal obstacle to the action discloses itself. The motion may be made not only when plaintiff rests but at any subsequent stage of the action before final submission.[2] If the motion is made after the defendant rests the plaintiff should be permitted to introduce evidence in rebuttal. If the defendant makes the motion when plaintiff rests and it is denied he may renew it at the close of the case.[3]

[1] Emmerson v. Weeks, 58 Cal. 382; Fisher v. Fisher, 5 Wis. 472; Oscanyan v. Arms Co. 103 U. S. 261; Dunham v. Byrnes, 36 Minn. 106, 30 N. W. 402.

[2] Farrell v. St. Paul etc. Ry. Co. 38 Minn. 394, 38 N. W. 100; Lomer v. Meeker, 25 N. Y. 361; Fox v. Southern Pac. Ry. Co. 95 Cal. 234; Brown v. Massachusetts etc. Ins. Co. 59 N. H. 307.

[3] Fitch v. Hassler, 54 N. Y. 677. See Merriman v. Ames, 26 Minn. 384, 4 N. W. 620.

Grounds of motion must be specified.

§ 850. The defendant must specify the grounds of his motion, pointing out wherein the plaintiff has failed to prove a cause of action

Digitized by Google

in order that the latter may, if possible, supply any deficiencies in his proof. In the absence of such specification it is not error to deny the motion unless it is apparent that the objection could not possibly be obviated by further evidence.

Gerding v. Haskin, 141 N. Y. 520; Silva v. Holland, 74 Cal. 530; Volmer v. Stagerman, 24 Minn. 434. See Dunnell, Minn. Pl. §§ 763, 767.

Error in denying motion cured.

§ 851. Error in denying a motion of the defendant for dismissal when plaintiff rests is cured, if all the evidence in the case, including that introduced after as well as before the motion, is sufficient to sustain the verdict.

Coles v. Curtis, 16 Minn. 182 Gil. 161; Berkey v. Judd, 22 Minn. 287; Deakin v. Chicago etc. Ry. Co. 27 Minn. 303, 7 N. W. 268; Keith v. Briggs, 32 Minn. 185, 20 N. W. 91; McRoberts v. McArthur, 62 Minn. 310, 64 N. W. 903; Manahan v. Halloran, 66 Minn. 483, 69 N. W. 619; Ingalls v. Oberg, 70 Minn. 102, 72 N. W. 841.

When there are several parties.

§ 852. A defendant may move for a dismissal as to one or more of several plaintiffs.[1] One or more of several defendants may move for a dismissal as to themselves alone.[2] A plaintiff cannot be nonsuited in an action of tort as to all of several defendants on evidence showing a failure of proof as to less than all.[3]

[1] Wiesner v. Young, 50 Minn. 21, 52 N. W. 390; Simar v. Canady, 53 N. Y. 298.

[2] Bunce v. Pratt, 56 Minn. 8, 57 N. W. 160; Woodling v. Knickerbocker, 31 Minn. 268, 17 N. W. 387; Masterman v. Lumbermen's Nat. Bank, 61 Minn. 299, 63 N. W. 723; Lomer v. Meeker, 25 N. Y. 361.

[3] Gerhardt v. Swaty, 57 Wis. 24.

When all the issues not submitted to jury.

§ 853. Where, in an action tried by the court, certain questions are submitted to a jury and an affirmative answer to one of them is essential to a recovery, the action may be dismissed, if, when plaintiff rests, there is no evidence which would warrant the jury in returning an affirmative answer to such question.

Sloan v. Becker, 31 Minn. 414, 18 N. W. 143.

Motion by intervener.

§ 854. A person cannot be allowed to make himself a party, on paper, to an action pending against others, for the purpose of objecting to a trial thereof or moving to dismiss.

Hunt v. O'Leary, 84 Minn. 200, 87 N. W. 611.

Digitized by Google

DIRECTING A VERDICT

General statement.

§ 855. It is the right and duty of a trial court in a civil action to direct the jury to find a verdict for either party when it would obviously be its duty to set aside a verdict against him. This right is a corollary of the right to grant a new trial but the test is not whether the court might in the exercise of its discretion grant a new trial. A verdict may be directed only in those unequivocal cases where it clearly appears to the court on the trial that it would be its manifest duty to set aside a contrary verdict as not justified by the evidence or as contrary to the law applicable to the case.[1] Although the evidence on the part of the plaintiff standing alone would justify submitting a case to the jury, yet the court should direct a verdict for the defendant if, upon all the evidence, it would be its manifest duty to set aside a verdict against him.[2] In other words, the court should direct a verdict in favor of a party in whose favor the evidence overwhelmingly preponderates, although there is some evidence in favor of the adverse party.[3] Where the evidence as to the existence of a material fact can only raise a bare conjecture the case should not be submitted to the jury.[4] The fact that there is no conflict in the testimony does not make the case one for the court instead of the jury, if the evidence is for any cause inconclusive in its nature—as, for example, where different conclusions may be reasonably drawn from it, or where its credibility is doubtful.[5] In passing on a motion for a directed verdict the court may take into consideration the credibility of the witnesses.[6] The right to direct a verdict involves the duty to do so,[7] but it is a right to be cautiously and sparingly exercised.[8] When the motion is made on the ground of a manifest preponderance of the evidence it should be denied if different men might reasonably draw different conclusions from the evidence.[9]

[1] Thompson v. Pioneer-Press Co. 37 Minn. 285, 33 N. W. 856; Dawson v. Helmes, 30 Minn. 107, 14 N. W. 462; Abbett v. Chicago etc. Ry. Co. 30 Minn. 482, 16 N. W. 266; Giermann v. St. Paul etc. Ry. Co. 42 Minn. 5, 43 N. W. 483; Hallam v. Doyle, 35 Minn. 337, 29 N. W. 130; Duluth Chamber of Commerce v. Knowlton, 42 Minn. 229, 44 N. W. 2; Trask v. Shotwell, 41 Minn. 66, 42 N. W. 699; Scheiber v. Chicago etc. Ry. Co. 61 Minn. 499, 63 N. W. 1034; Courtland Wagon Co. v. Sharvy, 52 Minn. 216, 53 N. W. 1147; Sage v. Larson, 69 Minn. 122, 71 N. W. 122.

[2] Giermann v. St. Paul etc. Ry. Co. 42 Minn. 5, 43 N. W. 483.

[3] Id. See Mt. Adams etc. Ry. Co. v. Lowery, 74 Fed. 463.

[4] Locke v. First Division St. Paul etc. Ry. Co. 15 Minn. 350 Gil. 283, 295; Ellison v. Truesdale, 49 Minn. 240, 51 N. W. 918; Minneapolis etc. Co. v. Great Northern Ry. Co. 83 Minn. 370, 86 N. W. 451.

[5] Burud v. Great Northern Ry. Co. 62 Minn. 243, 64 N. W. 562.

[6] Thompson v. Pioneer-Press Co. 37 Minn. 285, 33 N. W. 856; Boston etc. Co. v. Benz, 66 Minn. 99, 68 N. W. 602.

Digitized by Google

[7] Scheiber v. Chicago etc. Ry. Co. 61 Minn. 499, 63 N. W. 1034.
[8] Giermann v. St. Paul etc. Ry. Co. 42 Minn. 5, 43 N. W. 483; Scheiber v. Chicago etc. Ry. Co. 61 Minn. 499, 63 N. W. 1034.
[9] Abbett v. Chicago etc. Ry. Co. 30 Minn. 482, 16 N. W. 266; Bennett v. Syndicate Ins. Co. 39 Minn. 254, 39 N. W. 488; Young v. Ege, 63 Minn. 219, 65 N. W. 249, 67 N. W. 4; Rosenbaum v. Howard, 69 Minn. 41, 71 N. W. 823.

Directing a verdict and ordering a nonsuit compared.

§ 856. The grounds for ordering a nonsuit and directing a verdict are the same.[1] A directed verdict differs from a nonsuit in that it may be ordered in favor of either party and is, presumptively at least, on the merits, so that a judgment entered thereon is a bar to a future action between the same parties in the same cause.[2] A nonsuit may be ordered at any stage of the trial before final submission while a verdict cannot be properly directed until the close of the case and then only after an actual contest on the merits. Our statute has abolished all common law modes of terminating an action on the trial and substituted the single remedy of dismissal. It also provides that where a dismissal is not had the judgment shall be on the merits. (It follows that a verdict can properly be directed only after an actual contest on the merits.)

[1] Abbett v. Chicago etc. Ry. Co. 30 Minn. 482, 16 N. W. 266; Gerding v. Haskin, 141 N. Y. 520.
[2] Andrews v. School District, 35 Minn. 71, 27 N. W. 303.

When motion may be made.

§ 857. The proper time to move for a directed verdict is at the close of the case and just before the argument to the jury begins.[1] After the argument begins it is discretionary with the court to entertain the motion.[2] When the plaintiff rests can the defendant also rest, without introducing any evidence, and ask for a directed verdict? A motion at such a time is in substance an objection that the plaintiff has not proved a cause of action—has "failed to substantiate his claim or cause of action"—and our statute provides for a dismissal as the proper and exclusive remedy.[3] But if the court should improperly direct a verdict at such a time it would probably be treated as in effect a dismissal and the error one of form rather than substance.[4]

[1] Duluth Chamber of Commerce v. Knowlton, 42 Minn. 229, 44 N. W. 2; Andrews v. School District, 35 Minn. 70, 27 N. W. 303.
[2] Price v. Phœnix etc. Ins. Co. 17 Minn. 497 Gil. 473.
[3] See Andrews v. School District, 35 Minn. 70, 27 N. W. 303. To effect that a verdict may be directed see, Chickering & Sons v. White, 42 Minn. 457, 44 N. W. 988.
[4] See Duluth Chamber of Commerce v. Knowlton, 42 Minn. 229, 44 N. W. 2; Chickering & Sons v. White, 42 Minn. 457, 44 N. W. 988.

Grounds of motion must be specified.

§ 858. The specific grounds of the motion must be stated so that the court may pass upon the motion intelligently and the adverse

Digitized by Google

party be given an opportunity to supply deficiencies in his proof.[1] The moving party must not only specify his grounds of objection but he is limited to such as he specifies.[2]

[1] Tanderup v. Hansen, 8 S. D. 375, 66 N. W. 1073; Lewis v. Brown, 89 Ga. 115.

[2] Perkins v. Thorson, 50 Minn. 85, 52 N. W. 272.

When there are several parties.

§ 859. (A motion to direct a verdict in favor of the plaintiff against all of several defendants is properly denied when he is entitled to a verdict only against some of them.)

First Nat. Bank v. Holan, 63 Minn. 525, 65 N. W. 952.

Waiver.

§ 860. If a party neglects to move for a directed verdict at the proper time he cannot complain on a motion for a new trial or on appeal that the case was submitted to the jury.[1] By voluntarily litigating an issue without objection a party waives the right to a directed verdict on the ground of variance.[2] Where both parties moved for a directed verdict it was held a submission of the case to the court.[3]

[1] Price v. Phœnix etc. Ins. Co. 17 Minn. 497 Gil. 473; Hartford etc. Ins. Co. v. Unsell, 144 U. S. 439.

[2] Reed v. Great Northern Ry. Co. 76 Minn. 163, 78 N. W. 974.

[3] Chezick v. Minneapolis etc. Co. 66 Minn. 300, 68 N. W. 1093.

Ordering judgment instead of directing verdict.

§ 861. Ordering judgment for a party entitled to a directed verdict is, at most, an irregularity without prejudice.[1] If a jury refuse to bring in a verdict as directed the court has undoubted authority to discharge them and order judgment for the party in whose favor the verdict was directed.[2] It would be well if we had a statute authorizing the court to discharge a jury and order a judgment in cases where a verdict is now directed, because the judgment in such cases is in fact the judgment of the court[3] and it is advisable that all judicial proceedings should rest on reality rather than fiction. The court may amend a directed verdict to conform to its intention.[4]

[1] Duluth Chamber of Commerce v. Knowlton, 42 Minn. 229, 44 N. W. 2. See Chickering & Sons v. White, 42 Minn. 457, 44 N. W. 988.

[2] Gammon v. Abrams, 53 Wis. 323, 10 N. W. 479; Calteaux v. Mueller, 102 Wis. 525, 78 N. W. 1082; Cahill v. Chicago etc. Ry. Co. 74 Fed. 285.

[3] Mouat v. Wells, 76 Minn. 438, 79 N. W. 499.

[4] Id.

Digitized by Google

SICKNESS OF JUDGE

General statement.

§ 862. There cannot be a change of judges during the trial. If the judge before whom a trial is begun becomes sick or for any other reason is unable to attend the jury must be discharged or the trial adjourned from day to day for a reasonable time if it is probable that the judge will be able to return. Another judge may undoubtedly adjourn a trial or discharge the jury or receive a verdict.

Rossman v. Moffett, 75 Minn. 289, 77 N. W. 960.

ARGUMENT OF COUNSEL

General statement.

§ 863. In both civil and criminal actions when an issue is submitted to a jury the right to argue the case before the jury is absolute.[1] But in both civil and criminal actions the court has a discretionary power to keep the argument within reasonable limits of time.[2] And it is the duty of the court to keep the argument within reasonable bounds as to matter and manner.[3] No rule can be laid down defining the scope of legitimate argument. In his address to the jury it is the privilege of counsel to descant upon the facts proved, or admitted in the pleadings; to arraign the conduct of the parties; to impugn, excuse, justify or condemn motives, so far as they are developed in evidence; assail the credibility of witnesses when it is impeached by direct evidence or by the inconsistency or incoherence of their testimony, their manner of testifying, their appearance on the stand or by circumstances.[4] He may draw inferences from the evidence however illogical or absurd.[5] Comment on the failure of the opposite party to produce evidence manifestly in his power is always legitimate even in a criminal case.[6] But counsel must otherwise limit his comments to facts in evidence and it is highly improper for him to comment on evidence which has been excluded by the court.[7] Comments which would otherwise be illegitimate may be proper if provoked by the argument of opposing counsel.[8] Wide latitude is properly allowed in appeals to the sympathy of the jury,[9] but counsel should not be permitted to inflame the local,[10] racial [11] or religious [12] prejudices of the jury. Charges of corrupt practices in connection with the action for which there is no basis in the evidence should be sharply and promptly checked.[13] In actions against corporations counsel should not be permitted to indulge in an intemperate attack on corporations calculated to arouse the prejudices of the jury.[14] Counsel should not be permitted to read law books to the jury in connection with their argument,[15] nor medical books.[16] The jury are bound to accept the law as laid down by the court and it is not proper for counsel to argue questions of law to the jury.[17] Of course it is not improper for counsel to refer incidentally to the theory of the law upon which he has conducted his case or to the instructions which he anticipates the court will give, but this should only be done inci-

Digitized by Google

dentally and not contentiously.[18] It is provided by statute that requests for instructions which have been granted may be read to the jury by counsel as the law of the case.[19] It is not the duty of the court in its charge to refute erroneous propositions of law advanced by counsel on the argument.[20]

[1] State v. Holden, 42 Minn. 350, 44 N. W. 123; Douglass v. Hill, 29 Kans. 527.
[2] People v. Kelly, 94 N. Y. 526.
[3] Brown v. Swineford, 44 Wis. 282; Williams v. Brooklyn etc. Ry. Co., 126 N. Y. 96.
[4] Tucker v. Henniker, 41 N. H. 323; Brown v. Swineford, 44 Wis. 282; Williams v. Brooklyn etc. Ry. Co. 126 N. Y. 96; Johnson v. Walsh, 83 Minn. 74, 85 N. W. 910; Wells v. Moses, 92 N. W. 334.
[5] Wheeler v. Jenison, 120 Mich. 422, 79 N. W. 643; Inman v. State, 72 Ga. 278.
[6] Graves v. U. S. 150 U. S. 118.
[7] Johnson v. Chicago etc. Ry. Co. 37 Minn. 519, 35 N. W. 438; Brown v. Swineford, 44 Wis. 282.
[8] Wheeler v. Jenison, 120 Mich. 422, 79 N. W. 643.
[9] Dowdell v. Wilcox, 64 Iowa 724; Baker v. Madison, 62 Wis. 147.
[10] Rochester School Town v. Shaw, 100 Ind. 268.
[11] Freeman v. Dempsey, 41 Ill. App. 554; Fathman v. Tumilty, 34 Mo. App. 237.
[12] Rudolph v. Landwerlen, 92 Ind. 34.
[13] Sutton v. Chicago etc. Ry. Co. 98 Wis. 157, 73 N. W. 993.
[14] Masterson v. Chicago etc. Ry. Co. 102 Wis. 571, 78 N. W. 757; Williams v. Brooklyn, 126 N. Y. 96; Henry v. Huff, 143 Pa. St. 563.
[15] Steffenson v. Chicago etc. Ry. Co. 48 Minn. 285, 51 N. W. 610; Boltz v. Town of Sullivan, 101 Wis. 608, 77 N. W. 870.
[16] Com. v. Wilson, 1 Gray (Mass.) 337.
[17] Steffenson v. Chicago etc. Ry. Co. 48 Minn. 285, 51 N. W. 610 (inferentially); Philpot v. Taylor, 75 Ill. 309; Delaplane v. Crenshaw, 15 Gratt. (Va.) 458.
[18] Fosdick v. Van Arsdale, 74 Mich. 302. See Johnson v. Walsh, 83 Minn. 74, 85 N. W. 910.
[19] See § 880.
[20] Johnson v. Walsh, 83 Minn. 74, 85 N. W. 910.

INTERROGATORIES TO THE JURY

The statute.

§ 864. In all cases the court may instruct the jury, "if they render a general verdict, to find upon particular questions of fact, to be stated in writing, and may direct a written finding thereon. The special verdict or finding shall be filed with the clerk, and entered upon the merits. Where a special finding of facts is inconsistent with the general verdict, the former controls the latter, and the court shall give judgment accordingly."

Digitized by Google

[G. S. 1894 §§ 5380, 5381] Substantially identical provisions are to be found in the statutes of Wis., Iowa, Cal., Ohio, Neb., Kans., Wash., Or., Nev., Ind., N. C., Ky., and Mich.

Distinction between special findings and special verdicts.

§ 865. Special findings in response to interrogatories are not special verdicts in any true sense though they are not always clearly differentiated from them in our decisions.[1] Special verdicts are findings of some or all the issuable facts in a cause. In actions of a legal nature they cover all the issues and are the sole basis of the judgment. In equitable actions they are also the basis of the judgment, either alone or in connection with findings of the court.[2] On the other hand special findings in response to interrogatories are not necessarily findings of issuable facts and they are not ordinarily the foundation of the judgment. They play no part whatever in the determination of the action unless they chance to be inconsistent with the general verdict. Judgments rest on special verdicts but never on special findings as such. Moreover, special findings of fact in response to interrogatories are only made in actions of a legal nature. The statute provides for such findings only when the jury return a general verdict and as there are never general verdicts in actions of an equitable nature the practice is limited to legal actions. Special verdicts are never accompanied by general verdicts, special findings always. Special verdicts are returnable in both civil and criminal actions, while special findings are only returnable in civil actions.[3] Special verdicts are of ancient common law origin, while the practice of submitting special interrogatories to be answered in connection with a general verdict is of modern American origin and obtains in but a portion of the states.[4]

[1] Manning v. Gasharie, 27 Ind. 399; First Nat. Bank v. Peck, 8 Kans. 660. See Tarbox v. Gotzian, 20 Minn. 139 Gil. 122.

[2] See § 916.

[3] State v. Ridley, 48 Iowa, 370.

[4] See upon the general subject, 20 Am. Law Rev. 366; Elliott, General Practice, ch. 34.

Discretionary.

§ 866. The submission of special interrogatories to the jury at the request of counsel is a matter lying almost wholly in the discretion of the trial court and its action will not be reversed on appeal except for a manifest abuse of discretion.[1] There must be a real exercise of discretion.[2] The court need not submit interrogatories unless requested,[3] but it may do so.[4]

[1] McLane v. Burbank, 12 Minn. 530 Gil. 438; Jaspers v. Lano, 17 Minn. 296 Gil. 273; Iltis v. Chicago etc. Ry. Co. 40 Minn. 273, 41 N. W. 1040; Stensgaard v. St. Paul etc. Ins. Co. 50 Minn. 429, 52 N. W. 910.

[2] Jaspers v. Lano, 17 Minn. 296 Gil. 273.

[3] Board of County Com'rs v. Parker, 7 Minn. 267 Gil. 207.

[4] Eischen v. Chicago etc. Ry. Co. 81 Minn. 59, 83 N. W. 490.

Digitized by Google

Character of interrogatories.

§ 867. Interrogatories should be clear, concise, few in number and capable of categorical answer.[1] They must not assume facts in controversy.[2] They must be questions of fact and not of law.[3] They must be pertinent to the issues [4] and of so material a character that a general verdict inconsistent with answers to them could not stand.[5] It is no objection that they are leading.[6] By "particular questions" of fact something less than an issue presented in the case is intended. The meaning obviously is, that the jury may be required to find specially upon questions of fact pertinent to and involved in the issue, and essential to its support on the one side or the other, and which therefore would be impliedly covered by a general verdict.[7] Questions concerning mere evidentiary facts should not be submitted.[8]

[1] Jaspers v. Lano, 17 Minn. 296 Gil. 273; Iltis v. Chicago etc. Ry. Co. 40 Minn. 273, 41 N. W. 1040; Cummings v. Taylor, 24 Minn. 429; Marshall v. Blackshire, 44 Iowa 475; Lewis v. Chicago etc. Ry. Co. 57 Iowa 127; Phoenix v. Lamb, 29 Iowa 352; O'Leary v. German-American Ins. Co. 100 Iowa 399.

[2] Scagel v. Chicago etc. Ry. Co. 83 Iowa 380; Elliott v. Reynolds, 38 Kans. 274.

[3] Ohio etc. Ry. Co. v. Stansberry, 132 Ind. 533; Toledo Savings Bank v. Rathmann, 78 Iowa 288; Banner Tobacco Co. v. Jenison, 48 Mich. 459.

[4] Cormac v. Western etc. Co. 77 Iowa 32; Cummings v. Taylor, 24 Minn. 429; Jordan v. St. Paul etc. Ry. Co. 42 Minn. 172, 43 N. W. 849.

[5] Scagel v. Chicago etc. Ry. Co. 83 Iowa 380; Hamilton v. Shoaff, 99 Ind. 63; Cousins v. Lake Shore etc. Ry. Co. 96 Mich. 389.

[6] Anderson v. McPike, 41 Mo. App. 328.

[7] Manning v. Gasharie, 27 Ind. 399.

[8] Cousins v. Lake Shore etc. Ry. Co. 96 Mich. 389; Chicago etc. Ry. Co. v. Dunleavy, 129 Ill. 145.

Conditional.

§ 868. Interrogatories should be conditional on the jury bringing in a general verdict.

Taylor v. Burk, 91 Ind. 252.

Withdrawal of interrogatories.

§ 869. While it is discretionary with the court to submit interrogatories or not, if it does submit them, it cannot withdraw them without consent of the parties.

Eischen v. Chicago, 81 Minn. 59, 83 N. W. 490.

Time of request.

§ 870. Proper practice requires that proposed interrogatories be submitted to the court before the argument begins or at least in time to enable the court to give them adequate consideration and make necessary changes before the cause is submitted to the jury. The matter lies in the discretion of the court and it may entertain

Digitized by Google

a request even after a general verdict has been rendered and before the jury is discharged.[1] The request being made in the course of the trial of course no notice is necessary.

[1] Jaspers v. Lano, 17 Minn. 296 Gil. 273.

Answers compulsory.

§ 871. A party has an absolute right to have his interrogatories answered if they are material and proper and to have them answered clearly and fully. If the jury come in without discharging their duty in this regard they must be sent out again and required to return full and satisfactory answers.[1] A failure of the jury to answer immaterial questions is harmless error.[2]

[1] Tarbox v. Gotzian, 20 Minn. 139 Gil. 122; Nichols, Shepard & Co. v. Wadsworth, 40 Minn. 547, 42 N. W. 541; Ermentraut v. Providence-Washington Ins. Co. 67 Minn. 451, 70 N. W. 572; Elliott v. Village of Graceville, 76 Minn. 430, 79 N. W. 503; Eischen v. Chicago etc. Ry. Co. 81 Minn. 59, 83 N. W. 490.

[2] Finch v. Green, 16 Minn. 355 Gil. 315; Schneider v. Chicago etc. Ry. Co. 42 Minn. 68, 43 N. W. 783.

§ 872. Where the jury are sent back to answer certain interrogatories which they have omitted to answer or answered imperfectly an instruction by the court directing the jury to make proper answers and then to make its general verdict consistent with the answers, even if this should require a re-examination of the whole case and require a change of the general verdict, is proper. A verdict should not be received piecemeal and whenever the jury are sent back to make proper answers to interrogatories the general verdict should always be returned for their reconsideration.

Hyatt v. Clements, 65 Ind. 12; McMarshall v. Chicago etc. Ry. Co. 80 Iowa 757; Ryan v. Rockford Ins. Co. 77 Wis. 611; Rush v. Pedigo, 63 Ind. 479; Byram v. Galbraith, 75 Ind. 134.

Objections to answers—waiver.

§ 873. Formal defects in answers are waived unless objection is made upon the coming in of the verdict [1] or at least before the jury are discharged.[2] So, also, objection to the failure of the jury to answer interrogatories is waived if not taken before the jury are discharged.[3]

[1] Manny v. Griswold, 21 Minn. 506; Varco v. Chicago etc. Ry. Co. 30 Minn. 18, 13 N. W. 921; Crandall v. McIlrath, 24 Minn. 127.

[2] Tarbox v. Gotzian, 21 Minn. 139 Gil. 122.

[3] Long v. Duncan, 10 Kans. 294; Mack v. Leedle, 78 Iowa 164; St. Louis etc. Ry. Co. v. Dorman, 72 Ill. 504.

§ 874. When there is a general verdict and a special finding of fact, if the court desire to reserve the case for further consideration, it must, at the coming in of the verdict, enter an order reserving the case. Unless this is done the party in whose favor the general verdict is may have judgment entered on it.

Newell v. Houlton, 22 Minn. 19. See Schmitt v. Schmitt, 31 Minn. 106, 16 N. W. 543.

Digitized by Google

Judgment notwithstanding the general verdict.

§ 875. The statute provides that "where a special finding of facts is inconsistent with the general verdict, the former controls the latter, and the court shall give judgment accordingly." [1] Judgment will not be ordered under this statute unless the general verdict and the answers are wholly irreconcilable. Every doubt will be resolved in favor of the general verdict.[2] When the answers are inconsistent with one another the general verdict prevails.[3] The inconsistency must appear on the face of the verdict and answers. Resort cannot be had to the evidence.[4]

[1] G. S. 1894 § 5381.

[2] Goltz v. Winona etc. Ry. Co. 22 Minn. 55; Crandall v. McIlrath, 24 Minn. 127; Twist v. Winona etc. Ry. Co. 39 Minn. 164, 39 N. W. 402; Jordan v. St. Paul etc. Ry. Co. 42 Minn. 172, 43 N. W. 849; Nettersheim v. Chicago etc. Ry. Co. 58 Minn. 10, 59 N. W. 632; Maceman v. Equitable Life Ins. Co. 69 Minn. 285, 72 N. W. 111; Vogt v. Honstain, 85 Minn. 160, 88 N. W. 443; Kurstelska v. Jackson, 84 Minn. 415, 87 N. W. 1015; Lindem v. Northern Pac. Ry. Co. 85 Minn. 391, 89 N. W. 64.

[3] Keesling v. Ryan, 84 Ind. 89.

[4] Porter v. Waltz, 108 Ind. 40.

Judgment on findings as on special verdict.

§ 876. If special findings cover all the issues they may be treated as equivalent to a special verdict and judgment may be ordered thereon even in the absence of a general verdict.[1] It is clearly not the design of the statute that the interrogatories should cover all the issues and the answers be made the foundation of a judgment. It is expressly provided that they shall be answered only in case a general verdict is returned. The practice of covering all the issues by the interrogatories is objectionable because it tends to confuse juries, to render judgments uncertain, and to obliterate the distinction between special verdicts and special findings.

[1] Bixby v. Wilkinson, 27 Minn. 262, 6 N. W. 801; McNally v. Weld, 30 Minn. 209, 14 N. W. 8; Riley v. Mitchell, 36 Minn. 3, 29 N. W. 588; Coleman v. St. Paul etc. Ry. Co. 38 Minn. 260, 36 N. W. 638; Lane v. Lenfest, 40 Minn. 375, 42 N. W. 84; Reed v. Lammel, 40 Minn. 397, 42 N. W. 202; Crich v. Williamsburg etc. Ins. Co. 45 Minn. 441, 48 N. W. 198; Morrow v. St. Paul City Ry. Co. 74 Minn. 480, 77 N. W. 303; Armstrong v. Hinds, 9 Minn. 356 Gil. 341.

Motion for judgment.

§ 877. It is necessary for a party entitled to judgment notwithstanding the verdict to move for the same upon the coming in of the verdict or at least before the entry of judgment. Entry of judgment on the general verdict without objection constitutes a waiver of the right to a judgment on the special findings. Objection that the general verdict and special findings are inconsistent must be raised by motion for judgment and cannot be raised for the first time on a

Digitized by Google

motion for a new trial or on appeal.[1] If the motion is not made on the trial it must of course be made on notice or order to show cause. A motion for judgment does not prevent a subsequent motion for a new trial.[2] On the other hand a motion for judgment is not prevented by a motion for a new trial [3] or in arrest of judgment.[4]

[1] Moss v. Priest, 1 Robt. (N. Y.) 632; Bartlett v. Pittsburgh etc. Ry. Co. 94 Ind. 281; Northwestern etc. Ins. Co. v. Blankenship, 94 Ind. 535. See Newell v. Houlton, 22 Minn. 19.

[2] Stein v. Swensen, 44 Minn. 218, 46 N. W. 360.

[3] Leslie v. Merrick, 99 Ind. 180.

[4] Lemke v. Chicago etc. Ry. Co. 39 Wis. 449.

New trials.

§ 878. When there is a general verdict and special findings a motion for a new trial on the evidence should not be confined to one or more of the special findings but must always include the general verdict.[1] An order granting a new trial in such cases vacates not only the general verdict but also the special findings and the latter have no effect on the new trial.[2] Where there is no general verdict but only special findings a new trial may be ordered as to a portion of the issues.[3] Informality in findings,[4] failure of the jury to answer interrogatories,[5] inconsistency between the general verdict and special findings [6] and inconsistency between special findings [7] are not grounds for a new trial; the remedy is by motion. If the court gives erroneous instructions regarding either the general issues or the interrogatories a new trial will generally be granted.[8] The refusal of the court to compel the jury to answer immaterial questions is not a ground for a new trial.[9] If the jury return answers without a general verdict and are discharged a new trial must be granted.[10] A motion may probably be made in the alternative, that is, for judgment notwithstanding the verdict, or, if that is denied, for a new trial. There are certainly no serious objections to such practice and while not strictly logical it is so convenient that it ought to be allowed.[11] If any of the special findings are not justified by the evidence a new trial must be granted.[12]

[1] Jordan v. St. Paul etc. Ry. Co. 42 Minn. 172, 43 N. W. 849.

[2] Hollenbeck v. Marshalltown, 62 Iowa 21; Fitzpatrick v. Papa, 89 Ind. 17.

[3] Crich v. Williamsburg etc. Ins. Co. 45 Minn. 441, 48 N. W. 198.

[4] See cases under §§ 867, 873.

[5] See cases under § 873.

[6] See cases under § 875.

[7] See cases under § 873.

[8] Grover v. Bach, 82 Minn. 299, 84 N. W. 909.

[9] See cases under § 871.

[10] Pea v. Pea, 35 Ind. 387.

[11] See Hollenbeck v. Marshalltown, 62 Iowa 21; Pieart v. Chicago etc. Ry. Co. 82 Iowa 148; Grover v. Bach, 82 Minn. 299, 84 N. W. 299; Lennon v. White, 61 Minn. 150, 63 N. W. 150.

[12] Fuller v. Goodnow, 62 Minn. 163, 64 N. W. 161; Penney v. Haugan, 61 Minn. 279, 63 N. W. 728.

Digitized by Google

Appeal.

§ 879. Of course no direct appeal lies from an order refusing to submit special interrogatories. Neither does a direct appeal lie from an order denying a motion for judgment notwithstanding the verdict.[1] Such orders can only be reviewed on appeal from an order granting or denying a motion for a new trial or from the final judgment. An order refusing to submit interrogatories will not be reviewed on appeal in the absence of a record containing all the evidence.[2] On the other hand a record containing all the evidence is not essential to the review of an order made on a motion for judgment notwithstanding the verdict.[3] The special interrogatories and the answers thereto and orders made on motions for judgment notwithstanding the verdict are part of the record without a case or bill of exceptions.[4] On an appeal from an order granting a new trial on the evidence the rule of Hicks v. Stone applies as in other cases.[5]

[1] Treat v. Hiles, 75 Wis. 265. See St. Anthony Falls Bank v. Graham, 67 Minn. 318, 69 N. W. 1077; Oelschlegel v. Chicago etc. Ry. Co. 71 Minn. 50, 73 N. W. 631.

[2] Murphy v. Gould, 40 Neb. 728.

[3] Conners v. Burlington etc. Ry. Co. 71 Iowa 490.

[4] See G. S. 1894 § 5380, 5423, 6135; Frank v. Grimes, 105 Ind. 351; Cargar v. Fee, 140 Ind. 579.

[5] Elliott v. Village of Graceville, 76 Minn. 430, 79 N. W. 503; Cummings v. Taylor, 24 Minn. 429.

SUBMITTING THE CASE TO THE JURY

REQUESTS FOR INSTRUCTIONS

The statute.

§ 880. "Upon the trial of any civil action before a jury in any district or municipal court of this state, any party thereto having an interest in the result of such trial may, before the commencement of the argument to the jury, tender to the court instructions in writing, properly numbered, to be given to the jury, and require the court to indicate before the argument such as will be given, by writing opposite each the words 'given,' 'given as modified by the court,' or 'refused.' And if the court desires, it may hear argument thereon by the respective counsel before acting on the instructions tendered. And thereupon, during the argument to the jury, any instructions so indicated to be given, may be read to the jury as the law of the case; and the court shall give the same to the jury as the law when such jury is instructed by the court. And the court may of its own motion and shall upon application of either party, also before the commencement of the argument, lay before the parties any instructions properly numbered which it will give to the jury; and thereupon the same may be read by any one as the law while making an argument to the jury; provided, however, the court may give to the jury such other instructions, with those already approved, at the

Digitized by Google

close of the argument, as may be necessary to fully present the law to the jury and secure the ends of justice."

[G. S. 1894 § 5403]

§ 881. If a party waives objections to requests presented under this section and given to the jury by the court he cannot subsequently claim that they were erroneous.

Oddie v. Mendenhall, 84 Minn. 58, 86 N. W. 881.

Rule of court.

§ 882. "The points on which either party desires the jury to be instructed must be furnished in writing to the court before the argument to the jury is begun or the same may be disregarded."

[Rule 41, District Court]

Drafting requests—degree of accuracy.

§ 883. It is true that, when the court is requested to instruct the jury, it is incumbent upon the party making the request to put his proposition in clear, precise and intelligible form, so that no reasonable ground can be left for misapprehension on the part of the jury. But it is not necessary that every possible opportunity for misapprehension be anticipated.

Parson v. Lyman, 71 Minn. 34, 73 N. W. 634; Hocum v. Weitherick, 22 Minn. 152.

When requests may be refused.

§ 884. It is the duty of the court, when requested in a timely and proper manner,[1] to give in its charge any requested instruction which is correct as a proposition of law and applicable to the issues in the case, and a refusal to do so is ordinarily a ground for a new trial.[2] But the court may refuse to give a requested instruction which is not applicable to the case as made out by the evidence, however correct it may be as an abstract legal proposition;[3] or one which assumes the existence of controverted facts;[4] or one which is in part erroneous;[5] or one which is misleading, indefinite or ambiguous;[6] or one embodying no legal proposition but only a logical inference from the facts in the case;[7] or one which lays too much emphasis on particular facts;[8] or one which is argumentative;[9] or one which invites the jury to disagree;[10] or one which is inconsistent with the theory on which the case has been tried.[11]

[1] Sanborn v. School District, 12 Minn. 17 Gil. 1; Shartle v. City of Minneapolis, 17 Minn. 308 Gil. 284; Mobile Fruit & Trading Co. v. Potter, 78 Minn. 487, 81 N. W. 392.

[2] Parson v. Lyman, 71 Minn. 34, 73 N. W. 634; Taubert v. City of St. Paul, 68 Minn. 519, 71 N. W. 664; McCormick Harvesting Machine Co. v. Volkert, 81 Minn. 434, 84 N. W. 325; Squires v. Gamble, 84 Minn. 1, 86 N. W. 616.

[3] Coit v. Waples, 1 Minn. 134 Gil. 110; Sanborn v. School District, 12 Minn. 17 Gil. 1; Cowley v. Davidson, 13 Minn. 92 Gil. 86; Lake Superior etc. Ry. Co. v. Greve, 17 Minn. 322 Gil. 299; Marcotte v. Beaupre, 15 Minn. 152 Gil. 117; State v. Staley, 14 Minn. 105 Gil. 75; State v. Brown, 12 Minn. 538 Gil. 448;

Digitized by Google

Hocum v. Weitherick, 22 Minn. 152; Wilcox v. Chicago etc. Ry. Co. 24 Minn. 269; State v. Tripp, 34 Minn. 25, 24 N. W. 290; Macy v. St. Paul etc. Ry. Co. 35 Minn. 200, 28 N. W. 249; State v. Johnson, 37 Minn. 493, 35 N. W. 373; Weber v. McClure, 44 Minn. 407, 47 N. W. 150; State v. Smith, 56 Minn. 78, 57 N. W. 325; Voligny v. Stillwater Water Co. 73 Minn. 181, 75 N. W. 1132; Oftelie v. Town of Hammond, 78 Minn. 275, 80 N. W. 1123; Mittwer v. Stremel, 69 Minn. 19, 71 N. W. 698; Erickson v. Pomerank, 66 Minn. 376, 69 N. W. 39.

[4] Conehan v. Crosby, 15 Minn. 13 Gil. 1; Lake Superior etc. Ry. Co. v. Greve, 17 Minn. 322 Gil. 299; Siebert v. Leonard, 21 Minn. 442; Schwartz v. Germania Life Ins. Co. 21 Minn. 215; Starkey v. De Graff, 22 Minn. 431; Hocum v. Weitherick, 22 Minn. 152; Chandler v. De Graff, 25 Minn. 88; Jones v. Town, 26 Minn. 172, 2 N. W. 473; Simpson v. Krumdick, 28 Minn. 352, 10 N. W. 18; Faber v. St. Paul etc. Ry. Co. 29 Minn. 465, 13 N. W. 902; Burnett v. Great Northern Ry. Co. 76 Minn. 461, 79 N. W. 523.

[5] Castner v. The Dr. Franklin, 1 Minn. 73 Gil. 51; Bond v. Corbett, 2 Minn. 249 Gil. 209; Village of Mankato v. Meagher, 17 Minn. 265 Gil. 243; Simmons v. St. Paul etc. Ry. Co. 18 Minn. 184 Gil. 168; Thompson v. Great Northern Ry. Co. 79 Minn. 291, 82 N. W. 291.

[6] Shartle v. City of Minneapolis, 17 Minn. 308 Gil. 284; Egan v. Faendel, 19 Minn. 231 Gil. 191; Hocum v. Weitherick, 22 Minn. 152; Hayward v. Knapp, 23 Minn. 430; Beard v. Clarke, 38 Minn. 547, 39 N. W. 63; Olson v. Great Northern Ry. Co. 68 Minn. 155, 71 N. W. 5; Parson v. Lyman, 71 Minn. 34, 73 N. W 634; Burnett v. Great Northern Ry. Co. 76 Minn. 461, 79 N. W. 523; Watson v. Minneapolis Street Ry. Co. 53 Minn. 551, 55 N. W. 742; King v. Chicago, 77 Minn. 104, 79 N. W. 611; Johnson v. Dun, 75 Minn. 533, 78 N. W. 98.

[7] Davidson v. St Paul etc. Ry. Co. 34 Minn. 51, 24 N. W. 324; Kellogg v. Village of Janesville, 34 Minn. 132, 24 N. W. 359; Winger v. Vaale, 82 Minn. 145, 84 N. W. 659.

[8] Watson v. Minneapolis Street Ry. Co. 53 Minn. 551, 55 N. W. 742.

[9] Johnson v. Dun, 75 Minn. 533, 78 N. W. 98; Reem v. St. Paul City Ry. Co. 82 Minn. 98, 84 N. W. 652.

[10] State v. Rue, 72 Minn. 296, 75 N. W. 235.

[11] Perine v. Grand Lodge, 48 Minn. 82, 50 N. W. 1022.

Amendment of requests.

§ 885. The court may amend or qualify a request and if the instruction given is substantially as requested there is no error.[1] A party at whose request an erroneous instruction is given cannot complain of an erroneous qualification of it.[2]

[1] Dodge v. Rogers, 9 Minn. 223 Gil. 209; Blackman v. Wheaton, 13 Minn. 326 Gil. 299; Tozer v. Hershey, 15 Minn. 257 Gil. 197; Marcotte v. Beaupre, 15 Minn. 152 Gil. 117; Chandler

Digitized by Google

v. De Graff, 25 Minn. 88; Bartlett v. Hawley, 38 Minn. 308, 37 N. W. 580; Merriam v. Pine City Lumber Co. 23 Minn. 314; State v. Ryan, 78 Minn. 218, 80 N. W. 962; King v. Chicago etc. Ry. Co. 77 Minn. 104, 79 N. W. 611; Smith v. St. Paul etc. Ry. Co. 51 Minn. 86, 52 N. W. 1068.

[2] Simmons v. St. Paul etc. Ry. Co. 18 Minn. 184 Gil. 168.

Giving requests with disparaging comment.

§ 886. It is improper for the court to give a request with disparaging comment.

Horton v. Williams, 21 Minn. 187; Fitzgerald v. St. Paul etc. Ry. Co. 29 Minn. 336, 13 N. W. 168.

Requests covered by the general charge.

§ 887. The failure of the court to give special requests of counsel is no ground for a new trial if everything of substance in them is fully covered by the general charge. It is neither necessary for the court to adopt the language of the requests primarily, nor, after it has fully instructed the jury, to repeat its instructions in the language of the requests. A party is entitled to have the jury instructed fully, fairly and correctly, but he is not entitled to have them instructed in any particular language. It is therefore the general rule that error in refusing requests is cured by a correct and full general charge.

State v. McCartey, 17 Minn. 76 Gil. 54; State v. Beebe, 17 Minn. 241 Gil. 218; O'Leary v. City of Mankato, 21 Minn. 65; State v. Mims, 26 Minn. 183, 2 N. W. 494, 683; Wright v. Ames, 28 Minn. 362, 10 N. W. 21; Loucks v. Chicago etc. Ry. Co. 31 Minn. 526, 18 N. W. 651; Kolsti v. Minneapolis etc. Ry. Co. 32 Minn. 133, 19 N. W. 655; Hocum v. Weitherick, 22 Minn. 152; Ladd v. Newell, 34 Minn. 107, 24 N. W. 366; Davidson v. St. Paul etc. Ry. Co. 34 Minn. 51, 24 N. W. 324; Barbo v. Bassett, 35 Minn. 485, 29 N. W. 198; Holm v. Village of Carver, 55 Minn. 199, 56 N. W. 826; Moratzky v. Wirth, 74 Minn. 146, 76 N. W. 146; Papooshek v. Winona etc. Ry. Co. 44 Minn. 195, 46 N. W. 329; Schultz v. Bower, 64 Minn. 123, 66 N. W. 123; Shannon v. Delwer, 68 Minn. 138, 71 N. W. 14; Parsons Band Cutter etc. Co. v. Haub, 83 Minn. 180, 86 N. W. 14; Gibson v. Minneapolis etc. Ry. Co. 55 Minn. 177, 56 N. W. 686; Richardson v. Colburn, 77 Minn. 412, 80 N. W. 356, 784.

Giving requests discouraged—general charge in language of court preferable.

§ 888. "It is much better, if practicable, for a trial court, after due consideration of the requests of counsel, to charge a jury in an orderly, systematic and consecutive manner upon the whole law of the case in chief, than to confuse them, as is often done, by giving the special propositions submitted by counsel, which, though perhaps correct, present a partial, disjointed, and therefore often misleading view of the law."

Davidson v. St. Paul etc. Ry. Co. 34 Minn. 51, 24 N. W. 324. See also, Watson v. Minneapolis Street Ry. Co. 53 Minn. 551, 55

Digitized by Google

N. W. 742; Schultz v. Bower, 64 Minn. 123, 66 N. W. 139; Attix v. Minnesota Sandstone Co. 85 Minn. 142, 88 N. W. 436.

THE CHARGE

General statement.

§ 889. It is the duty of the court to present the law applicable to the case in such clear, precise and intelligible form as to leave no reasonable ground for misapprehension on the part of the jury, whose habits of thought and opportunities on the trial are not ordinarily such as to enable them readily to detect the correct meaning of a legal proposition at all obscurely or ambiguously expressed.[1] All that is required, however, is that the charge as a whole shall convey to the jury a clear and correct understanding of the law of the case. If it does this, mere verbal inaccuracies will be overlooked. A charge which is substantially correct is sufficient.[2] It is not necessary that every possible opportunity for misapprehension be anticipated and guarded against when wording a proposition.[3] If the charge, taken as a whole, fairly lays down the law of the case, the failure to state some abstract legal proposition or definition applicable thereto, in the technical language of the law, is not prejudicial error.[4] The court should not ordinarily go out of its way to refute erroneous theories of the law advanced by counsel in their argument to the jury.[5] The charge should be couched in simple, colloquial English and the use of technical terms should be studiously avoided.[6] A concrete form should be adopted so far as possible.[7] In stating rules of law it is not necessary for the court to give the reasons for them.[8] The charge must not be inconsistent[9] or argumentative,[10] or outside the issues and the evidence,[11] or ambiguous.[12] The charge should not assume the existence of facts in controversy,[13] or lay too much emphasis on particular facts,[14] or lead the jury to suppose that they might find a fact when there is no evidence which would justify such a finding,[15] or in effect withdraw from the jury issues properly determinable by them.[16] It is the duty of the court to lay down the law according to its own interpretation of it and not in accordance with the interpretation of counsel.[17] The charge should cover the whole case, including issues outside the pleadings tried by consent or without objection.[18] It is proper to give an instruction on an hypothetical statement of facts relevant to the issue where there is sufficient evidence in its support to go to the jury.[19] It is improper to give the jury the impression that they may draw inferences from facts not in evidence.[20]

[1] Hocum v. Weitherick, 22 Minn. 152; Gaffney v. St. Paul City Ry. Co. 81 Minn. 459, 84 N. W. 304.

[2] Hughley v. City of Wabasha, 69 Minn. 245, 72 N. W. 78; Cannon v. Moody, 78 Minn. 68, 80 N. W. 842; Brakken v. Minneapolis etc. Ry. Co. 31 Minn. 45, 16 N. W. 45.

[3] Parson v. Lyman, 71 Minn. 34, 73 N. W. 634; Gates v. Manny, 14 Minn. 21 Gil. 13; Brakken v. Minneapolis etc. Ry. Co. 31 Minn. 45, 16 N. W. 45.

Digitized by Google

[4] Kostuch v. St. Paul City Ry. Co. 78 Minn. 459, 81 N. W. 215.
[5] Johnson v. Walsh, 83 Minn. 74, 85 N. W. 910.
[6] Chappell v. Allen, 38 Mo. 213.
[7] Gaffney v. St. Paul City Ry. Co. 81 Minn. 459, 84 N. W. 304; Gorstz v. Pinske, 82 Minn. 456, 85 N. W. 215.
[8] State v. Johnson, 37 Minn. 493, 35 N. W. 373.
[9] See § 1121.
[10] See § 884.
[11] Id.
[12] See § 1119.
[13] Smith v. Dukes, 5 Minn. 373 Gil. 301. See § 893.
[14] Watson v. Minneapolis etc. Ry. Co. 53 Minn. 551, 55 N. W. 742.
[15] Rugland v. Tollefsen, 53 Minn. 267, 55 N. W. 123.
[16] Wilkinson v. City of Crookston, 75 Minn. 184, 77 N. W. 797.
[18] Fitzgerald v. St. Paul etc. Ry. Co. 29 Minn. 336, 13 N. W. 168.
[19] Chandler v. De Graff, 25 Minn. 88.
[20] Hughes v. Meehan, 81 Minn. 482, 84 N. W. 331.

Defining the issues.

§ 890. The court should always include in its charge a concise statement of the issues.[1] It is objectionable practice to refer the jury to the pleadings instead of making such a statement.[2] It is important that the court should distinctly refer to issues outside the pleadings tried by consent or without objection.[3]

[1] Burns v. Oliphant, 78 Iowa 456.
[2] Myer v. Moon, 45 Kans. 580; Wilbur v. Stoepel, 82 Mich. 344.
[3] See Qualy v. Johnson, 80 Minn. 408, 83 N. W. 393.

Reviewing the evidence.

§ 891. It is purely discretionary with the trial court to review the evidence in its charge. Neither party can require a review of his evidence.[1] An intelligent analysis and review of the testimony by the presiding judge is eminently proper to aid the jury in their investigation of the truth, provided their independence and responsibility, subject to the law given them, are in no way interfered with. It is proper for the court to state to the jury that certain evidence is material, or that it tends to prove certain facts, or to comment upon the evidence, when it is done fairly and the jury are fully advised of their duty and responsibility in the premises.[2]

[1] Lowe v. Minneapolis Street Ry. Co. 37 Minn. 283, 34 N. W. 33; Watson v. Minneapolis Street Ry. Co. 53 Minn. 551, 55 N. W. 742.
[2] State v. Rose, 47 Minn. 47, 49 N. W. 404. See McArthur v. Craigie, 22 Minn. 351; Haug v. Haugan, 51 Minn. 558, 53 N. W. 874; Eich v. Taylor, 17 Minn. 172 Gil. 145; Hillestad v. Hostetter, 46 Minn. 393, 49 N. W. 192; O'Connor v. Chicago etc. Ry. Co. 27 Minn. 166, 6 N. W. 481; Witzka v. Moudry, 83 Minn. 78, 85 N. W. 911.

Expressing an opinion on the issues.

§ 892. As a general rule the court should refrain from expressing an opinion in its charge upon the questions of fact which it is the

Digitized by Google

duty and peculiar province of the jury to determine. Ordinarily the expression of such an opinion in a civil case is not a ground for a new trial.[1] If a party fears undue influence on the jury in such a case he should request the court to charge them that they are the exclusive judges of the issues of fact.[2] Any expression of strong feeling should be studiously avoided.[3]

[1] First Nat. Bank v. Holan, 63 Minn. 525, 65 N. W. 952; Ames v. Cannon River Mfg. Co., 27 Minn. 245, 6 N. W. 787; McArthur v. Craigie, 22 Minn. 351; Wass v. Atwater, 33 Minn. 83, 22 N. W. 8; Alden v. City of Minneapolis, 24 Minn. 254. See the following cases under the statute repealed in 1866: Caldwell v. Kennison, 4 Minn. 47 Gil. 23; Derby v. Gallup, 5 Minn. 119 Gil. 85; Smith v. Dukes, 5 Minn. 373 Gil. 301.

[2] Ames v. Cannon River Mfg. Co., 27 Minn. 245, 6 N. W. 787.

[3] Goodhue Farmers' Warehouse Co. v. Davis, 81 Minn. 210, 83 N. W. 531.

§ 893. In charging a jury, the assumption by the court of the existence of a fact which is so clearly apparent, from the evidence, as to furnish no reasonable ground for dispute, affords no ground for a new trial.

Alden v. City of Minneapolis, 24 Minn. 254.

Proper charge as to credibility of witnesses.

§ 894. It is proper for the court to instruct the jury as to the weight to be given to the testimony of witnesses in the following language: You are the sole judges of the truthfulness of the witnesses and of the weight which is to be given to their testimony;[1] you are not to accept the testimony of witnesses passively and follow it blindly but it is your duty to consider it with care, subject it to the scrutiny of your judgment and experience and accept it only so far as it seems to you to be reasonable and true;[2] while it is your duty to accept as true the uncontradicted testimony of an unimpeached witness given with apparent candor and truthfulness and unopposed by circumstances impairing its credibility,[3] still, you are not bound to accept the testimony of a witness as true merely because there is no direct testimony contradicting it, if it contains improbabilities and contradictions which alone, or in connection with other facts and circumstances in evidence, furnish a reasonable ground for concluding that it is false;[4] if you believe from the evidence that any witness has knowingly and wilfully testified falsely as to any material fact in the case you may disregard his entire testimony except so far as it is corroborated by other credible evidence, but you are the sole judges of the credibility of such a witness and you may believe or disbelieve his testimony as to other facts according as you deem it worthy or unworthy of belief;[5] you may take into consideration the interest of the witnesses in the result of the action,[6] their relationship to the parties,[7] their appearance on the stand, the manner in which they gave their testimony and all facts and circumstances shown on the trial tending to their credit or discredit;[8] it is not your duty to count the number of witnesses and render a ver-

Digitized by Google

dict in accordance with the majority of them, but to weigh the evidence and render a verdict accordingly;[9] in weighing the testimony of experts you should consider their professional knowledge and experience, freedom from bias and the reasons they are able to give for their conclusions;[10] where it is shown that the reputation of a witness for truth is bad his evidence is not necessarily destroyed, but is to be considered under all the circumstances described in the evidence and given such weight as you believe it entitled to and you may disregard it altogether if you believe it entitled to no weight.[11]

[1] See § 665.

[2] Schwartz v. Germania Life Ins. Co. 21 Minn. 215; Johnson v. Hillstrom, 37 Minn. 122, 33 N. W. 547.

[3] Cantlon v. Eastern Ry. Co., 45 Minn. 481, 48 N. W. 22; Daly v. Chicago etc. Ry. Co. 43 Minn. 319, 45 N. W. 611; Second Nat. Bank v. Donald, 56 Minn. 491, 58 N. W. 269; Grover v. Bach, 82 Minn. 299, 84 N. W. 909; Hawkins v. Sauby, 48 Minn. 69, 50 N. W. 1015.

[4] Schwartz v. Germania Life Ins. Co. 21 Minn. 215; Klason v. Rieger, 22 Minn. 59; Hawkins v. Sauby, 48 Minn. 69, 50 N. W. 1015; Karsen v. Milwaukee etc. Ry. Co. 29 Minn. 12, 11 N. W. 122; Anderson v. Liljengren, 50 Minn. 3, 52 N. W. 219; Lang v. Ferrant, 55 Minn. 415, 57 N. W. 417; Kennedy v. McQuaid, 56 Minn. 450, 58 N. W. 35; Thompson v. Pioneer-Press Co. 37 Minn. 285, 33 N. W. 856.

[5] State v. Henderson, 72 Minn. 74, 74 N. W. 1014; Schuck v. Hagar, 24 Minn. 339; State v. McCartey, 17 Minn. 76 Gil. 54.

[6] Harriott v. Holmes, 77 Minn. 245, 79 N. W. 1003.

[7] State v. Hogard, 12 Minn. 293 Gil. 191. (The court may say "should" instead of "may.")

[8] State v. Hoy, 83 Minn. 286, 86 N. W. 98.

[9] State v. Nestaval, 72 Minn. 415, 75 N. W. 725.

[10] Bennison v. Walbank, 38 Minn. 313, 37 N. W. 447. Further than stated in the text the nature of instructions regarding expert testimony must vary with the particular case. See Moratzky v. Worth, 74 Minn. 146, 76 N. W. 1032. See Dunnell, Minn. Trial Book, §§ 1201–1203.

[11] Higgins v. Wren, 79 Minn. 462, 82 N. W. 859.

§ 895. It is improper for the court to single out particular witnesses and charge as to their credibility and if it does so the error is not cured by a general instruction that the jury are the sole judges of the credibility of the witnesses.

Harriott v. Holmes, 77 Minn. 245, 79 N. W. 1003; State v. Nestaval, 72 Minn. 415, 75 N. W. 725; Goodhue Farmers' Warehouse Co. v. Davis, 81 Minn. 210, 83 N. W. 531; State v. Hoy, 83 Minn. 286, 86 N. W. 98. But see State v. Borgstrom, 69 Minn. 508, 72 N. W. 799, 975; Schmitt v. Murray, 91 N. W. 1116.

Cautionary instructions.

§ 896. When evidence is admitted for a specific purpose and is not applicable to the main issues, as, for example, impeaching tes-

Digitized by Google

timony, the court should instruct the jury accordingly.[1] It is proper for the court to caution a jury against giving way to their sympathies[2] or their prejudices against corporations.[3] It is proper to caution the jury with respect to verbal admissions that they should be accepted with great caution.[4]

[1] Lundberg v. N. W. Elevator Co. 42 Minn. 37, 43 N. W. 685; Rosted v. Great Northern Ry. Co. 76 Minn. 123, 78 N. W. 971.

[2] Bingham v. Bernard, 36 Minn. 114, 30 N. W. 404.

[3] Minnesota Valley Ry. Co. v. Doran, 17 Minn. 188 Gil. 162.

[4] Tozer v. Hershey, 15 Minn. 257 Gil. 197.

Instructions as to the burden of proof.

§ 897. It is proper for the court to instruct the jury as to which party has the burden of proof and that he must prove his cause of action or defence by a preponderance of the evidence. And the court is bound to do so in a proper case if requested.[1] Burden of proof as here used means the burden of establishing the cause of action or defence.[2] We apprehend that it is never necessary for the court to instruct with reference to the burden of going on with the evidence. Where the evidence conclusively proves a fact it is not error for the court to refuse to charge upon which party the burden of proof originally rested.[3]

[1] Trainor v. Worman, 33 Minn. 484, 24 N. W. 297 (the minority confused the two senses of the term). See Hocum v. Weitherick, 22 Minn. 152.

[2] See § 805.

[3] In re Yetter's Estate, 55 Minn. 452, 57 N. W. 147.

Objections and exceptions to the charge.

§ 898. It is no longer necessary to take an exception to an erroneous charge in order to take advantage of the error on motion for a new trial or on appeal.[1] But it is still necessary to object to indefiniteness although it is not necessary to except if the objection is overruled.[2] And it is still no doubt necessary to object to an omission in a charge. It is the general rule that a mere omission to charge on a particular point is not error in the absence of a request from counsel.[3] If the party made a written request before the argument exactly covering the point it is of course not now necessary to object or except to the failure of the court to embody or cover it in the charge. But if no such request was made it is no doubt still necessary for counsel to point out specifically the omission and offer to the court a properly framed written instruction covering the point. If the court refuses to give the instruction it is not now necessary to except. It is important to distinguish between a non-direction and a misdirection. The court is bound to correct a misdirection upon its attention being called to it and counsel is not called upon to offer a correct instruction. An objection to an instruction, to be availing, must be specific. Counsel must put his finger on the error. The decisions under the former practice are still applicable in so far as objections are now necessary.[4] When it is apparent that the trial court may have misunderstood the evidence, or that it might admit

Digitized by Google

of different constructions, and an instruction to the jury is based upon the view of the court, a general objection to such instruction is insufficient. The party claiming to be prejudiced should point particularly to the alleged inaccuracy and either ask for a modification of the charge or request an additional instruction to meet his own view.[5] Where there are several parties and the charge is good as to some and bad as to others a joint objection is unavailing.[6] When the error is not one of mere verbal inaccuracy or incompleteness of statement it is not ordinarily necessary for the objector to explain to the court the reasons why the charge is erroneous.[7] The office of an objection to a charge is to call the attention of the court to an error so that it may be then and there corrected.[8] The court cannot relieve parties from the necessity of making their objections specific.[9] The rule requiring the objection to be specific is enforced more strictly on appeal than on a motion for a new trial.[10] All objections to the charge must be made before the jury retire.[11]

[1] Laws 1901, ch. 113.

[2] Steinbauer v. Stone, 85 Minn. 274, 88 N. W. 754; Torske v. Com. Lumber Co. (Minn.) 90 N. W. 532; State v. Lewis (Minn.) 90 N. W. 318; Applebee v. Perry, (Minn.) 91 N. W. 893.

[3] See § 1120; Applebee v. Perry, (Minn.) 91 N. W. 893.

[4] See Shull v. Raymond, 23 Minn. 66; Witzka v. Moudry, 83 Minn. 78, 85 N. W. 911; State v. Veek, 80 Minn. 221, 83 N. W. 141; Main v. Olen, 47 Minn. 89, 49 N. W. 523; Peterson v. Western Union Tel. Co. 72 Minn. 41, 74 N. W. 1022; Finance Co. v. Old Pittsburgh Coal Co. 65 Minn. 442, 68 N. W. 70; Dallemand v. Janney, 51 Minn. 514, 53 N. W. 803; Elmborg v. St. Paul City Ry. Co. 51 Minn. 70, 52 N. W. 969; Hillestad v. Hostetter, 46 Minn. 393, 49 N. W. 192; State v. Miller, 45 Minn. 521, 48 N. W. 401; Bishop v. St. Paul City Ry. Co. 48 Minn. 26, 50 N. W. 927; Lund v. Anderson, 42 Minn. 201, 44 N. W. 6; In re Nelson's Will, 39 Minn. 204, 39 N. W. 143; Russell v. St. Paul etc. Ry. Co. 33 Minn. 210, 22 N. W. 379; Rheiner v. Stillwater etc. Co. 31 Minn. 193, 17 N. W. 279; Ferson v. Wilcox, 19 Minn. 449 Gil. 388; Simmons v. St. Paul etc. Ry. Co. 18 Minn. 184 Gil. 168; Shartle v. City of Minneapolis, 17 Minn. 308 Gil. 284; Baldwin v. Blanchard, 15 Minn. 489 Gil. 403; State v. Staley, 14 Minn. 105 Gil. 75; Foster v. Berkey, 8 Minn. 351, Gil. 310; Castner v. The Dr. Franklin, 1 Minn. 73 Gil. 51; Judson v. Reardon, 16 Minn. 431 Gil. 387; Schurmeier, 10 Minn. 319 Gil. 250; Dodge v. Chandler, 9 Minn. 97 Gil. 87; Cole v. Curtis, 16 Minn. 182 Gil. 161; Gardner v. Kellogg, 23 Minn. 463; O'Connor v. Chicago etc. Ry. Co. 27 Minn. 166, 6 N. W. 481; State v. Hair, 37 Minn. 351, 34 N. W. 893; Carlson v. Dow, 47 Minn. 335, 50 N. W. 232; Columbia Mill Co. v. Nat. Bank of Commerce, 52 Minn. 224, 53 N. W. 1061.

[5] Witzka v. Moudry, 83 Minn. 78, 85 N. W. 911.

[6] Cole v. Curtis, 16 Minn. 182 Gil. 161.

[7] Peterson v. Western Union Tel. Co. 72 Minn. 41, 74 N. W. 1022.

[8] Shell v. Raymond, 23 Minn. 67.

Digitized by Google

[9] Columbia Mill Co. v. Nat. Bank of Commerce, 52 Minn. 224, 53 N. W. 1061.

[10] Castner v. The Dr. Franklin, 1 Minn. 81 Gil. 91.

[11] Rule 41, District Court. Barker v. Todd, 37 Minn. 370, 34 N. W. 895.

Giving additional instructions in absence of counsel.

§ 899. If the jury, after retiring, come into court and request further instructions they may be given in the absence of counsel. "The trial of a case is not concluded until a verdict has been recorded or the jury discharged. It is the duty of parties and counsel to remain in or be represented at the court during its sessions until the trial is ended. And it is no part of the duty of the court to send after parties or counsel who have absented themselves from the court-room before the trial of their cause is concluded. When a jury returns into court for further instructions, it is customary to send for counsel and to wait a reasonable time for their arrival, and it is desirable that this be done when practicable; but this is a matter of courtesy and not of right."

Hudson v. Minneapolis etc. Ry. Co. 44 Minn. 52, 46 N. W. 314; Reilly v. Bader, 46 Minn. 212, 48 N. W. 909; Coit v. Waples, 1 Minn. 134 Gil. 110.

Directing jury to name fellow servant causing injury.

§ 900. "In any action where a verdict is hereafter rendered awarding damages on account of the negligence of a co-employe or co-employes, fellow servant or fellow servants of the injured party, the court, upon the request of either party, made before the case is submitted to the jury, shall direct the jury to name, and it shall be their duty to name in their verdict such co-employe or co-employes, fellow servant or fellow servants, if the evidence shall disclose their name or names; and if the evidence does not disclose the name or names, then such co-employe or co-employes, fellow servant or fellow servants, shall be designated by words of description, having reference to class of service, nature of employment or otherwise, so as to identify them as far as possible under the evidence. Provided, further, that this act shall not apply to cases where the name or description of such person or persons is not disclosed by the evidence."[1] When the jury name an employe under this statute such finding excludes, by necessary implication, the negligence of every other employe, and, if the evidence fails to support the negligence of the employe named judgment for the defendant is required under Laws 1895 ch. 324.[2]

[1] Laws 1895 ch. 324.

[2] Crane v. Chicago etc. Ry. Co. 83 Minn. 278, 86 N. W. 328.

By what judge.

§ 901. The charge must be delivered in person by the judge who tried the case. He cannot write out his charge and have it read to the jury even by another judge of the same district.

Rossman v. Moffett, 75 Minn. 289, 77 N. W. 960.

Digitized by Google

Allowing jury to take papers to jury-room.

§ 902. "Upon retiring for deliberation, the jury may take with them all papers (except depositions) which have been received as evidence in the cause, or copies of such parts of public records or private documents, given in evidence as ought not, in the opinion of the court, to be taken from the person having them in possession; and they may also take with them notes of the testimony, or other proceedings on the trial, taken by themselves or any of them, but none taken by any other person."[1] It is discretionary with the court to allow the jury to take the pleadings to the jury-room,[2] but it is a discretion which should rarely be exercised.

[1] G. S. 1894 § 5375 (in full); Coit v. Waples, 1 Minn. 134 Gil. 110 (depositions taken in by consent).

[2] Brazil v. Moran, 8 Minn. 236 Gil. 205.

KEEPING JURY OUT—URGING TO AGREE

General statement.

§ 903. The length of time which a jury shall be kept together with a view to agreement is in the discretion of the trial court.[1] The court may properly urge an agreement in the following language: Gentlemen, the jury-room is no place for pride of opinion or for espousing and maintaining, in the spirit of controversy, either side of a cause; the single object to be there effected is to arrive at a true verdict and this can only be done by deliberation, mutual concession, and a due deference to the opinions of each other; you should consider that the case must at some time be decided, that you are selected in the same manner and from the same source, from which[1] any future jury must be selected and that there is no reason to suppose that the case will ever be submitted to twelve men more intelligent, more impartial, or more competent to decide it, or that more or clearer evidence will be produced on the one side or the other; although the verdict to which a juror agrees must of course be his own verdict, the result of his own convictions, and not a mere acquiescence in the conclusions of his fellows, yet, in order to bring twelve minds to a unanimous result, you must examine the questions submitted to you with candor, and with a proper regard and deference to the opinions of each other;[2] although no juror is required to sacrifice conscientious convictions, the fact that a juror finds his judgment opposed to the judgment of a great majority of the jury ought to induce him, as a reasonable man, so far to doubt the correctness of his own views as to weigh carefully the opinions of his associates, and the arguments and reasons upon which they are founded and if, upon due consideration, he is convinced that they are probably right and he is in error it is his duty to agree with them;[3] you should consider the time, labor and expense of this trial and the time, labor and expense which another trial would entail;[4] it is therefore your duty, gentlemen, to make all reasonable efforts to reach an agreement.[5]

Digitized by Google

[1] Coit v. Waples, 1 Minn. 134 Gil. 110; Rollins v. Nolting, 53 Minn. 232, 54 N. W. 1118; Watson v. Minneapolis Street Ry. Co. 53 Minn. 551, 55 N. W. 742.
[2] Com. v. Tuey, 8 Cush. (Mass.) 1.
[3] Ahearn v. Mann, 60 N. H. 472; Com. v. Tuey, 8 Cush. (Mass.) 1; Gibson v. Minneapolis etc. Ry. Co. 55 Minn. 177, 56 N. W. 686. See Peterson v. Village of Cokato, 84 Minn. 205, 87 N. W. 615.
[4] Watson v. Minneapolis Street Ry. Co. 53 Minn. 551, 55 N. W. 742.
[5] Id.; McNulty v. Stewart, 12 Minn. 434 Gil. 319.

THE VERDICT

The statute.

§ 904. "The verdict of a jury is either general or special. A general verdict is that by which they pronounce generally upon all or any of the issues, either in favor of the plaintiff or defendant. A special verdict is that by which the jury find the facts only, leaving the judgment to the court; it shall present the conclusions of fact, as established by the evidence, and not the evidence to prove them; and those conclusions of fact shall be so presented as that nothing remains to the court, but to draw from them conclusions of law."

[G. S. 1894 § 5379] This is substantially identical with the statutes of Cal., Kans., Iowa, Wash. and the other code states.

Definition.

§ 905. A verdict is the decision of a petit jury upon an issue of fact submitted to them.

Jones v. King, 30 Minn. 368, 15 N. W. 670.

Effect of verdict as determining rights.

§ 906. As a general rule a verdict does not determine the rights of the parties.[1] It does not operate as an estoppel until it has passed into judgment.[2] But a verdict gives the successful party a property right which is assignable.[3]

[1] Craig v. Dunn, 58 Minn. 59, 49 N. W. 396; Hunt v. Conrad, 47 Minn. 557, 50 N. W. 614; St. Paul etc. Ry. Co. v. Matthews, 16 Minn. 341 Gil. 303.
[2] Schurmeier v. Johnson, 10 Minn. 319 Gil. 250; Child v. Morgan, 51 Minn. 116, 52 N. W. 1127.
[3] Kent v. Chapel, 67 Minn. 420, 70 N. W. 2.

GENERAL VERDICTS

Nature.

§ 907. A general verdict embraces both the law and the facts. It states the result of the whole controversy. It determines the ultimate rights of the parties. It combines the decisions of the court with the opinions of the jury. True, the jury receive the law in the instructions of the court, but they apply the law to the facts, and, having combined the two, declare the result. So that under such

Digitized by Google

a verdict they really perform two functions: that of finding the facts, and then that of applying the law to those facts. A special verdict on the other hand, finds only the facts, and leaves to the court the duty both of determining the law and of applying it to the facts.

Brewer, J., First Nat. Bank v. Peck, 8 Kans. 660. See Cummings v. Taylor, 21 Minn. 366.

§ 908. A statement in the record that on the trial counsel appeared "for the defendants" will be presumed to mean for all the defendants and in such case a general verdict for the defendants must be construed as one in favor of all of them.

Adamson v. Sundby, 51 Minn. 460, 53 N. W. 761.

Must cover all the issues.

§ 909. A verdict must cover all the issues made by the pleadings.[1] But this need not be done in terms, as a verdict in general form is presumed to cover all the issues.[2]

[1] Meighen v. Strong, 6 Minn. 177 Gil. 111; Jones v. King, 30 Minn. 368, 15 N. W. 670; State v. Currie, 72 Minn. 403, 75 N. W. 742.

[2] Goltz v. Winona etc. Ry. Co. 22 Minn. 55; Eklund v. Martin, 92 N. W. 406.

Must be confined to issues.

§ 910. A verdict must be confined to the issues made by the pleadings.[1] An unauthorized finding of costs may be treated as surplusage and rejected.[2]

[1] Moriarty v. McDevitt, 46 Minn. 136, 48 N. W. 684; Jones v. King, 30 Minn. 368, 15 N. W 670.

[2] Coit v. Waples, 1 Minn. 134 Gil. 110.

Definiteness—informality.

§ 911. A verdict must be certain, positive, and free from all ambiguity or obscurity.[1] It is not sufficiently certain when it cannot be made certain by reference to the record.[2] But verdicts must be reasonably construed with reference to the pleadings and the record. However informal or indefinite a verdict is sufficient if the finding of the matter in issue may be clearly ascertained by reference to the pleadings and the record.[3] In the construction of a verdict resort cannot be had to the evidence.[4] The verdict as recorded must govern.[5]

[1] State v. Coon, 18 Minn. 518 Gil. 464; Moriarty v. McDevitt, 46 Minn. 136, 48 N. W. 684; Fryberger v. Carney, 26 Minn. 84, 1 N. W. 807; Cummings v. Taylor, 21 Minn. 366; Manny v. Griswold, 21 Minn. 506.

[2] Moriarty v. McDevitt, 46 Minn. 136, 48 N. W. 684.

[3] Leftwich v. Day, 32 Minn. 512, 21 N. W. 731; Jones v. King, 30 Minn. 368, 15 N. W. 670; Desnoyer v. McDonald, 4 Minn. 512 Gil. 402; Coit v. Waples, 1 Minn. 134 Gil. 110; Red River etc. Ry. Co. v. Sture, 32 Minn. 95, 20 N. W. 229; Adamson v. Sundby, 51 Minn. 460, 53 N. W. 761; Hanson v. Bean, 51 Minn. 546, 53 N. W. 871; State v. Framness, 42 Minn. 490, 45 N. W. 1098; St. Paul etc. Ry. Co. v. Matthews, 16 Minn. 341 Gil. 303;

Digitized by Google

State v. Ryan, 13 Minn. 370 Gil. 343; Bilansky v. State, 3 Minn. 427 Gil. 313; State v. Eno, 8 Minn. 220 Gil. 190.

[4] Jones v. King, 30 Minn. 368, 15 N. W. 670.

[5] Leftwich v. Day, 32 Minn. 512, 21 N. W. 731.

When jury must assess amount of recovery.

§ 912. "When a verdict is found for the plaintiff in an action for the recovery of money, or for the defendant when a counterclaim for the recovery of money is established beyond the amount of the plaintiff's claim as established, the jury shall also assess the amount of the recovery."

[G. S. 1894 § 5382.] Substantially identical statutes are to be found in N. Y., Wis., Iowa, Kans., Cal., Ind., Or., Wash., Mont., Colo., N. D. and the other code states.

§ 913. In cases where the amount of plaintiff's recovery is in issue, or where, as in actions in tort, the damages are unliquidated, an assessment by the jury is essential.[1] It is not essential where no assessment is necessary in order to determine the amount of plaintiff's recovery, because the amount, if he recover at all, is not in issue, but depends wholly upon the construction of the pleadings, and involves a pure question of law over which the jury have no control.[2] Where the action is for a definite sum which the plaintiff is entitled to recover as a matter of law if he is entitled to recover at all an assessment by the jury is not indispensable.[3] Where the amount is determinable by mathematical calculation from data included in the verdict and pleadings the calculation may be made by the clerk or court and judgment entered accordingly.[4] It is the duty of the jury to figure interest due and include it in their assessment of the amount due.[5] A verdict for a certain amount "with interest" is rarely sufficient.[6] But where the verdict is for a specified amount with interest from a specified date it is sufficient and the court or clerk may compute the interest accordingly.[7] This statute is applicable to special verdicts in jury cases.[8] In an action for trespass in which treble damages are assessable the court may instruct the jury to assess the actual damage and render their verdict for treble that amount; or it may instruct them to return the single damage, and the fact whether the trespass was wilful or involuntary, and the court may then treble the damage so found.[9] A general verdict is presumed to include all the damages to which the successful party is entitled.[10] Under this section it is not only the province but the duty of a jury to find the amount of the recovery, as well as plaintiff's right to recover, and the findings upon both questions, after the verdict is received and the jury are discharged, are binding upon the court, unless the verdict is set aside in some manner provided by law. When, therefore, a verdict has been returned by a jury which expresses their intention, and they have been discharged, the court is powerless to amend it however erroneous it may be. It must either order a judgment thereon or set it aside and grant a new trial.[11] The rule is otherwise in the case of a directed verdict.[12]

[1] Jones v. King, 30 Minn. 368, 15 N. W. 670; Fiore v. Ladd, 29 Or. 528; Parks v. Turner, 12 How. (U. S.) 39.

Digitized by Google

[2] Jones v. King, 30 Minn. 368, 15 N. W. 670; Redmond v. Weismann, 77 Cal. 423; Bulkley v. Marks, 15 Abb. Pr. (N. Y.) 454; English v. Goodman, 3 N. D. 129; Josephi v. Mady Clothing Co. 13 Mont. 195.
[3] Hodgkins v. Mead, 119 N. Y. 166.
[4] Knight v. Fisher, 15 Colo. 176; Fletcher v. Nelson, 6 N. D. 94; Fromme v. Jones, 13 Iowa, 474.
[5] Mills v. Mills, 39 Kans. 455; Watson v. Damon, 54 Cal. 278; Fiore v. Ladd, 29 Or. 528. See Thoreson v. Minneapolis Harvester Works, 29 Minn. 341, 13 N. W. 156.
[6] Lashua v. Markham, 21 R. I. 492; Meeker v. Gardella, 1 Wash. 139.
[7] Mills v. Mills, 39 Kans. 455; Hattenback v. Hoskins, 12 Iowa 109; Gaff v. Hutchinson, 38 Ind. 341.
[8] Wainright v. Burroughs, 1 Ind. App. 393.
[9] Tait v. Thomas, 22 Minn. 537.
[10] Id.
[11] Fiore v. Ladd, 29 Or. 528; Gaither v. Wilmer, 71 Md. 361. See Thoreson v. Minneapolis Harvester Works, 29 Minn. 341, 13 N. W. 156.
[12] Mouat v. Wells, 76 Minn. 438, 79 N. W. 499.

§ 914. From the mere fact that the jury assessed the plaintiff's damages at a specified sum "plus" another specified sum, the latter being the amount demanded in the complaint for special damages, it is not to be conclusively presumed that this was awarded as special damages.[1] The jury cannot assess special damages not pleaded,[2] unless the evidence in proof thereof is introduced without objection.[3] They cannot exceed the amount demanded in the complaint.[4] If the jury bring in a verdict in which the damages are not assessed or are improperly assessed it is the right and the duty of the court to send them out again under proper instructions.[5] The subject of improper methods of arriving at an assessment [6] and of assessment in particular actions will be found considered elsewhere.[7]

[1] Bishop v. St. Paul City Ry. Co. 48 Minn. 26, 50 N. W. 927.
[2] See Dunnell, Minn. Pl. § 365.
[3] Isaacson v. Minneapolis etc. Ry. Co. 27 Minn. 463, 8 N. W. 600; Thoreson v. Minneapolis Harvester Works, 29 Minn. 341, 13 N. W. 156; Qualy v. Johnson, 80 Minn. 408, 83 N. W. 393.
[4] See § 1241.
[5] Aldrich v. Grand Rapids Cycle Co., 61 Minn. 531, 63 N. W. 1115; Clark v. Lude, 63 Hun (N. Y.) 363; High v. Johnson, 28 Wis. 72.
[6] See § 1009.
[7] See Dunnell, Minn. Pl. § 836 (claim and delivery); § 887 (ejectment); § 1129 (conversion).

§ 915. In actions for wilful tort against several parties joint or entire damages must be assessed. Each party is liable for all the damages. The jury should estimate the damages against all guilty defendants according to the amount which they think the most cul-

Digitized by Google

pable should pay; but where a jury have improperly apportioned and severed such damages between defendants the plaintiff may cure the irregularity by entering a nolle prosequi as to all but one, taking judgment against him only.

Warren v. Westrup, 44 Minn. 237, 46 N. W. 347.

SPECIAL VERDICTS

Definition.

§ 916. Our statute gives a definition of a special verdict.[1] It is necessary, however, to discriminate between special verdicts in actions of a legal nature and special verdicts in actions of an equitable nature.[2] A special verdict in an action of a legal nature is a finding of all the issuable facts in a cause by the jury, with a conditional conclusion that, if upon such facts the law is for the plaintiff, then they find for the plaintiff; if for the defendant, then they find for the defendant.[3] A special verdict in an equitable action is a finding by the jury of such of the issuable facts in a cause as are submitted to them by the court and unlike a special verdict in an action of a legal nature does not necessarily embrace all of the facts in issue and is without a conditional conclusion. Generally it embraces but a portion of the issues. The distinction between special verdicts and special findings is pointed out elsewhere.[4]

[1] See § 904.
[2] See Schmitt v. Schmitt, 31 Minn. 106, 16 N. W. 543.
[3] Mumford v. Wardwell, 6 Wall. (U. S.) 423.
[4] See § 865.

Must cover all issues to authorize judgment.

§ 917. To authorize a judgment a special verdict, whether in an action of a legal or equitable nature, must find all the facts which are requisite to enable the court to say, upon the pleadings and verdict and without looking into the evidence, which party is entitled to judgment; and such facts should be found so clearly and unequivocally as not to leave them to be made out by argument or inference.[1] The same rule applies to special findings in response to interrogatories.[2] The effect of a failure to cover all the issues in a special verdict depends upon whether the action is of a legal or equitable nature.[3]

[1] Pint v. Bauer, 31 Minn. 4, 16 N. W. 425; Lane v. Lenfest, 40 Minn. 375, 42 N. W. 84; Crich v. Williamsburg etc. Ins. Co. 45 Minn. 441, 48 N. W. 198; Bahnsen v. Gilbert, 55 Minn. 334, 56 N. W. 1117; Meighen v. Strong, 6 Minn. 177 Gil. 111; Cobb v. Cole, 44 Minn. 278, 46 N. W. 364; State v. Currie, 72 Minn. 403, 75 N. W. 742.
[2] See § 876.
[3] See § 918.

Effect of failure to cover all the issues.

§ 918. The effect of a failure in a special verdict to cover all the issues depends upon whether the action is tried by the court or jury;

Digitized by Google

or, speaking generally, whether the action is of a legal or equitable nature. On the coming in of a special verdict in an action of a legal nature—where the whole cause has been submitted to the jury—the court cannot order judgment thereon unless all the issues are passed upon by the jury. The court cannot, as in an action of an equitable nature, make findings upon the issues not covered by the special verdict and then order judgment on both findings and verdict.[1] The court should see to it that a special verdict in such cases covers all the issues, and if it does not, send the jury out to complete it. If the jury bring in a special verdict which does not cover all the issues and they are thereupon discharged it is a mistrial and a new trial must be granted. The new trial may be limited to the issues not covered.[2] In actions tried by the court, that is, in actions of an equitable nature, on the coming in of a special verdict which does not cover all the issues the court may find on all the issues not covered by the special verdict and order judgment on its findings and the special verdict.[3] This distinction in practice rests on the fact that in the former case the whole cause is submitted to the jury and in the latter the court retains the cause for its determination.[4] The failure of the court to make findings on issues not covered by the special verdict is not a ground for a new trial of the whole cause.[5] The remedy is a motion to the court to make the necessary findings.

[1] Crich v. Williamsburg etc. Ins. Co. 45 Minn. 441, 48 N. W. 198. See Williams v. Schembri, 44 Minn. 250, 46 N. W. 403; Woodling v. Knickerbocker, 31 Minn. 268, 17 N. W. 387.

[2] Schmitt v. Schmitt, 31 Minn. 106, 16 N. W. 543.

[3] Piper v. Packer, 20 Minn. 274 Gil. 245; Sumner v. Jones, 27 Minn. 312, 7 N. W. 265; Schmitt v. Schmitt, 31 Minn. 106, 16 N. W. 543.

[4] See Schmitt v. Schmitt, 31 Minn. 106, 16 N. W. 543.

[5] Cobb v. Cole, 44 Minn. 278, 46 N. W. 364; Id. 51 Minn. 48, 52 N. W. 985.

Preparation of special verdicts in jury cases.

§ 919. It is the duty of counsel for both parties to prepare forms for a special verdict in a jury case such as they respectively believe to be justified under the pleadings and evidence and submit them to the court for approval. The two forms, with any corrections that the court may have deemed proper to make, are then submitted to the jury with proper alternative instructions.

Special verdict how far optional with jury.

§ 920. Our statute provides that "in every action for the recovery of money only, or specific real property, the jury, in their discretion, may render a general or special verdict."[1] This provision has been emasculated by judicial decision. It has been held—upon reasoning not at all satisfactory—that it is discretionary with the court to permit or refuse to permit a jury to return a special verdict in such cases.[2]

[1] G. S. 1894 § 5380.

Digitized by Google

[2] Morrow v. St. Paul City Ry. Co. 74 Minn. 480, 77 N. W. 303. See Riley v. Mitchell, 36 Minn. 3, 29 N. W. 588.

RECEIVING THE VERDICT

Court always open to receive verdict.

§ 921. It is provided by statute that "while the jury are absent, the court may adjourn from time to time, in respect to other business; but it is, nevertheless, to be deemed open for every purpose connected with the cause submitted to the jury, until a verdict is rendered or the jury discharged. A final adjournment of the court discharges the jury." [1] A verdict may be received on Sunday and the jury discharged but judgment should not be entered or sentence pronounced.[2] It would undoubtedly be held under our statute that the court may discharge a jury on Sunday for inability to agree.[3] A verdict may be received on a legal holiday and the jury discharged.[4]

[1] G. S. 1894 § 5376.

[2] G. S. 1894 § 4841; Ball v. United States, 140 U. S. 118; Stone v. United States, 167 U. S. 178; Sorenson v. Swenson, 55 Minn. 58, 56 N. W. 350.

[3] See Ex parte Tice, 32 Or. 179.

[4] See State v. Sorenson, 32 Minn. 118, 19 N. W. 738.

Presence of counsel and parties unnecessary.

§ 922. In a civil case our rules of court provide that "it shall not be necessary to call either party, or that either party be present or represented when the jury returns to the bar to deliver their verdict." [1] In an early case it was held that if the court adjourns while the jury are out the judge cannot, in the absence of the parties, receive the verdict till the court meets.[2] This case, however, has apparently been overruled.[3]

[1] Rule 42, District Court.

[2] Kennedy v. Raught, 6 Minn. 235 Gil. 155.

[3] Reilly v. Bader, 46 Minn. 212, 48 N. W. 909. See also, Hudson v. Minneapolis etc. Ry. Co. 44 Minn. 52, 46 N. W. 314.

In open court—presence of judge.

§ 923. The verdict must always be rendered in open court in the presence of all the jury and this is none the less true when a sealed verdict has been directed. In case of a sealed verdict the jury deliver it to the judge, clerk or such person as may be agreed upon; they are not discharged but only permitted to separate and in all cases assemble to render the verdict.[1] A verdict should not be received and entered by the clerk in the absence of the judge.[2]

[1] Kennedy v. Raught, 6 Minn. 235 Gil. 155.

[2] Bedal v. Spurr, 33 Minn. 207, 22 N. W. 390.

Practice on coming in of verdict.

§ 924. The prevailing practice in this state, on the coming in of the verdict, varies somewhat from statutory requirements. The fore-

Digitized by Google

man hands the verdict to the clerk who in turn hands it unopened to the judge. The judge examines the verdict to see if it "is such as the court may receive." If it is informal, indefinite or illegal the court then and there corrects it in the presence of the jury and with their consent or sends them out with instructions to perfect it. If it "is such as the court may receive," the judge, without reading it aloud, hands it to the clerk who immediately says to the jury "Gentlemen of the jury, you will listen to the reading of your verdict as the same will be recorded." And after reading it, "Gentlemen, is that your verdict?"

See State v. Levy, 24 Minn. 362.

Polling the jury.

§ 925. "When a verdict is rendered, and before it is recorded, the jury may be polled, on the request of either party, for which purpose each juror must be asked whether it is his verdict; if any one answers in the negative, the jury shall be sent out for further deliberation. If the verdict is informal or insufficient, it may be corrected by the jury under the advice of the court, or the jury may be again sent out."

[G. S. 1894 § 5377]

§ 926. The right to poll a jury is not affected by an agreement that the jury may return a sealed verdict. After a verdict is recorded neither party has a right to poll the jury.[1] A jury cannot be polled before they have rendered their verdict for the purpose of ascertaining how they stand.[2] The court may poll the jury on its own motion.[3] If a poll is not requested at the proper time the right is waived.[4] The question asked the juror must be that given in the statute and nothing more.[5] A juror cannot be asked to explain a verdict [6] or give the reasons for his assent or dissent.[7] The verdict must stand and the jury be discharged unless the dissent of the juror is unequivocal.[8] The right to poll does not exist in case of a directed verdict.[9]

[1] Steele v. Etheridge, 15 Minn. 501 Gil. 413.
[2] Aldrich v. Grand Rapids Cycle Co. 61 Minn. 531, 63 N. W. 1115; Cross v. North Carolina, 132 U. S. 131.
[3] Harris v. State, 31 Ark. 196.
[4] Hommer v. State, 85 Md. 562.
[5] Lobar v. Koplin, 4 N. Y. 547.
[6] Id.
[7] Poulson v. Collier, 18 Mo. App. 583; Mitchell v. Parks, 26 Ind. 354; Anderson v. Green, 46 Ga. 361.
[8] Wyley v. Bull, 41 Kans. 206; Mitchell v. Parks, 26 Ind. 354; Farrell v. Hennesy, 21 Wis. 632; Rankin v. Harper, 23 Mo. 579; Hill v. State, 64 Ga. 453.
[9] Kinser v. Calumet Fire Clay Co. 165 Ill. 505.

Sending jury back to correct verdict.

§ 927. It is the right and duty of the trial court to send the jury back to correct an informal, indefinite or illegal verdict to the end that a verdict may be rendered which will sustain a judgment.[1] A trifling error of form or calculation is frequently made by the court

Digitized by Google

in the presence of the jury and with their consent.[2] It is said to be the duty of the court to mould the verdict into form where the intention of the jury appears.[3] Our statute provides that "if the verdict is informal or insufficient, it may be corrected by the jury under the advice of the court, or the jury may be again sent out."[4] A jury may be sent out to correct a sealed verdict.[5] If a party is entitled to a certain sum if he is entitled to anything and the jury bring in a verdict for a less amount they may be sent back with instructions that they must find for the proper sum, if at all.[6] If a party is entitled to substantial damages, if any, and the jury bring in nominal damages they may be sent back under proper instructions.[7] A jury cannot be sent back for further consideration simply because the court regards their verdict as contrary to the evidence.[8] The right of the jury to change or correct their verdict and of the court to send them out for correction does not expire until the jury are discharged; the mere entry of the verdict in the minutes does not terminate the right.[9] After the verdict is recorded and the jury discharged the verdict cannot be amended or impeached by the jury[10] and can be amended by the court only as to matters of form.[11] The verdict as recorded is conclusive on appeal.[12]

[1] Jaspers v. Lano, 17 Minn. 296 Gil. 273; Nininger v. Knox, 8 Minn. 140 Gil. 110; Tarbox v. Gotzian, 20 Minn. 139 Gil. 122; Aldrich v. Grand Rapids Cycle Co. 61 Minn. 531, 63 N. W. 1115; State v. Clementson, 69 Wis. 628; Brown v. Dean, 123 Mass. 255.

[2] Nininger v. Knox, 8 Minn. 140 Gil. 110; Osgood v. McConnell, 32 Ill. 74; Lincoln v. Cambria Iron Co. 103 U. S. 412.

[3] Moriarty v. McDevitt, 46 Minn. 136, 48 N. W. 684.

[4] G. S. 1894 § 5377.

[5] See § 928.

[6] Hatch v. Attrill, 118 N. Y. 383.

[7] State v. Clementson, 69 Wis. 628; Rogan v. Mullins, 22 N. Y. App. Div. 117.

[8] See State v. Baldwin, 14 S. C. 135. Aldrich v. Grand Rapids Cycle Co. 61 Minn. 531, 63 N. W. 1115, is not to be taken as authority to the contrary. The court cannot impose its opinion of questions of fact on the jury by compelling them to go out and reconsider their verdict.

[9] Rogan v. Mullins, 22 N. Y. App. Div. 117; Warner v. N. Y. Central Ry. Co. 52 N. Y. 437. See Jaspers v. Lano, 17 Minn. 296 Gil. 273; Tarbox v. Gotzian, 20 Minn. 139 Gil. 122.

[10] Dana v. Farrington, 4 Minn. 433 Gil. 335; Steele v. Etheridge, 15 Minn. 501 Gil. 413; Stevens v. Montgomery, 27 Minn. 108, 6 N. W. 456.

[11] See § 1345.

[12] Seeman v. Feeney, 19 Minn. 79 Gil. 54.

Sealed verdict.

§ 928. It is common practice for the court, with consent of counsel, to instruct the jury that in case of an agreement during an ad-

Digitized by Google

journment of the court they may seal their verdict and deliver it to the clerk or officer in charge and then separate for the night to appear in court the following morning for the purpose of rendering their verdict.[1] According to the better view, the court may do this in a civil action without the consent of counsel.[2] In a criminal action the consent of counsel is essential.[3] If a jury return a sealed verdict without authority objection must be made at once or it is deemed waived.[4] A sealed verdict must be rendered in open court in the presence of all the jury.[5] The right to poll the jury exists in the case of a sealed verdict.[6] A sealed verdict is no more binding than an oral one. At any time before it is "rendered" in open court it may be nullified by the dissent of a single juror.[7] Merely formal defects in a sealed verdict may be corrected by the court in the presence of the jury and with their consent or the jury may be sent out to make the correction themselves.[8] They cannot be sent out for further deliberation where it appears that no verdict was in fact agreed upon before separation.[9] If, upon the coming in of a sealed verdict, one of the jurors dissents unequivocally on matters of substance it has been held that the court cannot send the jury out for further consideration but must grant a new trial.[10]

[1] Kennedy v. Raught, 6 Minn. 235 Gil. 155; Steele v. Etheridge, 15 Minn. 501 Gil. 413; Nininger v. Knox, 8 Minn. 140 Gil. 110; Tarbox v. Gotzian, 20 Minn. 139 Gil. 122.

[2] Green v. Bliss, 12 How. Pr. (N. Y.) 428; Kramer v. Kister, 187 Pa. St. 227.

[3] State v. Anderson, 41 Minn. 104, 42 N. W. 786.

[4] Loudy v. Clarke, 45 Minn. 477, 48 N. W. 25.

[5] Kennedy v. Raught, 6 Minn. 235 Gil. 155; Warner v. N. Y. Central Ry. Co. 52 N. Y. 437.

[6] Steele v. Etheridge, 15 Minn. 501 Gil. 413.

[7] Root v. Sherwood, 6 Johns. (N. Y.) 68. See Aetna Ins. Co. v. Grube, 6 Minn. 82 Gil. 32.

[8] Nininger v. Knox, 8 Minn. 140 Gil. 110; Tarbox v. Gotzian, 20 Minn. 139 Gil. 122; Loudy v. Clarke, 45 Minn. 477, 48 N. W. 25. See Hatch v. Attrill, 118 N. Y. 383; Warner v. N. Y. Central Ry. Co. 52 N. Y. 437; Brown v. Dean, 123 Mass. 254.

[9] White v. Martin, 3 Ill. 69; Oliver v. Springfield First Presb. Church, 5 Cow. (N. Y.) 284.

[10] Kramer v. Kister, 187 Pa. St. 227. See Nininger v. Knox, 8 Minn. 140 Gil. 110; Aetna Ins. Co. v. Grube, 6 Minn. 82 Gil. 32.

Recording the verdict—statute.

§ 929. "When the verdict is given, and is such as the court may receive, the clerk shall immediately record it in full in the minutes, and read it to the jury, and inquire of them whether it is their verdict; if any juror disagrees, the fact shall be entered in the minutes, and the jury again sent out; but if no disagreement is expressed, the verdict is complete, and the jury shall be discharged from the case."

[G. S. 1894 § 5378]

Digitized by Google

§ 930. Except on a direct application for an amendment of the record the verdict as recorded by the clerk must be taken as the verdict of the jury and the one to which they assented.[1] But the clerk may at any time and without notice correct his own clerical mistakes in transcribing the verdict.[2] Practically the verdict is "complete" when the jury assent to it, on its being read to them by the clerk, and they are discharged.[3] In practice, as stated elsewhere,[4] the verdict is not in fact recorded until after the jury are discharged, but it is nevertheless "complete" in the sense of being beyond change or impeachment by the jury when they are discharged.[5] It has frequently been held that after the verdict is "recorded" and the jury discharged, the verdict cannot be impeached.[6]

[1] Leftwich v. Day, 32 Minn. 512, 21 N. W. 731.
[2] Smith v. Coe, 7 Robt. (N. Y.) 477.
[3] Warner v. N. Y. Central Ry. Co. 52 N. Y. 437; Tarbox v. Gotzian, 20 Minn. 139 Gil. 122.
[4] See § 924.
[5] See Warner v. N. Y. Central Ry. Co. 52 N. Y. 437.
[6] Steele v. Etheridge, 15 Minn. 501 Gil. 413; Stevens v. Montgomery, 27 Minn. 108, 6 N. W. 456; Dana v. Farrington, 4 Minn. 433 Gil. 335.

Entries on receiving verdict—order reserving case—stay—statute.

§ 931. "Upon receiving a verdict, an entry shall be made in the minutes of the court, specifying the time and place of trial, the names of the jurors and witnesses, the verdict, and either the judgment to be rendered thereon, or an order that the case be reserved for argument or further consideration;[1] or the judge trying the cause may, in his discretion, and upon such terms[2] as shall be just, stay the entry of judgment and further proceedings, until the hearing and final decision of a motion for a new trial,[3] or in arrest of judgment, or for judgment notwithstanding the verdict, or to set aside the verdict, or dismiss the action."

[G. S. 1894 § 5384]

[1] Newell v. Houlton, 22 Minn. 19.
[2] Dennis v. Nelson, 55 Minn. 144, 56 N. W. 589; Graves v. Backus, 69 Minn. 532, 72 N. W. 811.
[3] Kimball v. Palmerlee, 29 Minn. 302, 13 N. W. 129.

§ 932. It is provided in another section of the statutes that "no order to stay proceedings for a longer time than twenty days shall be made, except upon notice to the adverse party."[1] This limitation is construed to apply only to an ex parte application made to the court at chambers in cases where the stay is not made and entered as a part of the final decision therein.[2] The court has a general discretionary power to stay all proceedings in a cause.[3] A stay does not oust the jurisdiction of the court, although proceedings in disregard of a stay are error or irregularity.[4] There can be no stay except by express order of the court. A notice of a motion for a new trial does not constitute per se a stay of proceedings and does not prevent the entry of judgment; if it is desired to stay the entry of judgment,

Digitized by Google

the party moving must obtain an order to that effect from the judge. The party in whose favor the verdict is rendered can proceed at once and enter his judgment, if he is willing to waive his costs, and can enter it in two days after verdict, by giving his adversary the regular notice of taxation of costs.[5]

[1] G. S. 1894 § 5227.
[2] State v. Searle, 81 Minn. 467, 84 N. W. 324.
[3] Briggs v. Shea, 48 Minn. 218, 50 N. W. 1037.
[4] Briggs v. Shea, 48 Minn. 218, 50 N. W. 1037.
[5] Eaton v. Caldwell, 3 Minn. 134 Gil. 80. See § 1213.

Remedy for defects appearing on face of verdict.

§ 933. The objection that a verdict is informal, indefinite, irresponsive or fails to find on all the issues is not waived if not taken before the jury are discharged but may be raised by motion to set aside;[1] by motion for a new trial;[2] or for the first time on appeal from the judgment.[3] Defects of a merely formal nature, however will generally be disregarded if the objection is first raised on appeal.[4]

[1] Moriarty v. McDevitt, 46 Minn. 136, 48 N. W. 684; State v. Currie, 72 Minn. 403, 75 N. W. 742.
[2] Cummings v. Taylor, 21 Minn. 366; Meighen v. Strong, 6 Minn. 177 Gil. 111.
[3] Fryberger v. Carney, 26 Minn. 84, 1 N. W. 807; Leftwich v. Day, 32 Minn. 512, 21 N. W. 731.
[4] See § 1857.

Digitized by Google

CHAPTER XI

MOTION IN ARREST OF JUDGMENT

General statement.

§ 934. After verdict and any time before judgment is entered an unsuccessful defendant may move in arrest of judgment on the ground that there is some error appearing on the face of the record and not waived on the trial which vitiates the proceedings. The evidence is no part of the record for this purpose. Probably the only objections that can be raised on such a motion in this state are want of jurisdiction over the subject matter of the action and failure of the complaint to state a cause of action.[1] Upon such a motion the complaint is liberally construed and every reasonable doubt resolved in favor of its sufficiency. Defects that would be fatal on demurrer are not necessarily so on a motion in arrest of judgment.[2] A good cause of action may have been made out by the evidence and in such a case, if the evidence was admitted without objection that it was inadmissible under the pleadings, the court would allow an amendment to conform to the proof.[3] Again, the complaint may have been aided by the answer[4] or verdict.[5]

[1] Wentworth v. Wentworth, 2 Minn. 277 Gil. 238; Lee v. Emory, 10 Minn. 187 Gil. 151; Smith v. Dennett, 15 Minn. 81 Gil. 59; Gould, Pl. ch. 10; Noyes v. Parker, 64 Vt. 379; Van Stone v. Stillwell etc. Mfg. Co. 142 U. S. 135.

[2] Lee v. Emery, 10 Minn. 187 Gil. 151; Smith v. Dennett, 15 Minn. 81 Gil. 59.

[3] Dunnell, Minn. Pl. § 727.

[4] Id. § 746.

[5] Id. § 750.

Digitized by Google

CHAPTER XII

JUDGMENT NOTWITHSTANDING THE VERDICT

I UNDER LAWS 1895 CH. 320

The statute.

§ 935. "In all cases where at the close of the testimony in the case tried a motion is made by either party to the suit requesting the trial court to direct a verdict in favor of the party making such motion, which motion was denied, the trial court on motion made that judgment be entered notwithstanding the verdict, or on motion for a new trial, shall order judgment to be entered in favor of the party who was entitled to have verdict directed in his or its favor; and the supreme court of the state on appeal from an order granting or denying a motion for a new trial in the action in which such motion was made may order and direct judgment to be entered in favor of the party who was entitled to have such verdict directed in his or its favor whenever it shall appear from the testimony that the party was entitled to have such motion granted."

[Laws 1895 ch. 320]

When judgment should be ordered.

§ 936. Judgment should not be ordered under the statute unless it clearly appears from the whole evidence that the cause of action or defence sought to be established does not, in point of substance, constitute a legal cause of action or a legal defence.[1] It is not alone sufficient to authorize such a judgment that the evidence was such that the trial court, in its discretion, ought to have granted a new trial.[2] If there is some evidence reasonably tending to prove a good cause of action or defence judgment cannot be ordered under the statute.[3] Where it appears probable that a party has a good cause of action or defence and that deficiencies of proof might be remedied on another trial judgment should not be ordered.[4] If it is unreasonable to suppose that fatal deficiencies of proof might be remedied on another trial judgment should be ordered.[5] The objection that an answer does not state a defence may be raised on a motion under the statute after a verdict for the defendant.[6]

[1] Cruikshank v. St. Paul etc. Ins. Co. 75 Minn. 266, 77 N. W. 958; Marquardt v. Hubner, 77 Minn. 442, 80 N. W. 617; McKibbin v. Great Northern Ry. Co. 78 Minn. 232, 80 N. W. 1052; Kreatz v. St. Cloud School District, 79 Minn. 14, 81 N. W. 533; Fohl v. Common Council, 80 Minn. 67, 82 N. W. 1097; Brennan Lumber Co. v. Great Northern Ry. Co. 80 Minn. 205, 83 N. W. 137; Jones v. Chicago etc. Ry. Co. 80 Minn. 488, 83 N. W. 446; Baxter v. Covenant Mut. Life Assoc. 81 Minn. 1, 83 N. W. 459; Bragg v. Chicago etc. Ry. Co. 81 Minn. 130, 83 N. W. 511; Sours v. Great Northern Ry. Co. 81 Minn.

Digitized by Google

337, 84 N. W. 114; Greengard v. St. Paul City Ry. Co. 72 Minn. 181, 75 N. W. 221; Fohl v. Chicago etc. Ry. Co. 84 Minn. 314, 87 N. W. 919; Kurstelska v. Jackson, 84 Minn. 415, 87 N. W. 1015; Marengo v. Great Northern Ry. Co. 84 Minn. 397, 87 N. W. 1117; Martin v. Courtney, 81 Minn. 112, 83 N. W. 503; Kreuzer v. Great Northern Ry. Co. 83 Minn. 385, 86 N. W. 413; Lindem v. Northern Pac. Ry. Co. 85 Minn. 391, 89 N. W. 64.

[2] Marquardt v. Hubner, 77 Minn. 442, 80 N. W. 617.

[3] Bragg v. Chicago etc. Ry. Co. 81 Minn. 130, 83 N. W. 511.

[4] Cruikshank v. St. Paul etc. Ins. Co. 75 Minn. 266, 77 N. W. 958; Kreatz v. St. Cloud School District, 79 Minn. 14, 81 N. W. 533; Fohl v. Common Council, 80 Minn. 67, 82 N. W. 1097; Brennan Lumber Co. v. Great Northern Ry. Co. 80 Minn. 205, 83 N. W. 137; Kurstelska v. Jackson, 84 Minn. 415, 87 N. W. 1015; Marengo v. Great Northern Ry. Co. 84 Minn. 397, 87 N. W. 1117; Baxter v. Covenant etc. Assoc. 81 Minn. 1, 83 N. W. 459.

[5] Brennan Lumber Co. v. Great Northern Ry. Co. 80 Minn. 205, 83 N. W. 137; Baxter v. Covenant Mutual Life Assoc. 81 Minn. 1, 83 N. W. 459; Swenson v. Erlandson (Minn.) 90 N. W. 534. See Plano Mfg. Co. v. Richards (Minn.) 90 N. W. 120.

[6] Plano Mfg. Co. v. Richards (Minn.) 90 N. W. 120.

Criticism of Cruikshank case.

§ 937. The practice under this statute will never be placed on a clear and rational basis until the Cruikshank case [1] is overruled. That case is fundamentally wrong in its assumption that the legislature, in enacting this statute, intended merely to extend the common law practice of rendering a judgment non obstante veredicto. If such was the intention why was a motion on the trial for a directed verdict made essential? The intention of the legislature was to enable a court after verdict to correct its error in denying a motion on the trial for a directed verdict, by the simple remedy of ordering a judgment instead of a new trial.[2] Consequently the test whether the court should order judgment under the statute is simply whether it ought to have granted the motion for a directed verdict on the trial. The grounds for directing a verdict are well understood by the profession and are stated elsewhere.[3] Instead of this simple test we are treated to an exhibition of legal obscurantism and told that judgment should not be ordered unless it clearly appears from the whole evidence that the cause of action or defence sought to be established does not, in point of substance, constitute a legal cause of action or defence. The ambiguous phrase "in point of substance" would have delighted the heart of a mediæval scholastic.

[1] Cruikshank v. St. Paul etc. Ins. Co. 75 Minn. 266, 77 N. W. 958.

[2] Kernan v. St. Paul City Ry. Co. 64 Minn. 312, 67 N. W. 71, proceeds upon this theory of the statute.

[3] See § 855.

Digitized by Google

Motion for directed verdict necessary.

§ 938. A party is not entitled to a judgment under the statute unless, at the close of the testimony, he made a motion to direct a verdict in his favor.[1] On appeal it must be made to appear affirmatively in the settled case that such a motion was made on the trial; it cannot be made to appear by affidavit or a recital in the order for judgment.[2]

[1] Hemstad v. Hall, 64 Minn. 136, 66 N. W. 366; Netzer v. City of Crookston, 66 Minn. 355, 68 N. W. 1099; Sayer v. Harris Produce Co. 84 Minn. 216, 87 N. W. 617.

[2] Hemstad v. Hall, 64 Minn. 136, 66 N. W. 366.

Motion for judgment.

§ 939. A party is not entitled to a judgment under the statute unless, after verdict, he specifically moves for it. The court cannot grant such relief on a mere motion for a new trial.[1] A party may make his motion in the alternative; that is, for judgment notwithstanding the verdict, or, in case that is denied, for a new trial.[2] A party must state in his notice of motion that he will ask for a judgment in his favor and this notice must appear in the record on appeal. A mere recital in the order for judgment is insufficient.[3]

[1] Kernan v. St. Paul City Ry. Co. 64 Minn. 312, 67 N. W. 71; Crane v Knauf, 65 Minn. 447, 68 N. W. 79; Netzer v. City of Crookston, 66 Minn. 355, 68 N. W. 1099.

[2] Netzer v. City of Crookston, 66 Minn. 355, 68 N. W. 1099; St. Anthony Falls Bank v. Graham, 67 Minn. 318, 69 N. W. 1077.

[3] Netzer v. City of Crookston, 66 Minn. 355, 68 N. W. 1099.

Must not infringe right to jury trial.

§ 940. The statute is not an unconstitutional infringement of the right of trial by jury.[1] But it must be construed and applied so as not to invade that right.[2]

[1] Kernan v. St. Paul City Ry. Co. 64 Minn. 312, 67 N. W. 71.

[2] Marengo v. Great Northern Ry. Co. 84 Minn. 397, 87 N. W. 1117 and cases cited.

Inapplicable to trial by court.

§ 941. The statute is inapplicable to an action tried by the court without a jury.

Hughes v. Meehan, 84 Minn. 226, 87 N. W. 768.

Appealability of order on motion.

§ 942. An order granting or denying a motion under the statute for judgment is not, standing alone, appealable.[1] "If the party moving for judgment notwithstanding the verdict does not desire a new trial, but to stand upon the record, he should move for judgment without asking for the alternative relief of a new trial. Then, if either party wishes to review the order made on such motion, he can have judgment entered in accordance with the order,—that is, on the verdict or notwithstanding it,—and appeal from the judgment, and have the order reviewed as an intermediate one affecting the merits. But if the defeated party is unwilling to stand or fall

Digitized by Google

on his claim to a judgment in his favor upon the record as a matter of strict legal right, he may blend his motion for judgment with one for a new trial. If his motion is wholly denied, he may appeal from the order, and review the action of the trial court upon either or both of the alternative motions so united.[2] If any part of his motion is granted, the adverse party may appeal from the order disposing of the motion."[3] Where, however, the trial court grants the alternative request of the moving party for a new trial and denies the balance of the motion, he cannot, after securing a new trial, appeal only from so much of the order as denied his alternative motion for judgment, leaving the order for a new trial in full force.[4] But in such a case he may appeal from the order as a whole and have reviewed that part of the order denying his motion for judgment.[5]

[1] St. Anthony Falls Bank v. Graham, 67 Minn. 318, 69 N. W. 1077; Oelschlegel v. Chicago etc. Ry. Co. 71 Minn. 50, 73 N. W. 631; Savings Bank of St. Paul v. St. Paul Plow Co. 76 Minn. 7, 78 N. W. 873.

[2] Kernan v. St. Paul etc. Ry. Co. 64 Minn. 312, 67 N. W. 71.

[3] St. Anthony Falls Bank v. Graham, 67 Minn. 318, 69 N. W. 1077.

[4] Id.

[5] Katz v. Winona etc. Ry. Co. 76 Minn. 351, 79 N. W. 310.

Disposition of case on appeal.

§ 943. Where the motion is made in the alternative, that is, for a judgment notwithstanding the verdict or for a new trial and the trial court orders judgment improperly the supreme court on appeal may remand the case with leave to the defeated party to renew his motion for a new trial if his first motion was not passed upon.[1] Where a party makes a motion for a judgment notwithstanding the verdict but does not also move for a new trial he waives his right to the latter remedy. Consequently the supreme court on appeal in such cases either orders judgment for the opposite party[2] or sustains the judgment.[3] It does not grant a new trial.

[1] Kreatz v. St. Cloud School District, 79 Minn. 14, 81 N. W. 533; Fohl v. Common Council, 80 Minn. 67, 82 N. W. 1097; Id. 84 Minn. 314, 87 N. W. 919.

[2] Marquardt v. Hubner, 77 Minn. 442, 80 N. W. 617; Bragg v. Chicago etc. Ry. Co. 81 Minn. 130, 83 N. W. 511.

[3] Cruikshank v. St. Paul etc. Ins. Co. 75 Minn. 266, 77 N. W. 958.

Scope of review on appeal from judgment.

§ 944. On an appeal from a judgment ordered by the court notwithstanding a verdict any action of the trial court in admitting or rejecting evidence and assigned as error by appellant may be reviewed. As regards appeal such a judgment stands on the same footing as a judgment entered upon a verdict.

De Blois v. Great Northern Ry. Co. 71 Minn. 45, 73 N. W. 637.

Digitized by Google

II AT COMMON LAW

General statement.

§ 945. When the answer distinctly admits the facts set up in the complaint but pleads matters in avoidance which are found true by the jury and a verdict accordingly rendered for the defendant the court on motion will order a judgment for the plaintiff non obstante veredicto if such matters in avoidance are insufficient in law to defeat plaintiff's cause of action. The answer, being bad in law, cannot be rendered effectual by a verdict which merely finds it to be true in point of fact.[1] In this state the strict common law rule prevails and the motion can only be made by the plaintiff.[2] The motion must be made before entry of judgment.[3] The motion is never granted for any formal defects in the pleadings,[4] but only on the merits and for defects of substance appearing on the face of the record without reference to the evidence.[5] In this state, in addition to the common law judgment non obstante, we have such a judgment by statute when special findings are inconsistent with the general verdict [6] and when a motion on the trial for a directed verdict is erroneously denied.[7]

[1] Williams v. Anderson, 9 Minn. 50 Gil. 39; Lough v. Bragg, 18 Minn. 121 Gil. 106; Lough v. Thornton, 17 Minn. 253 Gil. 230; Gaffney v. St. Paul etc. Ry. Co. 38 Minn. 111, 35 N. W. 728; Wentworth v. Wentworth, 2 Minn. 277 Gil. 238; Cruikshank v. St. Paul etc. Ins. Co. 75 Minn. 266, 77 N. W. 958; Plano Mfg. Co. v. Richards (Minn.) 90 N. W. 120; Dewey v. Humphrey, 5 Pick. (Mass.) 187; Roberts v. Dame, 11 N. H. 226; Moye v. Petway, 76 N. C. 327; Berry v. Borden, 7 Blackf. (Ind.) 384; Lewis v. Clement, 3 B. & Ald. 702; Rex v. Philips, 1 Strange 394; Atkinson v. Davies, 11 M. & W. 236; Down v. Hatcher, 10 A. & E. 121.

[2] Id. See also, German Ins. Co. v. Frederick, 58 Fed. 144; Sheehy v. Duffy, 89 Wis. 6; Bradshaw v. Hedge, 10 Iowa 402.

[3] State v. Commercial Bank, 6 S. & M. (Miss.) 218.

[4] Lough v. Thornton, 17 Minn. 253 Gil. 230; Lough v. Bragg, 18 Minn. 121 Gil. 106.

[5] Cruikshank v. St. Paul etc. Ins. Co. 75 Minn. 266, 77 N. W. 958.

[6] See § 875.

[7] See § 935.

Digitized by Google

CHAPTER XIII

NEW TRIALS

GENERAL PRINCIPLES

Definitions.

§ 946. A new trial is a retrial of an issue of fact in the same court.

Dodge v. Bell, 37 Minn. 382, 34 N. W. 739; Fergus Printing & Publishing Co. v. Board County Com'rs, 60 Minn. 212, 62 N. W. 272.

§ 947. At common law a new trial is a retrial of issues of fact as distinguished from issues of law and our statute regulating new trials does not authorize a new trial merely for the retrial of an issue of law.[1] Still, it is held that on a motion for a new trial the court may correct or modify its conclusions of law on the ground that they are not justified by the findings of fact.[2]

[1] Dodge v. Bell, 37 Minn. 382, 34 N. W. 739; Fergus Printing & Publishing Co. v. Board County Com'rs, 60 Minn. 212, 62 N. W. 272.

[2] See § 534.

Power inherent in district court.

§ 948. The district courts have inherent power to grant new trials. The statute relating to new trials is a regulation rather than a grant of power.[1] It has been held by a divided court that in civil actions the power of the district courts to grant new trials is limited to the grounds specified and prescribed by the statute.[2] On the other hand the broad rule has been laid down that it is discretionary with the trial court to grant a new trial on the ground that on the evidence substantial justice has not been done and that an appellate court will interfere only in case of an abuse of discretion.[3] The trial court may grant a new trial on its own motion.[4]

[1] McNamara v. Minnesota Central Ry. Co. 12 Minn. 388 Gil. 269; Bank of Willmar v. Lawler, 78 Minn. 135, 80 N. W. 868.

[2] Valerius v. Richard, 59 Minn. 443, 59 N. W. 534.

[3] State v. Shevlin-Carpenter Co. 66 Minn. 217, 68 N. W. 973; Gray v. Minnesota Tribune, 81 Minn. 333, 84 N. W. 113.

[4] Bank of Willmar v. Lawler, 78 Minn. 135, 80 N. W. 868.

Statute applicable to both legal and equitable actions.

§ 949. Our statute regulating new trials is applicable to all actions, whether of a legal or equitable nature. The statute was designed to supersede the methods of the old practice and to provide a single mode of securing a new trial regardless of the nature of the action. The bills of review, supplemental bills in the nature of bills of review and supplemental bills of the old chancery practice

Digitized by Google

are all superseded. These methods of relief in chancery cases, though well adapted to promote correct results, were cumbrous and onerous and relief after a judgment at law was obtained only by methods similarly burdensome. The policy of the code of practice is to simplify the proceedings through which the ends of justice may be reached and the remedy by motion in the original action has taken the place of all others. A reargument is unauthorized.

Sheffield v. Mullin, 28 Minn. 251, 9 N. W. 756; Marvin v. Dutcher, 26 Minn. 391, 4 N. W. 685; Ashton v. Thompson, 28 Minn. 330, 9 N. W. 876; Volmer v. Stagerman, 25 Minn. 234, 244.

Motion for new trial matter of right.

§ 950. The right to move for a new trial is absolute. It is not a matter of discretion with the court whether it will entertain such a motion or not. A party has the same right to have his motion for a new trial heard and duly considered as he has to institute or defend an action.[1] It is the duty of the court to exercise a deliberate judgment on the motion and an order denying a new trial obviously made pro forma cannot be made the basis of an appeal.[2] And when a cause is remanded from the supreme court without prejudice to the right to move again for a new trial the moving party is entitled to have his motion heard and determined by the trial court uninfluenced, so far as discretion is concerned, by anything said by the supreme court.[3]

[1] McCord v. Knowlton, 76 Minn. 391, 79 N. W. 397.

[2] Johnson v. Howard, 25 Minn. 558.

[3] Fohl v. Chicago etc. Ry. Co. 84 Minn. 314, 87 N. W. 919.

Legislature cannot grant.

§ 951. When an action or other judicial proceeding has been tried, and a decision rendered, the legislature cannot, by an act subsequently passed grant a new trial.

State v. Flint, 61 Minn. 539, 63 N. W. 1113.

Necessity of motion to secure review on appeal.

§ 952. Ordinarily the primary object of a motion for a new trial is to secure a correction of errors without incurring the expense, delay and inconvenience of appealing to the supreme court.[1] When the trial is by jury it is usually necessary to move for a new trial in order to secure a full review on appeal [2] and this is often the sole object of the motion, it being perfectly well understood that the motion will be denied.

[1] Chittenden v. German American Bank, 27 Minn. 143, 6 N. W. 773.

[2] See § 953.

§ 953. Where the trial is by jury it is usually necessary to move for a new trial in order to question on appeal the sufficiency of the evidence to justify the verdict.[1] This is true where a part of the issues are submitted to the jury in an action of an equitable nature.[2] But where the court rules upon the sufficiency of the evidence on a motion for a directed verdict at the close of the testimony, the

Digitized by Google

sufficiency of the evidence to justify the verdict may be reviewed on appeal from the judgment although no motion for a new trial was made.[3] A motion for a new trial is necessary in order to raise the objection on appeal that the damages are excessive.[4]

[1] Kelly v. Rogers, 21 Minn. 146; Byrne v. Minneapolis etc. Ry. Co. 29 Minn. 200, 12 N. W. 698; Barker v. Todd, 37 Minn. 370, 34 N. W. 895; Barringer v. Stoltz, 39 Minn. 63, 38 N. W. 808; Lund v. Anderson, 42 Minn. 201, 44 N. W. 6; Spencer v. St. Paul etc. Ry. Co. 22 Minn. 29; Wampach v. St. Paul etc. Ry. Co. 22 Minn. 34.

[2] Jordan v. Humphrey, 31 Minn. 495, 18 N. W. 450.

[3] Hefferen v. Northern Pacific Ry. Co. 45 Minn. 471, 48 N. W. 1, 526.

[4] Severns v. Brainard, 61 Minn. 265, 63 N. W. 477.

§ 954. When an action is tried by the court without a jury a party may move for a new trial and from the order made on his motion appeal to the supreme court.[1] This is not necessary, however, in order to secure a full review on appeal. Contrary to the rule in nearly every jurisdiction in this country it is held in this state that when the trial is by the court without a jury it is not necessary to move for a new trial in order to question on appeal the sufficiency of the evidence to justify the findings.[2]

[1] Chittenden v. German American Bank, 27 Minn. 143, 6 N. W. 773; Ashton v. Thompson, 28 Minn. 330, 9 N. W. 876.

[2] St. Paul Fire & Marine Ins. Co. v. Allis, 24 Minn. 75; Chittenden v. German American Bank, 27 Minn. 143, 6 N. W. 773; Jordan v. Humphrey, 31 Minn. 495, 18 N. W. 450; Bannon v. Bowler, 34 Minn. 416, 26 N. W. 237; Nelson v. Central Land Co. 35 Minn. 408, 29 N. W. 121.

§ 955. The district court has power to grant a new trial when the action was tried by a referee.[1] It is not necessary, however, to move for a new trial in order to question on appeal the sufficiency of the evidence to justify the findings of a referee provided a case is settled containing all the evidence introduced on the trial.[2]

[1] Thayer v. Barney, 12 Minn. 502 Gil. 406; Cochrane v. Halsey, 25 Minn. 52; Koktan v. Knight, 44 Minn. 304, 46 N. W. 354; Hughley v. City of Wabasha, 69 Minn. 245, 72 N. W. 78.

[2] Cooper v. Breckenridge, 11 Minn. 341 Gil. 241; Teller v. Bishop, 8 Minn. 226 Gil. 195.

Granted only for material error and to remedy manifest injustice.

§ 956. It is a general principle of the law of new trials that a court will not move except to remedy manifest injustice. Our statute provides that a new trial should not be granted except for error "materially affecting the substantial rights" of the aggrieved party.[1] There must always be a reasonable prospect that another trial might result differently[2] and when the motion is made on some grounds there must be a strong probability of a different result.[3] A new trial will not be granted for a failure to assess merely nominal damages where no question of permanent right is involved.[4] A new trial

Digitized by Google

will not be granted even where there is error if from the whole case it is apparent that the result will not be changed.[5] A party can secure a new trial only for error directly affecting himself and where it is apparent that the moving party would not be benefited by it a new trial may be denied although there was error on the trial.[6] A new trial will not be granted simply to enable a party to litigate a question not raised by the pleadings.[7] The law does not concern itself with trifles and if the verdict is only a trifle more or less than it ought to have been a new trial will not be granted.[8] That which is merely technical and may be remedied on the trial, in the discretion of the court, ought not, as a general rule, to be regarded after verdict.[9] If the verdict of a jury can be sustained on any proper and consistent theory of the evidence it is the duty of the court to sustain it, and refuse a new trial, unless the record presents some error in law of sufficient importance to justify setting it aside.[10]

[1] See § 987; Tarbox v. Gotzian, 20 Minn. 139 Gil. 122.

[2] See cases under (5)

[3] See §§ 1058, 1060.

[4] Knowles v. Steele, 59 Minn. 452, 61 N. W. 557; Harris v. Kerr, 37 Minn. 537, 35 N. W. 379; Warner v. Lockerby, 31 Minn. 421, 18 N. W. 145, 821; United States Express Co. v. Koerner, 65 Minn. 540, 68 N. W. 181; Jensen v. Chicago etc. Ry. Co. 64 Minn. 511, 67 N. W. 631.

[5] Dorr v. Mickley, 16 Minn. 20 Gil. 8; Colter v. Mann, 18 Minn. 96 Gil. 79; Webb v. Kennedy, 20 Minn. 419 Gil. 374; Perry v. Minneapolis Street Ry. Co. 69 Minn. 165, 72 N. W. 55; Lewis v. St. Paul etc. Ry. Co. 20 Minn. 260 Gil. 234; Hurt v. St. Paul etc. Ry. Co. 39 Minn. 485, 40 N. W. 613.

[6] Maher v. Winona etc. Ry. Co. 31 Minn. 401, 18 N. W. 105; Torinus v. Matthews, 21 Minn. 99.

[7] Bullis v. Cheadle, 36 Minn. 164, 30 N. W. 549.

[8] Palmer v. Degan, 58 Minn. 505, 60 N. W. 342; Singer Mfg. Co. v. Potts, 59 Minn. 240, 61 N. W. 23; D. M. Osborne & Co. v. Johnson, 35 Minn. 300, 28 N. W. 510; Nickerson v. Wells-Stone Mercantile Co. 71 Minn. 230, 73 N. W. 959, 74 N. W. 891; American Mfg. Co. v. Klarquist, 47 Minn. 344, 50 N. W. 243; Mannheim v. Carleton College, 68 Minn. 531, 71 N. W. 705.

[9] Short v. McRea, 4 Minn. 119 Gil. 78; Steele v. Maloney, 1 Minn 347 Gil. 257.

[10] Nichols v. Shepard Co. v. Hackney, 78 Minn. 461, 81 N. W. 322.

Who may move.

§ 957. One not a party to the action, though directly interested in the result, cannot move for a new trial.

Stewart v. Duncan, 40 Minn. 410, 42 N. W. 89.

Waiver of right.

§ 958. In a civil action a party may, by express agreement, waive his right to a new trial and an attorney has implied authority to do so for his client.[1] A party waives his right to a new trial by appeal-

Digitized by Google

ing from the judgment;[2] by failing to have a case or bill of exceptions settled within the statutory time;[3] by failing to move with due diligence.[4]

[1] Bray v. Doheny, 39 Minn. 355, 40 N. W. 262.
[2] McArdle v. McArdle, 12 Minn. 122 Gil. 70.
[3] See § 975. [4] See § 974 et seq.

§ 959. A party does not waive his right to move for a new trial by moving for judgment non obstante veredicto on special findings.[1] In an action in the nature of ejectment a party does not waive his right to a second trial under the statute by first moving for a new trial for cause.[2]

[1] Stein v. Swensen, 44 Minn. 218, 46 N. W. 360.
[2] See § 1153.

When there are several parties.

§ 960. When there are several parties seeking a new trial in the same action there should be separate motions and assignments of error unless it is clear that the errors were common to all. It is held in this state, sacrificing substance to form, that a joint motion is properly denied if the verdict was justified as respects any one of the parties.[1] This rule is purely technical[2] and the supreme court has shown a commendable disposition to break away from it. Thus, a notice by three defendants to the effect that they and each of them will move the court for a new trial is held to be a joint and several motion and the foregoing rule does not apply.[3]

[1] Miller v. Adamson, 45 Minn. 99, 47 N. W. 452; McKasy v. Huber, 65 Minn. 9, 67 N. W. 650; Baer v. Kloos, 81 Minn. 218, 83 N. W. 980.
[2] See for a very just criticism of the rule, Boehmer v. Big Rock Irrigation District, 117 Cal. 19.
[3] Bathke v. Krassin, 78 Minn. 272, 80 N. W. 272.

§ 961. A new trial may be granted as to one or more of several parties and denied as to the others. Where a verdict is justified as to one of several parties it is error to grant a new trial as to him.

Lee v. Fletcher, 46 Minn. 49, 48 N. W. 456. See also, Clark v. City of Austin, 38 Minn. 487, 36 N. W. 615; First Nat. Bank v. Lincoln, 37 Minn. 473, 40 N. W. 573.

When there are several causes of action.

§ 962. Where there are two causes of action one may be retried without retrying the other.

Schmitt v. Schmitt, 32 Minn. 130, 19 N. W. 649.

Of less than all the issues.

§ 963. A new trial of a single independent issue may be ordered where justice does not demand a retrial of all the issues.

Buerfening v. Buerfening, 23 Minn. 563; Sauer v. Traeger, 56 Minn. 364, 57 N. W. 935; Chicago etc. Ry. Co. v. Porter, 43 Minn. 527, 46 N. W. 75; Swanson v. Andrus, 83 Minn. 505, 86 N. W. 465; Coolbaugh v. Roemer, 32 Minn. 445, 21 N. W. 472.

Digitized by Google

§ 964. If the jury bring in a special verdict which fails to include findings upon all the issues and are discharged a new trial must be granted. The new trial may be limited to the issues not passed upon.

Crich v. Williamsburg City Fire Ins. Co. 45 Minn. 441, 48 N. W. 198.

§ 965. In an action of an equitable nature, specific issues having been tried before a jury by order of the court, leaving other material issues untried, the court, upon the verdict of the jury, ordered judgment for the defendant. It was held that the party prejudiced was not entitled to a new trial of all the issues but only of the untried issues.

Cobb v. Cole, 44 Minn. 278, 46 N. W. 364.

Renewal of motion.

§ 966. When a motion for a new trial has been denied absolutely the court will rarely entertain a second motion on substantially the same grounds. The matter rests in the discretion of the court.

Little v. Leighton, 46 Minn. 201, 48 N. W. 778.

Setting aside order granting.

§ 967. The district court has power to set aside an order granting a new trial on the ground that such order was erroneously granted any time before the period for appeal expires.

Beckett v. N. W. Masonic Aid Assoc. 67 Minn. 298, 69 N. W. 923.

Effect of order granting.

§ 968. The effect of an order granting a new trial is to vacate the verdict [1] and the judgment entered thereon [2] without any special order to that effect. The award of a new trial wipes out the verdict and the situation is the same as if there had been no trial. The plaintiff then has the same right to dismiss or discontinue as if no trial had ever been had.[3]

[1] Phelps v. Winona etc. Ry. Co. 37 Minn. 485, 35 N. W. 273; St. Anthony Falls Bank v. Graham, 67 Minn. 318, 69 N. W. 1077; Hemstad v. Hall, 64 Minn. 136, 66 N. W. 366; Hidden v. Jordan, 28 Cal. 301.

[2] Minnesota Valley Ry. Co. v. Doran, 15 Minn. 240 Gil. 186; Conklin v. Hinds, 16 Minn. 457 Gil. 411; Low v. Fox, 56 Iowa 221; Fleming v. Lord, 1 Root (Conn.) 214; Maxwell v. Campbell, 45 Ind. 361; Thompson v. Smith, 28 Cal. 534.

[3] Phelps v. Winona etc. Ry. Co. 37 Minn. 485, 35 N. W. 273.

§ 969. In granting a motion for a new trial after entry of judgment the court may also set aside the judgment to give effectiveness to its decision.

Cochrane v. Halsey, 25 Minn. 52.

Imposing conditions.

§ 970. Within ill-defined limits a court may grant a new trial conditionally. The discretion of the court in imposing terms on the

Digitized by Google

moving party is very large and will rarely be controlled by the appellate court.[1] The power to grant a new trial unless the opposite party will consent to certain conditions is much narrower.[2] The court has no authority to grant a new trial conditionally so as to determine, in effect, the issues of fact involved in the case.[3]

[1] Rice v. Gashirie, 13 Cal. 53; Chouteau v. Parker, 2 Minn. 118 Gil. 95.

[2] See First Nat. Bank v. Lincoln, 39 Minn. 473, 40 N. W. 573.

[3] Miller v. Hogan, 81 Minn. 312, 84 N. W. 40.

§ 971. Where there are several defendants joining in a motion for a new trial the court may grant a new trial unless the plaintiff will consent to take judgment against each of the defendants for a specified amount or it may sever the case and direct a new trial as to one of the defendants unless the plaintiff consents to take judgment for a specified amount against him and direct a new trial as to another unless the plaintiff consents to take judgment against him for a specified amount. A party is bound to the alternative presented by the court. Where the court grants a new trial as to several defendants jointly unless the plaintiff consents to take judgment against them for specified amounts the plaintiff cannot take judgment as to a part of the defendants and a new trial as to the others.

First Nat. Bank v. Lincoln, 37 Minn. 473, 40 N. W. 573.

Stating grounds in order.

§ 972. There is no uniformity of practice in this state respecting a statement in the order granting a new trial of the grounds upon which the order is made. The prevailing practice is not to state the grounds. Inasmuch as such a statement may affect the burden of proof on appeal the court ought to state the grounds if requested by the party against whom the order is made. If an order granting a new trial is justified on any ground stated in the notice of motion it will be sustained on appeal although it is not justified on the ground stated in the order.[1] Grounds stated in a memorandum of the judge not made a part of the order will not be considered on appeal.[2] There is no presumption that a new trial was granted upon the ground that the verdict was not justified by the evidence in the absence of a statement in the order or memorandum.[3]

[1] Langan v. Iverson, 78 Minn. 299, 80 N. W. 1051; Morrow v. St. Paul City Ry. Co. 65 Minn. 382, 67 N. W. 1002; Nelson v. Village of West Duluth, 55 Minn. 497, 57 N. W. 149; Adams v. Hastings etc. Ry. Co. 18 Minn. 260 Gil. 236; Jenkinson v. Koester, (Minn.) 90 N. W. 382.

[2] Jenkinson v. Koester, (Minn.) 90 N. W. 382.

[3] See § 987 and Park v. Electric Thermostat Co. 75 Minn. 349, 77 N. W. 988.

Who may hear motion.

§ 973. It is the general rule that the motion must be heard by the judge who tried the case.[1] If he is dead or removed or his term

Digitized by Google

expired his successor may entertain a motion.[2] Where there are several judges of the same court and the case is tried by a single judge the latter should sit alone in passing on a motion for a new trial. In some cases in this state the judge who tried the case has called in his associates to sit with him on the motion for a new trial.[3] This ought not to be done over the objection of the moving party, especially where the motion is based on the insufficiency of the evidence. It is the duty of a judge taking up the trial of an action to carry it to completion.[4]

[1] McCord v. Knowlton, 76 Minn. 391, 79 N. W. 397.
[2] Hughley v. City of Wabasha, 69 Minn. 245, 72 N. W. 78; Reynolds v. Reynolds, 44 Minn. 132, 46 N. W. 236; Price v. Churchill, 84 Minn. 519, 88 N. W. 11.
[3] Demueles v. St. Paul etc. Ry. Co. 44 Minn. 436, 46 N. W. 912.
[4] Voullaire v. Voullaire, 45 Mo. 602.

TIME WITHIN WHICH MOTION MUST BE MADE

When made on the minutes of the court.

§ 974. The statute provides that a motion for a new trial based on the minutes of the court must be made at the same term of court at which the trial is heard.[1] This statutory requirement is imperative.[2] It may, however, be waived by the failure of the opposite party to raise a timely objection.[3]

[1] G. S. 1894, § 5399. See § 982.
[2] Le Tourneau v. Board County Com'rs, 78 Minn. 82, 80 N. W. 840.
[3] Larson v. Ross, 56 Minn. 74, 57 N. W. 323; Gribble v. Livermore, 64 Minn. 396, 67 N. W. 213.

When made on a case or bill of exceptions.

§ 975. A motion for a new trial based on a case or bill of exceptions must be made at least within the time allowed to appeal from the judgment.[1] Within such period the right to make a motion for a new trial depends upon whether the party has secured a case or bill of exceptions [2] and whether he has been diligent in making the motion. A motion for a new trial, whether the trial was by a court, referee or jury, must, if the party has a reasonable opportunity, be made before judgment, but if he has no reasonable opportunity before judgment, he may make it afterwards within the time for bringing an appeal from the judgment. In such cases, however, he must use due diligence in making it, and will lose his right to make it by neglect of such diligence. The determination of the question whether he has used due diligence is within the sound discretion of the court. It therefore behooves a party desiring to move for a new trial upon a case or bill of exceptions to act promptly upon the coming in of the verdict or upon notice of the filing of the decision or report, to get his case or bill of exceptions settled and to procure a stay to prevent the entry of judgment, to enable him to make the motion, and, if judgment be en-

Digitized by Google

tered before he can make the motion, to be equally prompt in acting afterwards.[3]

[1] Kimball v. Palmerlee, 29 Minn. 302, 13 N. W. 129; Deering v. Johnson, 33 Minn. 97, 22 N. W. 174; Conklin v. Hinds, 16 Minn. 457 Gil. 411; Groh v. Bassett, 7 Minn. 325 Gil. 254; Richardson v. Rogers, 37 Minn. 461, 35 N. W. 270.

[2] See § 1763 et seq.

[3] Kimball v. Palmerlee, 29 Minn. 302, 13 N. W. 129; Collins v. Bowen, 45 Minn. 186, 47 N. W. 719 (right lost by laches).

When made on affidavits.

§ 976. A motion for a new trial based on affidavits must be made within the same time as a similar motion based on a case or bill of exceptions. That is, it must be made at least within the time allowed to appeal from the judgment and the moving party must act with due diligence.[1] A motion for a new trial on the ground of newly discovered evidence is no exception to the general rule;[2] but if new and material evidence is discovered after the right to a new trial is lapsed, relief may be had, in a clear case, within one year from notice of judgment under the statute authorizing the opening of judgments for mistakes.[3]

[1] Deering v. Johnson, 33 Minn. 97, 22 N. W. 174; Kimball v. Palmerlee, 29 Minn. 302, 13 N. W. 129; Eaton v. Caldwell, 3 Minn. 134 Gil. 80.

[2] Deering v. Johnson, 33 Minn. 97, 22 N. W. 174; Lathrop v. Dearing, 59 Minn. 234, 61 N. W. 24; Sheffield v. Mullin, 28 Minn. 251, 9 N. W. 756. See Scott & Holston Lumber Co. v. Sharvy, 62 Minn. 528, 64 N. W. 1132.

[3] Sheffield v. Mullin, 28 Minn. 251, 9 N. W. 756.

NOTICE OF MOTION

The statute—no exceptions necessary.

§ 977. "Every ruling, order or decision made by any judge of any court of record, in any action or proceeding, and every instruction to a jury, shall be deemed excepted to by any party aggrieved thereby, and the same may be reviewed upon a motion for a new trial, or upon appeal, as fully as if exception thereto had been taken at the time such ruling, order or decision was made or such instructions given. Provided, that upon a motion for a new trial the party aggrieved, in his notice of motion for new trial, shall specify the errors upon which he will ask a new trial; which notice, with proof of service thereof, shall be filed with the clerk and become a part of the record in the cause."

[Laws 1901 ch. 113]

§ 978. This statute does not obviate the necessity of making objections on the trial.[1] A notice of motion must be served on all parties against whom it is sought to secure a new trial.[2] It must be served eight days before the hearing [3] and must specify the grounds

Digitized by Google

upon which the motion will be made.[4] The grounds may be stated in the language of the statute except as to errors of law occurring on the trial. In both the trial and appellate court the party is restricted to the grounds specified in his notice.[5] But of course the court may, in its discretion, grant a new trial on a ground not stated.[6] It was held, prior to Laws 1901 ch. 113, that objection that the notice does not state the grounds is waived if not taken at the hearing.[7] In order to take advantage of Laws 1901 ch. 113 the moving party must specify in his notice of motion the errors upon which he relies.[8] But if exceptions are taken at the trial a party may proceed as under the old practice, stating the ground of motion generally.[9]

[1] Steinbauer v. Stone, 85 Minn. 274, 88 N. W. 754; Torske v. Com. Lumber Co. (Minn.) 90 N. W. 532; State v. Lewis (Minn.) 90 N. W. 318; Applebee v. Perry, (Minn.) 91 N. W. 893. But see Robertson v. Burton, 92 N. W. ——.

[2] Clark v. City of Austin, 38 Minn. 487, 36 N. W. 615; Adams v. City of Thief River Falls, 84 Minn. 30, 86 N. W. 767.

[3] See § 2057.

[4] Cappis v. Weidemann, (Minn.) 90 N. W. 368. See Chesley v. Mississippi etc. Co. 39 Minn. 83, 38 N. W. 769; Clark v. Nelson Lumber Co. 34 Minn. 289, 25 N. W. 628; Spencer v. Stanley, 74 Minn. 35, 76 N. W. 953; First Nat. Bank v. City of St. Cloud, 73 Minn. 219, 75 N. W. 1054.

[5] First Nat. Bank v. City of St. Cloud, 73 Minn. 219, 75 N. W. 1054; Kernan v. St. Paul City Ry. Co. 64 Minn. 312, 67 N. W. 71; Anchor Invest. Co. v. Kirkpatrick, 59 Minn. 378, 61 N. W. 29; State v. District Court, 56 Minn. 55, 57 N. W. 319.

[6] See Bank of Willmar v. Lawler, 78 Minn. 135, 80 N. W. 868.

[7] Chesley v. Mississippi etc. Co. 39 Minn. 83, 38 N. W. 769; Searles v. Thompson, 18 Minn. 316, 1 Gil. 285.

[8] Cappis v. Wiedemann (Minn.) 90 N. W. 368.

[9] Id.; Olson v. Berg (Minn.) 91 N. W. 1103.

§ 979. In actions in which the damages are governed by fixed rules and are wholly compensatory for pecuniary loss the objection that the damages are excessive or inadequate may be raised on a notice which states that the motion will be made on the ground that the verdict is not justified by the evidence.

First Nat. Bank v. City of St. Cloud, 73 Minn. 219, 75 N. W. 1054.

§ 980. If, in connection with a motion for a new trial, a party wishes to move for a judgment notwithstanding the verdict under the statute, he must state in his notice of motion that he will ask for that relief.

Kernan v. St. Paul City Ry. Co. 64 Minn. 312, 67 N. W. 71; Netzer v. City of Crookston, 66 Minn. 355, 68 N. W. 1099.

§ 981. The record on appeal must contain the notice of motion and where a notice of motion does not state any grounds of the motion an appeal from an order denying a new trial will be affirmed.[1] On appeal a party is restricted to the grounds urged below.[2]

Digitized by Google

[1] Spencer v. Stanley, 74 Minn. 35, 76 N. W. 953; Clark v. Nelson Lumber Co. 34 Minn. 289, 25 N. W. 628.
[2] State v. District Court, 56 Minn. 56, 57 N. W. 319.

HOW MADE

General statement.

§ 982. When a motion for a new trial is based on the fourth, fifth or seventh subdivision of our statute it is made either upon a bill of exceptions or a statement of the case; provided, however, that the judge who tries the cause, may, in his discretion, entertain a motion to be made on his minutes, or upon the minutes of the stenographic reporter, where the motion is upon exceptions, or for insufficient evidence, or for excessive damages.[1] When a motion for a new trial is based on the first,[2] second, third or sixth subdivision of the statute it is made on affidavits.[3] Although not expressly authorized a court may undoubtedly entertain a motion on its minutes for inadequate damages. When the motion is based on the judge's minutes all proceedings in the case, whether of record or not [4] and all the evidence introduced on the trial, whether reduced to writing or stenographic notes or not,[5] are before the court for its consideration. When the trial is by the court without a jury it is still an open question in this state whether a motion may be made on the minutes of the judge.[6] The reasons for allowing such a practice are so cogent that it is safe for the practitioner to assume that the supreme court will hold it a matter of discretion with the trial court. At all events, until a contrary rule is adopted by our supreme court, a trial court should always entertain such a motion when promptly made. Our statute regulating new trials is a mere skeleton of a code [7] and is a regulation rather than a grant of power.[8] Consequently it ought not to be taken too seriously. The practice of moving for a new trial on the minutes is to be encouraged on account of its simplicity and inexpensiveness.[9] After moving on the minutes a party cannot renew the motion on a settled case as of right.[10]

[1] G. S. 1894 § 5399.
[2] Valerius v. Richard, 57 Minn. 443, 59 N. W. 534.
[3] G. S. 1894 § 5399; Hudson v. Minneapolis etc. Ry. Co. 44 Minn. 52, 46 N. W. 314.
[4] Hinton v. Coleman, 76 Wis. 221.
[5] Malcolmson v. Harris, 90 Cal. 262.
[6] Gribble v. Livermore, 64 Minn. 396, 67 N. W. 213.
[7] Valerius v. Richard, 57 Minn. 443, 449, 59 N. W. 534.
[8] See § 947.
[9] Malcolmson v. Harris, 90 Cal. 262.
[10] J. I. Case etc. Co. v. Hoffman, (Minn.) 90 N. W. 5.

§ 983. When a motion is made to set aside a verdict and for a new trial upon the minutes of the court the case or bill of exceptions, in the event of an appeal from the decision of the court, must be proposed and settled within the time and in the manner

Digitized by Google

prescribed in § 1767.[1] A stay of proceedings with an extension of time within which to propose and settle a case may be obtained as in other cases.[2]

[1] Van Brunt & Wilkins Mfg. Co. v. Kinney, 51 Minn. 337, 53 N. W. 643; Hendrickson v. Back, 74 Minn. 90, 76 N. W. 1019.

[2] Van Brunt & Wilkins Mfg. Co. v. Kinney, 51 Minn. 337, 53 N. W. 643; Loveland v. Cooley, 59 Minn. 259, 61 N. W. 138.

§ 984. A motion for a new trial should be addressed to the court rather than to the judge and the notice of motion should be framed accordingly but the distinction is not vital.

See §§ 19, 2086 and McNamara v. Minnesota Central Ry. Co. 12 Minn. 388 Gil. 269, 279.

COSTS

General statement.

§ 985. The matter of allowing costs to the applicant on a motion for a new trial rests in the discretion of the trial court.[1] So also the matter of compelling an applicant for a new trial to pay the costs and disbursements of the former trial as a condition of a new trial is in the discretion of the trial court and this discretion is to be exercised with reference to the grounds on which the new trial is granted. In all cases where a new trial is awarded for error of the court the costs and disbursements of the irregular trial should abide the event of the action and be recovered by the party who ultimately succeeds.[2] If the new trial is granted for newly discovered evidence [3] or accident or surprise [4] the payment of the costs and disbursements of the first trial by the applicant should ordinarily be made a condition of a new trial.[5] When the new trial is granted for insufficiency of the evidence the costs and disbursements should ordinarily abide the event, according to the better view.[6] The matter, however, is almost wholly in the discretion of the trial court and its action will be reversed on appeal only for a gross abuse of discretion.[7]

[1] G. S. 1894, § 5506; Siebert v. Mainzer, 26 Minn. 104, 1 N. W. 824.

[2] Walker v. Barron, 6 Minn. 508 Gil. 353. See § 1174.

[3] Smith v. Smith, 51 Wis. 665; Jones v. Williams, 108 Ala. 282.

[4] Parshall v. Klinck, 43 Barb. (N. Y.) 203; Ryan v. Mooney, 49 Cal. 33.

[5] North Center Creek etc. Co. v. Eakins, 23 Kans. 317.

[6] Brewer, J. in North Center Creek etc. Co. v. Eakins, 23 Kans. 317.

[7] Brooks v. San Francisco etc. Ry. Co. 110 Cal. 173.

§ 986. Where a new trial is ordered, nothing being said about the costs of the first trial, such costs are recoverable by the party who ultimately succeeds.[1] The award of costs to the applicant on a motion for a new trial being in the discretion of the court they cannot be recovered unless expressly granted in the order.[2]

Digitized by Google

[1] Walker v. Barron, 6 Minn. 508 Gil 353.
[2] Myers v. Irvine, 4 Minn. 553 Gil. 435.

STATUTORY GROUNDS FOR A NEW TRIAL

The statute.

§ 987. "A verdict, report or decision may be vacated and a new trial granted, on the application of the party aggrieved, for any of the following causes materially affecting the substantial rights of such party:

(1) Irregularity in the proceedings of the court, jury, referee or prevailing party, or any order of the court or referee, or abuse of discretion, by which the moving party was prevented from having a fair trial.

(2) Misconduct of the jury or prevailing party.

(3) Accident or surprise which ordinary prudence could not have guarded against.

(4) Excessive or inadequate and insufficient damages, appearing to have been given under the influence of passion or prejudice.

(5) That the verdict, report or decision is not justified by the evidence, or is contrary to law.

(6) Newly discovered evidence, material for the party making the application, which he could not with reasonable diligence have discovered and produced at the trial.

(7) Error in law occurring at the trial.

Provided, that when a new trial is granted, under the provisions of this section, it shall not be presumed upon appeal that such new trial was granted upon the ground that the verdict, report or decision was not justified by the evidence, unless so expressly stated in the order granting such new trial or in a memorandum attached thereto."

[G. S. 1894 § 5398 as amended by Laws 1901 ch. 46, 113]

FOR IRREGULARITY AND ABUSE OF DISCRETION

Construction of statute.

§ 988. It has been held that a new trial may be granted under this section of the statute for error on the trial in referring a case,[1] in dismissing an action before the introduction of evidence,[2] and in refusing to strike a case from the calendar.[3] On the other hand it has been held that an abuse of discretion before trial cannot be assigned as error on a motion for a new trial under this section.[4] The writer confesses his inability to reconcile these cases. It is expressly provided by statute that a motion for a new trial under this section must be made on affidavits.[5] This would seem to indicate that the section has reference exclusively to errors or irregularities not occurring on the trial. It has been held that no error in the charge can be reviewed under this section. An irregularity of the court is not an error of law. Errors of law occur only when there are rulings made

Digitized by Google

on questions of law and it is evident that no error of law in giving or refusing instructions can be reviewed under this section.[6]

[1] St. Paul etc. Ry. Co. v. Gardner, 19 Minn. 132 Gil. 99.

[2] Dunham v. Byrnes, 36 Minn. 106, 30 N. W. 402. See also, St. Paul etc. Ry. Co. v. Gardner, 19 Minn. 132 Gil. 99.

[3] Flanagan v. Borg, 64 Minn. 394, 67 N. W. 216.

[4] City of Winona v. Minnesota Ry. Const. Co. 27 Minn. 415, 6 N. W. 795, 8 N. W. 148; Minneapolis etc. Ry. Co. v. Home Ins. Co. 64 Minn. 61, 66 N. W. 132; Schumann v. Mark, 35 Minn. 379, 28 N. W. 927. But see, Mead v. Billings, 43 Minn. 239, 45 N. W. 228; St. Paul etc. Ry. Co. v. Gardner, 19 Minn. 132 Gil. 99.

[5] See § 982.

[6] Valerius v. Richard, 57 Minn. 443, 59 N. W. 534.

Improper remarks of court.

§ 989. Improper remarks of the court preventing a party from having a fair trial are ground for a new trial.[1] It is rare, however, that an appellate court feels justified in granting a new trial on this ground.[2] To be reviewed on appeal improper remarks of the court must be objected to at the time they were made and incorporated in a case or bill of exceptions.[3]

[1] State v. English, 62 Minn. 402, 64 N. W. 1136; Horton v. Williams, 21 Minn. 187.

[2] Minnesota Valley Ry. Co. v. Doran, 17 Minn. 188 Gil. 162; McArthur v. Craigie, 22 Minn. 351; Bingham v. Bernard, 36 Minn. 114, 30 N. W. 404; C. Aultman & Co. v. Falkum, 47 Minn. 414, 50 N. W. 471; Haug v. Haugan, 51 Minn. 558, 53 N. W. 874; State v. Floyd, 61 Minn. 467, 63 N. W. 1096; State v. Hayward, 62 Minn. 474, 65 N. W. 63; Zimmerman v. Lamb, 7 Minn. 421 Gil. 336.

[3] Smith v. Kingman & Co. 70 Minn. 453, 73 N. W. 253; State v. Floyd, 61 Minn. 467, 63 N. W. 1096.

Miscellaneous cases of misconduct in the court.

§ 990. After the jury have retired for consultation the judge cannot communicate with them or give them the least information except in open court and in the presence of or after due notice to the parties. Failure to observe this rule is error and ground for a new trial.[1] It has been held, however, in a civil case that the court may grant additional instructions to the jury in open court in the absence of counsel and without notice to them.[2] It was held in an early case that if the court adjourns while the jury are out, the judge cannot, in the absence of the parties, receive the verdict until the court meets.[3]

[1] Hoberg v. State, 3 Minn. 262 Gil. 181. But see, Helmbrecht v. Helmbrecht, 31 Minn. 504, 18 N. W. 449.

[2] Reilly v. Bader, 46 Minn. 212, 48 N. W. 909.

[3] Kennedy v. Raught, 6 Minn. 235 Gil. 155, apparently overruled in Reilly v. Bader, 46 Minn. 212, 48 N. W. 909.

Digitized by Google

FOR MISCONDUCT OF THE JURY

By supreme court.

§ 991. The matter of granting new trials for misconduct of the jury rests almost wholly in the discretion of the trial court and its action will not be reversed on appeal except for a clear abuse of discretion.

Hewitt v. Pioneer Press Co. 23 Minn. 178; State v. Adamson, 43 Minn. 196, 45 N. W. 152; Hull v. Minneapolis Street Ry. Co. 64 Minn. 402, 67 N. W. 218; Tierney v. Minneapolis etc. Ry. Co. 33 Minn. 311, 23 N. W. 229; State v. Conway, 23 Minn. 291; State v. Durnam, 73 Minn. 150, 75 N. W. 1127; Aldrich v. Wetmore, 52 Minn. 164, 53 N. W. 1072; State v. Salverson (Minn. 1902) 91 N. W. 1.

§ 992. When the affidavits are conflicting as to the occurrence of the facts constituting the alleged misconduct the decision of the trial court is conclusive on appeal.

Hewitt v. Pioneer Press Co. 23 Minn. 178; State v. Floyd, 61 Minn. 467, 63 N. W. 1096; State v. Conway, 23 Minn. 291; Hull v. Minneapolis Street Ry. Co. 64 Minn. 402, 67 N. W. 218; State v. Madigan, 57 Minn. 425, 59 N. W. 490; State v. Salverson (Minn. 1902) 91 N. W. 1.

§ 993. The record on appeal must contain all the affidavits used on the motion in the trial court.[1] It is probably not necessary that the record should contain all of the evidence submitted on the trial. The question is still an open one.[2]

[1] Tierney v. Minneapolis etc. Ry. Co. 33 Minn. 311, 23 N. W. 229.

[2] See Twaddle v. Mendenhall, 80 Minn. 177, 83 N. W. 135.

By the trial court—a matter of discretion.

§ 994. The matter of granting new trials on the ground of misconduct of the jury is governed by no fixed rules but rests almost wholly in the discretion of the trial court.[1] Motions for a new trial on this ground are disfavored and granted with extreme caution.[2] "It is doubtful whether a case, and especially a capital case, could arise, in which some one could not be procured to make affidavit of misconduct or irregularity on the part of some member of the jury. The temptation would be great where life is involved, and the risk of detection small. Testimony, therefore, of this character, made to impeach a verdict, should be received with the utmost caution, and tried by the strictest test." [3] To authorize a new trial it is not enough that the jury have been guilty of misconduct. It is not the policy of the law to punish a successful litigant for the sins of the jury.[4] They may always be fined or imprisoned for their misconduct.[5] To justify a new trial there must not only be misconduct on the part of the jury but also prejudice to the moving party. "If it does not appear that the misconduct was occasioned by the prevailing party or any one in his behalf, and if it does not indicate any improper bias upon the jurors' minds, and the court cannot

Digitized by Google

see that it either had or might have had an effect unfavorable to the party moving for a new trial, the verdict ought not to be set aside." [6]

[1] Hewitt v. Pioneer Press Co. 23 Minn. 178; State v. Salverson (Minn. 1902) 91 N. W. 1.

[2] State v. Dumphey, 4 Minn. 438 Gil. 340; Koehler v. Cleary, 23 Minn. 325; Twaddle v. Mendenhall, 80 Minn. 177, 83 N. W. 135; Tarbox v. Gotzian, 20 Minn. 139 Gil. 122.

[3] State v. Dumphey, 4 Minn. 438 Gil. 340.

[4] Eich v. Taylor, 20 Minn. 378 Gil. 330; State v. Conway, 23 Minn. 291. See also, Helmbrecht v. Helmbrecht, 31 Minn. 504, 18 N. W. 449.

[5] State v. Conway, 23 Minn. 291.

[6] Koehler v. Cleary, 23 Minn. 325. See also, Woodbury v. City of Anoka, 52 Minn. 329, 54 N. W. 187; Oswald v. Minneapolis etc. Ry. Co. 29 Minn. 5, 11 N. W. 112; State v. Conway, 23 Minn. 291; Tarbox v. Gotzian, 20 Minn. 139 Gil. 122; Pettibone v. Phelps, 13 Conn. 445; Jackson v. Smith, 21 Wis. 26; Sawvel v. Bitterlee, 86 Wis. 420; Dennison v. Powers, 35 Vt. 39.

Objections on the trial.

§ 995. When the misconduct is of such a nature that its effects can be obviated on the trial it is the duty of the party affected to call the attention of the court to the matter promptly on its discovery and ask for appropriate relief. Failing to do so he will be deemed to have waived the objection. A party cannot be permitted to remain silent under such circumstances and speculate on a favorable verdict.[1] If, upon the misconduct of one or more jurors being called to the attention of the court, the trial proceeds by consent without a full panel, the misconduct is not a ground for a new trial.[2]

[1] Gurney v. Minneapolis etc. Ry. Co. 41 Minn. 223, 43 N. W. 2; State v. Nichols, 29 Minn. 357, 13 N. W. 153; State v. Floyd, 61 Minn. 467, 63 N. W. 1096; Young v. Otto, 57 Minn. 307, 59 N. W. 199; State v. Salverson (Minn.) 91 N. W. 1.

[2] Young v. Otto, 57 Minn. 307, 59 N. W. 199.

Presumption of prejudice—burden of proof.

§ 996. If the moving party shows such misconduct that prejudice may have resulted to him from it a new trial will be granted unless the successful party shows that in fact such prejudice did not result. The fact of non-prejudice must be made to appear very clearly if it is reasonable to suppose that prejudice might have resulted. Any doubt in the mind of the court should be resolved in favor of a new trial.

Koehler v. Cleary, 23 Minn. 325; Oswald v. City of Minneapolis, 29 Minn. 5, 11 N. W. 112; Woodbury v. City of Anoka, 52 Minn. 329, 54 N. W. 187; Svenson v. Chicago etc. Ry. Co. 68 Minn. 14, 70 N. W. 795; Rush v. St. Paul City Ry. Co. 70 Minn. 5, 72 N. W. 733; Twaddle v. Mendenhall, 80 Minn. 177, 83 N. W. 135; State v. Salverson (Minn.) 91 N. W. 1.

Digitized by Google

Made on affidavits.

§ 997. The motion for a new trial on this ground is made on affidavits.[1] Copies of the affidavits must be served with the notice of motion.[2] The question has been raised whether it is necessary to have a case settled for use on such a motion.[3] It is extremely unlikely that the supreme court will impose so needless a burden on litigants.

[1] See § 982. [2] See § 2059.

[3] Twaddle v. Mendenhall, 80 Minn. 177, 83 N. W. 135.

Affidavits of jurors.

§ 998. It is the settled law of this state that the affidavits of jurors as to what transpired in the jury-room cannot be received to impeach their verdict.

St. Martin v. Desnoyer, 1 Minn. 156 Gil. 131; Knowlton v. McMahon, 13 Minn. 386 Gil. 358; State v. Stokely, 16 Minn. 282 Gil. 249; State v. Beebe, 17 Minn. 241 Gil. 218; State v. Mims, 26 Minn. 183, 2 N. W. 492, 494, 683; Bradt v. Rommel, 26 Minn. 505, 5 N. W. 680; Stevens v. Montgomery, 27 Minn. 108, 6 N. W. 456; State v. Lentz, 45 Minn. 177, 47 N. W. 720; Gardner v. Minea, 47 Minn. 295, 50 N. W. 199; Aldrich v. Wetmore, 52 Minn. 164, 53 N. W. 1072; Svenson v. Chicago etc. Ry. Co. 68 Minn. 14, 70 N. W. 795; Wester v. Hedberg, 68 Minn. 434, 71 N. W. 616; Rush v. St. Paul City Ry. Co. 70 Minn. 5, 72 N. W. 733; State v. Durnam, 73 Minn. 150, 75 N. W. 1127.

§ 999. The affidavits of jurors are inadmissible to show misconduct in the officer having them in charge.[1] On the other hand the affidavit of such officer may be received to show misconduct in the jury.[2]

[1] Knowlton v. McMahon, 13 Minn. 386 Gil. 358; Gardner v. Minea, 47 Minn. 295, 50 N. W. 199.

[2] Bradt v. Rommel, 26 Minn. 505, 5 N. W. 680.

§ 1000. The affidavits of persons other than jurors are admissible to impeach the verdict provided they relate to acts of the jury showing misconduct.[1] They are inadmissible, however, if they relate to statements of jurors,[2] except for purposes of impeachment.[3]

[1] Bradt v. Rommel, 26 Minn. 505, 5 N. W. 680; Svenson v. Chicago etc. Ry. Co. 68 Minn. 14, 70 N. W. 795.

[2] Svenson v. Chicago etc. Ry. Co. 68 Minn. 14, 70 N. W. 795; Aldrich v. Wetmore, 52 Minn. 164, 53 N. W. 1072; St. Martin v. Desnoyer, 1 Minn. 156 Gil. 131.

[3] Aldrich v. Wetmore, 52 Minn. 164, 53 N. W. 1072.

§ 1001. The affidavits of jurors as to what transpired in the jury-room or as to occurrences outside the jury-room during the course of the trial may be received in support of the verdict.

St. Martin v. Desnoyer, 1 Minn. 156 Gil. 131; Eich v. Taylor, 20 Minn. 378 Gil. 330; Aldrich v. Wetmore, 52 Minn. 164, 53 N. W. 1072; Svenson v. Chicago etc. Ry. Co. 68 Minn. 14, 70 N. W. 795; State v. Lentz, 45 Minn. 177, 47 N. W. 720.

Digitized by Google

§ 1002. The affidavits of jurors respecting matters occurring outside the jury-room during the progress of the trial are admissible to impeach their verdict.

Rush v. St. Paul City Ry. Co. 70 Minn. 5, 72 N. W. 733; Twaddle v. Mendenhall, 80 Minn. 177, 83 N. W. 135; Pierce v. Brennan, 83 Minn. 422, 86 N. W. 417.

§ 1003. Affidavits of jurors in general terms that they were not affected by what they saw, and that their verdict was rendered wholly on the evidence given in court, are of little or no weight. They may think that this was so and still their minds have been insensibly affected by what they saw.

Aldrich v. Wetmore, 52 Minn. 164, 53 N. W. 1072; Pierce v. Brennan, 83 Minn. 422, 86 N. W. 416.

Separation of the jury.

§ 1004. In a criminal action it is discretionary with the court to allow the jury to separate during the course of the trial and before the case is finally submitted to them.[1] After submission they cannot be permitted to separate until their discharge.[2] Any separation after final submission is presumptively prejudicial and ground for a new trial.[3] A temporary separation of a juror from his fellows, after the withdrawal of the jury, under the charge of the court, for deliberation upon their verdict, is no ground for a new trial, when it clearly and affirmatively appears that no prejudice resulted, and that the facts and circumstances connected with the separation were such as to exclude all reasonable presumption or suspicion that the juror was tampered with, or that the verdict was or could have been in any way influenced or affected by the irregularity.[4] In a civil action the jury are always allowed to separate during the course of the trial. After submission it is customary to keep them together until they reach a verdict. Whether the court has discretionary power to allow them to separate after final submission is still an open question in this state. It is properly a matter resting in the discretion of the court.[5] If the jury separate without authority from the court a new trial will ordinarily be granted.[6]

[1] Bilansky v. State, 3 Minn. 427 Gil. 313; State v. Ryan, 13 Minn. 370 Gil. 343; State v. Salverson, 91 N. W. 1.

[2] Maher v. State, 3 Minn. 444 Gil. 329; State v. Parrant, 16 Minn. 178 Gil. 157 (an extreme case—contra, State v. Hendricks, 32 Kans. 559); State v. Anderson, 41 Minn. 104, 42 N. W. 786; State v. Durnam, 73 Minn. 150, 75 N. W. 1127.

[3] Maher v. State, 3 Minn. 444 Gil. 329.

[4] State v. Conway, 23 Minn. 291; State v. Matakowich, 59 Minn. 514, 61 N. W. 677; State v. Wright, 98 Iowa 702.

[5] Dozenback v. Raymer, 13 Colo. 451.

[6] Aetna Ins. Co. v. Grube, 6 Minn. 82 Gil. 32.

Drinking intoxicating liquors.

§ 1005. The drinking of intoxicating liquors by jurors during the course of the trial and before final submission is not a ground for a

Digitized by Google

new trial unless it is made to appear that the drinking was at the expense of the prevailing party [1] or that the juror was thereby rendered unfit to discharge his duties intelligently.[2] The burden rests upon the moving party to show these facts affirmatively and unequivocally and in addition that he was unaware of the condition of the juror until after verdict and did not in any way participate in bringing it about.[3] Our supreme court has said that "such drinking raises more or less of a presumption against the verdict, which may be rebutted by showing that the juror was not in fact intoxicated." [4] This is vague. If it means that the prevailing party has the burden of proving non-intoxication it is clearly not good law. The true rule is that the moving party must show that the juror was intoxicated to such an extent that he could not intelligently discharge his duties. If he makes this showing he is entitled to a new trial unless it is made to appear that he directly or indirectly caused the intoxication or was aware of it before verdict or for any reason was not prejudiced.[5] A new trial ought not ordinarily to be granted unless it is made to appear by affidavit that both the party and his counsel were ignorant of the condition of the juror before verdict.[6] If liquor is drunk by the jury after retiring to the jury-room for deliberation a new trial will ordinarily be granted as a matter of course and it is not necessary to show intoxication.[7]

[1] State v. Madigan, 57 Minn. 425, 59 N. W. 490; State v. Salverson (Minn. 1902) 91 N. W. 1; Huston v. Vail, 51 Ind. 299; Vose v. Muller, 23 Neb. 171; Sacramento etc. Co. v. Showers, 6 Nev. 291.

[2] State v. Salverson (Minn. 1902) 91 N. W. 1; State v. Madigan, 57 Minn. 425, 59 N. W. 490; State v. Adamson, 43 Minn. 196, 45 N. W. 152; State v. Parrant, 16 Minn. 178 Gil. 157; State v. Bruce, 48 Iowa 530; State v. Livingston, 64 Iowa 560.

[3] State v. Salverson (Minn. 1902) 91 N. W. 1; State v. Bruce, 48 Iowa 530; State v. Livingston, 64 Iowa 560.

[4] State v. Madigan, 57 Minn. 425, 59 N. W. 490.

[5] State v. Salverson (Minn. 1902) 91 N. W. 1.

[6] Id.

[7] State v. Baldy, 17 Iowa 39; Ryan v. Harrow, 27 Iowa 494; State v. Madigan, 57 N. W. 425, 59 N. W. 490.

Visiting locus in quo.

§ 1006. The theory of the modern jury trial is that the evidence on which the verdict is based must all be submitted in open court where the judge can rule out inadmissible evidence and the parties can examine and cross-examine the witnesses and explain or rebut their testimony. If jurors were permitted to pursue private investigations out of court they would form opinions, often erroneous and one-sided, which the party prejudiced thereby would have no opportunity to correct.[1] If all the evidence were not submitted in open court the judge would never know whether the verdict was justified by the evidence or not.[2] Jurors cannot base their verdict on their private knowledge of the facts in issue or of facts relevant to the facts

Digitized by Google

in issue.[3] If a juror has any knowledge of such facts he must be sworn as a witness.[4] It is misconduct for a juror to visit the locus in quo during the trial except as provided by statute. But "not every unauthorized view of the locus in quo will require the setting aside of a verdict. Considerations of practical justice forbid it. It would be an injustice to deprive an innocent party of his verdict simply because there was a casual inspection of the premises by some of the jurors or because they were familiar with them. If verdicts were set aside for such reasons there would be no reasonable limits to litigation, especially in cities where the opportunities are great for jurors personally to view the locality of an accident under consideration. A caution in such cases by the trial court to the jurors at the commencement of the trial not to examine the locality except by order of the court would not, in all cases, prevent such examination, although in the majority of cases it probably would, as no upright juror would disregard the injunction of the court. But, where the gist of the action is the character or condition of the locus in quo or where a view of it will enable the jurors the better to determine the credibility of the witnesses or any other disputed fact in the case, if in such a case jurors, without the permission of the court or knowledge of the parties, visit the locality for the express purpose of acquiring such information, their verdict will be set aside, unless it is clear that their misconduct could not and did not influence their verdict. It cannot be tolerated that jurors should go on a private search for evidence in such cases and make an inspection of their own accord, because the parties have no opportunity of meeting, explaining or rebutting evidence so obtained. This rule must be given a reasonable operation and not be applied where there is only a possibility that the result was influenced by the alleged misconduct; but it is to be applied where the court cannot determine with any reasonable certainty whether the result was affected or not." [5]

[1] Aldrich v. Wetmore, 52 Minn. 164, 53 N. W. 1072.

[2] Chute v. State, 19 Minn. 271 Gil. 230.

[3] For the origin of this rule see Thayer, Ev. ch. III.

[4] Chute v. State, 19 Minn. 271 Gil. 230.

[5] Rush v. St. Paul City Ry. Co. 70 Minn. 5, 72 N. W. 733. See also, Koehler v. Cleary, 23 Minn. 325; Aldrich v. Wetmore, 52 Minn. 164, 53 N. W. 1072; Woodbury v. City of Anoka, 52 Minn. 329, 54 N. W. 187; Twaddle v. Mendenhall, 80 Minn. 177, 83 N. W. 135; Pierce v. Brennan, 83 Minn. 422, 86 N. W. 417.

§ 1007. Affidavits of the jurors themselves are admissible to prove their misconduct in this regard.

Rush v. St. Paul City Ry. Co. 70 Minn. 5, 72 N. W. 733; Twaddle v. Mendenhall, 80 Minn. 177, 83 N. W. 135; Pierce v. Brennan, 83 Minn. 422, 86 N. W. 417.

Unauthorized communications with jury.

§ 1008. Where any unauthorized communication is made to a juror in a cause on trial, which may have influenced his mind in favor

Digitized by Google

of the successful party, a new trial will be granted for that reason;[1] but if it is apparent that the communication could not have had such influence, it is no ground for a new trial.[2] "A communication made by a successful party should be more carefully scrutinized than one by a stranger; and, if made with intent to affect the minds of the jury, it might, ordinarily, be proper to assume that it had some influence. If, however, casually made, and without any such intent, the court can clearly see that it was harmless, we think it ought not to be ground for a new trial."[3]

[1] Hayward v. Knapp, 22 Minn. 5; Hoberg v. State, 3 Minn. 262 Gil. 181; State v. Floyd, 61 Minn. 467, 63 N. W. 1096.

[2] Chalmers v. Whittemore, 22 Minn. 305; Oswald v. Minneapolis etc. Ry. Co. 29 Minn. 5, 11 N. W. 112; State v. Lentz, 45 Minn. 177, 47 N. W. 720. See also, Helmbrecht v. Helmbrecht, 31 Minn. 504, 18 N. W. 449.

[3] Oswald v. Minneapolis etc. Ry. Co. 29 Minn. 5, 11 N. W. 112.

Miscellaneous cases of misconduct.

§ 1009. It is improper for a jury to make up their verdict by agreeing each to specify a sum and to divide the aggregate of such sums by twelve and accept the quotient as the verdict. But if such sum is finally agreed upon by subsequent discussion among the jurors a new trial will not be granted. To authorize a new trial in such cases it should appear that the jury, before ascertaining the quotient, agreed among themselves to abide at all events by the contingent result as their verdict, and that it was made up and rendered accordingly.[1] A jury who had leave to bring in a sealed verdict, stated to the officer in charge that they had agreed, though they had not, and they were allowed to separate, and the next morning two of them protested against the verdict, stating that they had voted for it under protest; and one of them, still adhering to his views, they were sent out again and finally agreed to a verdict. A new trial was granted although there was no evidence of prejudice.[2] If, during the progress of the trial, jurors express opinions which show clearly that they have prejudged the case a new trial will be granted as a matter of course.[3] An attempt by a juror, while the jury were deliberating, to send a letter to his wife, by the hands of the successful party, such party knowing nothing of it, was held no ground for a new trial. A slight and casual service rendered a juror by a party is not, in itself, a ground for a new trial.[4] A verdict was rendered and the jury discharged. Two days afterwards the jurors came into court and stated that the verdict as rendered was not such as they intended. It was held that a verdict could not be so impeached.[5]

[1] St. Martin v. Desnoyer, 1 Minn. 156 Gil. 131. See Bradt v. Rommel, 26 Minn. 505, 5 N. W. 680.

[2] Aetna Ins. Co. v. Grube, 6 Minn. 82 Gil. 32.

[3] State v. Dumphey, 4 Minn. 438 Gil. 340.

[4] Eich v. Taylor, 20 Minn. 378 Gil. 330.

[5] Stevens v. Montgomery, 27 Minn. 108, 6 N. W. 456.

Digitized by Google

§ 1010. It is not improper for the foreman to state to the judge in open court how the jury stands; at least it is no ground for a new trial.[1] During the course of the trial two jurors took a boat ride at night with the prevailing party and two of his important witnesses. They were excused from the trial by the court and by consent the trial proceeded with the other ten. It was held that the misconduct was waived.[2] In condemnation proceedings a view was ordered by the court. Only eleven jurors were present at the view but they were accompanied by the moving party and his counsel. On returning from the view the trial proceeded without such party calling the attention of the court to the absence of a juror on the view. It was held that he waived the irregularity.[3] At the close of the evidence, and before the court had charged the jury, six of the jurors sent a request to the counsel for the state and for the defendant that the cause be submitted without argument and this was done. Held not a ground for a new trial.[4]

[1] McNulty v. Stewart, 12 Minn. 434 Gil. 319.
[2] Young v. Otte, 57 Minn. 307, 59 N. W. 199.
[3] Gurney v. Minneapolis etc. Ry. Co. 41 Minn. 223, 43 N. W. 2.
[4] State v. Holden, 42 Minn. 350, 44 N. W. 123.

FOR MISCONDUCT OF COUNSEL

Improper remarks.

§ 1010a. The matter of granting a new trial for improper remarks of counsel in the course of the trial is governed by no fixed rules but rests almost wholly in the discretion of the trial court. The action of the trial court in this regard will be reversed on appeal only for a clear abuse of discretion.[1] Furthermore, whatever may be the rule in the trial court, a new trial will not be granted by the supreme court unless an objection was made to the remarks on the trial, and a ruling obtained. The remarks and objections must be properly presented to the supreme court in a case or bill of exceptions.[2] "When counsel in their arguments to the jury make remarks which are foreign to the case, are unwarranted by the testimony, and are calculated to prejudice a party in the minds of the jurors, the attention of the court should be called to the objectionable language and a ruling obtained. This may be done at the time the words are used, or when the jury is charged upon the law applicable to the pending issues. An exception to the remarks of counsel simply, is insufficient to raise the question on appeal."[3] According to the better view a trial court has the discretionary power to grant a new trial in such cases although no exception was taken on the trial.[4] The question is still an open one in this state. An objection made by the court, of its own motion, to the improper conduct complained of, is sufficient to enable the opposite party to take advantage of such conduct.[5]

[1] Knowles v. Van Gorder, 23 Minn. 197; Olson v. Gjertsen, 42 Minn. 407, 44 N. W. 306; State v. Adamson, 43 Minn. 196, 45

Digitized by Google

N. W. 152; Watson v. St. Paul City Ry. Co. 42 Minn. 46, 43 N. W. 904; Loucks v. Chicago etc. Ry. Co. 31 Minn. 526, 18 N. W. 651; Mykleby v. Chicago etc. Ry. Co. 49 Minn. 457, 52 N. W. 213; Johnson v. Chicago etc. Ry. Co. 37 Minn. 519, 35 N. W. 438; Riley v. Chicago etc. Ry. Co. 71 Minn. 425, 74 N. W. 171; Rheiner v. Stillwater etc. Ry. Co. 31 Minn. 193, 17 N. W. 279; Belyea v. Minneapolis etc. Ry. Co. 61 Minn. 224, 63 N. W. 627 (new trial granted in supreme court); State v. Floyd, 61 Minn. 467, 63 N. W. 1096. See cases under § 863.

[2] St. Martin v. Desnoyer, 1 Minn. 156 Gil. 131; State v. Adamson, 43 Minn. 196, 45 N. W. 152; Smith v. Wilson, 36 Minn. 334, 31 N. W. 176; Haug v. Haugan, 51 Minn. 558, 53 N. W. 874.

[3] State v. Frelinghuysen, 43 Minn. 265, 45 N. W. 432. To same effect: Olson v. Gjertsen, 42 Minn. 407, 44 N. W. 306; State v. Brown, 12 Minn. 538 Gil. 448; Nininger v. Knox, 8 Minn. 140 Gil. 110; Knowles v. Van Gorder, 23 Minn. 197; Corrigan v. Elsinger, 81 Minn. 42, 83 N. W. 492; Schultz v. Schneckenberger, 81 Minn. 380, 84 N. W. 119; State v. Reid, 39 Minn. 277, 39 N. W. 796; Mykleby v. Chicago etc. Ry. Co. 49 Minn. 457, 52 N. W. 213.

[4] Hill v. State, 42 Neb. 503, 60 N. W. 916; Tucker v. Henniker, 41 N. H. 317; Berry v. State, 10 Ga. 511; Cook v. Doud, 14 Colo. 483; Rudolph v. Landwerlen, 92 Ind. 34.

[5] Knowles v. Van Gorder, 23 Minn. 197.

§ 1011. Improper remarks of counsel on the trial will not ordinarily constitute a ground for a new trial if he desists when objection is made and the court instructs the jury to disregard them.[1] Where the case or bill of exceptions shows nothing to the contrary the supreme court will assume that the trial court disapproved of any improper remarks of counsel and properly instructed the jury to disregard them.[2]

[1] Johnson v. Chicago etc. Ry. Co. 37 Minn. 519, 35 N. W. 438; State v. Reid, 39 Minn. 277, 39 N. W. 796; Mykleby v. Chicago etc. Ry. Co. 49 Minn. 457, 52 N. W. 213; Riley v. Chicago etc. Ry. Co. 71 Minn. 425, 74 N. W. 171; Olson v. Gjertsen, 42 Minn. 407, 44 N. W. 306.

[2] State v. Brown, 12 Minn. 538 Gil. 448.

Miscellaneous cases of misconduct of counsel.

§ 1012. Counsel for the prevailing party offered prejudicial incompetent evidence and persisted in discussing the same in his argument to the jury though his offer was ruled out and he was ordered by the court not to discuss it. A new trial was granted in the supreme court.[1] A misrecital by counsel before a jury of the testimony of a witness is no ground for a new trial if it is apparent that no prejudice could have resulted.[2] Improper comments on a decision of the supreme court upon an appeal in the same cause has been held a ground for a new trial.[3]

[1] Belyea v. Minneapolis etc. Ry. Co. 61 Minn. 224, 63 N. W. 627.

Digitized by Google

[2] Rheiner v. Stillwater etc. Ry. Co. 31 Minn. 193, 17 N. W. 279.
[3] Martin v. Courtney, 81 Minn. 112, 83 N. W. 503.

FOR ACCIDENT OR SURPRISE

A matter of discretion.

§ 1013. Motions for a new trial on the ground of accident or surprise are not governed by any well defined rules but depend in a great degree upon the peculiar circumstances of each case. They are addressed to the sound judicial discretion of the court, and whether they should be granted or refused involves the inquiry whether substantial justice has been done, the court having in view solely the attainment of that end.[1] They should be granted with great caution and only to remedy manifest injustice.[2] They should not be granted unless there is a strong probability that a new trial would result differently.[3] Such motions are often closely allied to a motion for a new trial on the ground of newly discovered evidence.[4]

[1] Hull v. Minneapolis Street Ry. Co. 64 Minn. 402, 67 N. W. 218; Miller v. Layne, 84 Minn. 221, 87 N. W. 605; Wester v. Hedberg, 68 Minn. 434, 71 N. W. 616; Ragan v. James, 7 Kans. 355; Continental Nat. Bank v. Adams, 67 Barb. (N. Y.) 318; Hill v. Denslinger, 61 Iowa 240; Tyler v. Hoornbeck, 48 Barb. (N. Y.) 197.

[2] Hull v. Minneapolis Street Ry. Co. 64 Minn. 402, 67 N. W. 218; Matthews v. Allaire, 11 N. J. L. 242; Merrick v. Britton, 26 Ark. 496.

[3] Hull v. Minneapolis Street Ry. Co. 64 Minn. 402, 67 N. W. 218; Farnham v. Jones, 32 Minn. 7, 19 N. W. 83; Andrist v. Union Pacific Ry. Co. 30 Fed. 345; Haber v. Lane, 45 Miss. 608; Hargis v. Price, 4 Dana (Ky.) 79.

[4] Sheffield v. Mullin, 28 Minn. 251, 9 N. W. 756.

By supreme court.

§ 1014. The matter of granting or refusing a new trial on the ground of accident or surprise rests almost wholly in the discretion of the trial court and its action will rarely be reversed on appeal. The question for an appellate court in such cases is not whether a new trial might properly have been granted or denied but whether the court below violated a clear legal right of the appellant or abused its judicial discretion.[1] Especially is this true where the action of the trial court was based on conflicting affidavits.[2] "As a general rule a trial judge is more capable of correctly deciding whether the surprise alleged is induced by oversight, inattention, or forgetfulness, than a reviewing court. Many matters transpire in the conduct of a case in the court-room which it is almost impossible to present in detail to another tribunal, and of all of which the trial judge is necessarily observant. Further, the trial judge becomes better acquainted with the accustomed acts and habits of the various attorneys in constant practice before him, and therefore can

Digitized by Google

more accurately judge whether a complaint of such surprise as is here charged is of such a character as to demand relief. In some cases the acts of a trial judge which are seemingly harsh and arbitrary are, in view of all the circumstances surrounding them, just and even necessary to enforce dispatch and attention to the trial of cases."[3]

[1] Hull v. Minneapolis Street Ry. Co. 64 Minn. 402, 67 N. W. 218; Desnoyer v. McDonald, 4 Minn. 515 Gil. 402; Otterness v. Botten, 80 Minn. 430, 83 N. W. 382; Miller v. Layne, 84 Minn. 221, 87 N. W. 605; Huntress-Brown Lumber Co. v. Wyman, 55 Minn. 262, 56 N. W. 896.

[2] Wintermute v. Stinson, 19 Minn. 394 Gil. 340; Hull v. Minneapolis Street Ry. Co. 64 Minn. 402, 67 N. W. 218.

[3] Green v. Bulkley, 23 Kans. 130.

Objection on the trial.

§ 1015. It is a general rule that when a party is surprised on the trial he must instantly call the attention of the court to the matter and fortify his position by resorting to all available modes of present relief.

Wells-Stone Mercantile Co. v. Bowman, 59 Minn. 364, 61 N. W. 135; Nelson v. Carlson, 54 Minn. 90, 55 N. W. 821; Adamant Mfg. Co. v. Pete, 61 Minn. 464, 63 N. W. 1027; Wester v. Hedberg, 68 Minn. 434, 71 N. W. 616; Otterness v. Botten, 80 Minn. 430, 83 N. W. 382. See also, Bragg v. Moberly, 17 Mo. App. 221; Thiele v. Citizens Ry. Co. 140 Mo. 319; Gotzian v. McCollum, 8 S. Dak. 186; Lee Clark Co. v. Yankee, 9 Colo. App. 443.

§ 1016. When a party is surprised on the trial it is ordinarily his duty to move for a postponement or continuance[1] except when the surprise relates to the disqualification of a juror.[2] A party is not permitted to remain silent under such circumstances and speculate on the chances of a favorable verdict. Motions for a continuance or postponement are granted almost as a matter of course in such cases.[3] The rule requiring a party to make such a motion when surprised on the trial is not inflexible, but yields to the demands of justice.[4]

[1] Eich v. Taylor, 17 Minn. 172 Gil. 145; Ward v. Hackett, 30 Minn. 150, 14 N. W. 578; State v. Bagan, 41 Minn. 285, 43 N. W. 5; Cheney v. Dry Wood Lumber Co. 34 Minn. 440, 26 N. W. 236; Hendrickson v. Tracy, 53 Minn. 404, 55 N. W. 622; Lowe v. Minneapolis Street Ry. Co. 37 Minn. 283, 34 N. W. 33; Otterness v. Botten, 80 Minn. 430, 83 N. W. 382; Merrick v. Britton, 26 Ark. 496; Flint etc. Co. v. Marine Ins. Co. 71 Fed. 210.

[2] Wells-Stone Mercantile Co. v. Bowman, 59 Minn. 364, 61 N. W. 135.

[3] Lando v. Chicago etc. Ry. Co. 81 Minn. 279, 83 N. W. 1089; Merrick v. Britton, 26 Ark. 496.

[4] Farnham v. Jones, 32 Minn. 7, 19 N. W. 83; Nudd v. Home Ins.

Digitized by Google

Co. 25 Minn. 101; Russell v. Reed, 32 Minn. 45, 19 N. W. 86; Miller v. Layne, 84 Minn. 221, 87 N. W. 605; Alger v. Merritt, 16 Iowa 121; Delmas v. Martin, 39 Cal. 558; Rodrigues v. Comstock, 24 Cal. 88.

Showing on motion—affidavits.

§ 1017. It must be made to appear affirmatively and unequivocally that the accident or surprise could not have been guarded against by the exercise of ordinary prudence [1] and that due diligence was exercised in seeking to avert the consequences thereof.[2] The affidavit should state with particularity the circumstances of the accident or surprise and the facts showing diligence [3] or excusing the absence of an attorney,[4] party,[5] or witness.[6] If new evidence is sought to be introduced affidavits of the new witnesses must be submitted as on motions for a new trial for newly discovered evidence.[7] The affidavit should be made by the person who knows the facts and experienced the surprise. This is usually the attorney, if the accident or surprise occurred on the trial.[8] Counter and corroborating affidavits are permissible. Where the application is made by the defendant it must be made to appear affirmatively and unequivocally that he has a good defence on the merits. This may appear by his verified answer, but usually it is necessary for him to present an affidavit of merits setting forth with particularity the nature of his defence and the evidence by which he is able to prove it. It is doubtful if an affidavit of merits in conformity with Rule XIX would be sufficient on a motion for a new trial on this ground.

[1] Eich v. Taylor, 17 Minn. 172 Gil. 145; Cheney v. Dry Wood Lumber Co. 34 Minn. 440, 26 N. W. 236; Caughey v. Northern Pac. Elevator Co. 51 Minn. 324, 53 N. W. 545; Scott & Holston Lumber Co. v. Sharvy, 62 Minn. 528, 64 N. W. 1132; State v. Bagan, 41 Minn. 285, 43 N. W. 5; State v. Madigan, 57 Minn. 425, 59 N. W. 490.

[2] See cases under §§ 1015, 1016.

[3] See § 1051.

[4] Caughey v. Northern Pac. Elevator Co. 51 Minn. 324, 53 N. W. 545; Feltus v. Balch, 27 Minn. 357, 7 N. W. 688.

[5] Desnoyer v. McDonald, 4 Minn. 515 Gil. 402.

[6] Eich v. Taylor, 17 Minn. 172 Gil. 145; Swartzell v. Rogers, 3 Kans. 374; Warren v. Ritter, 11 Mo. 354.

[7] Eich v. Taylor, 17 Minn. 172 Gil. 145. See § 1052.

[8] Greene v. Farlow, 138 Mass. 146; Schellhouse v. Ball, 29 Cal. 605.

Cases in which motion granted.

§ 1018. A new trial for accident and surprise was granted where the question was whether plaintiff's or defendant's mortgages were filed first, and an abstract of the record made by the register of deeds for the defendant showed that the defendant's mortgages were filed first, and the defendant's attorneys, relying upon that made no preparation to prove the times of filing otherwise than by the record and the court admitted parol evidence of the times of filing; [1] where

Digitized by Google

a verdict was obtained by false testimony concerning a lost letter and the applicant was unable, without any want of diligence, to rebut such testimony on the trial;[2] where a written instrument, which a party with good reason believed to be lost, was unexpectedly produced at the trial by the opposite party to the suit, who was not entitled to its possession, and on its face disclosed an erasure and apparent alteration, which it was material for the former to explain, but which he was unable to do, in the absence of the notary who witnessed its execution, but whose evidence was not discovered to be material until after an inspection of the instrument subsequent to the trial;[3] where an original record was lost, and the defeated party was misled by a certified copy used on the trial, which was subsequently discovered not to conform to the original in important particulars, but the correctness of which he had no reasonable ground for suspecting on the trial;[4] where the plaintiff had gone to Germany with his wife and was unexpectedly detained there by her illness;[5] where the original defendant died during the pendency of the action and one of the executors dying, there was uncertainty as to who should be substituted and the remaining executor was a woman and ignorant.[6]

[1] Shaw v. Henderson, 7 Minn. 480 Gil. 386.
[2] Nudd v. Home Ins. Co. 25 Minn. 100.
[3] Russell v. Reed, 32 Minn. 45, 19 N. W. 86.
[4] Farnham v. Jones, 32 Minn. 7, 19 N. W. 83.
[5] Miller v. Layne, 84 Minn. 221, 87 N. W. 605.
[6] Huntress-Brown Lumber Co. v. Wyman, 55 Minn. 262, 56 N. W. 896.

Cases in which motion denied.

§ 1019. A motion for a new trial on the ground of accident or surprise was denied where a party, relying upon the statement of his counsel that the case would not be reached before a certain time, was absent when the case was called;[1] where a material witness, who was not subpœnaed, but who, at the request of the party, had promised to attend and testify, was physically unable to attend and the trial was had without him;[2] where the party was absent from the trial without excuse;[3] where counsel inadvertently overlooked a special statute of limitations;[4] where counsel was absent without excuse when the case was called;[5] where a material witness of the opposite party assured the applicant before trial that he would testify in a given way, but on the trial testified directly contrary;[6] where counsel failed to detect an omission in the sheriff's return on attachment until long after the trial, such return being an essential part of his case;[7] where counsel claimed to be surprised by a decision of the supreme court;[8] where a witness testified contrary to the expectations of the applicant and after trial made an affidavit contradicting his testimony on the trial;[9] where it was claimed that a witness did not understand or speak English perfectly and failed to express his true meaning on the stand;[10] where counsel was not present at the call of the calendar at the opening of the term and was

Digitized by Google

surprised at the early date at which the case was set and in consequence was not prepared for trial;[11] where the disqualification of a juror was discovered on the trial but counsel failed to ask for the discharge of the jury;[12] where a witness testified on the trial contrary to her testimony before a committing magistrate;[13] where a witness on the trial testified contrary to his statements to the applicant before trial;[14] where a witness claimed that his testimony on the trial did not express his real meaning;[15] where a juror was disqualified by reason of non-residence in the county;[16] where a juror was disqualified by reason of alienage;[17] where the applicant claimed to have been surprised at the tistimony of a witness and did not discover it until after trial;[18] where one of the jurors did not understand the English language;[19] where, on a fifth trial of the same cause, a witness was first produced who testified, to the surprise of applicant, that he had seen the accident;[20] where the applicant was surprised at the testimony of a witness;[21] where a party was surprised at not being allowed to introduce further evidence after resting;[22] where the party did not secure the attendance of a material witness who had promised to be present;[23] where counsel failed to construe a pleading properly;[24] where it was claimed that one of the jurors was disqualified by reason of deafness;[25] where counsel failed to put in all his evidence on account of a remark of the judge to the effect that a certain ruling put an end to his case.[26]

[1] Desnoyer v. McDonald, 4 Minn. 515 Gil. 402.
[2] Eich v. Taylor, 17 Minn. 172 Gil. 145.
[3] Cheney v. Dry Wood Lumber Co. 34 Minn. 440, 26 N. W. 236.
[4] Barrows v. Fox, 39 Minn. 61, 38 N. W. 777.
[5] Caughey v. Northern Pac. Elevator Co. 51 Minn. 324, 53 N. W. 545; Latusek v. Davies, 79 Minn. 279, 82 N. W. 587.
[6] Adamant Mfg. Co. v. Pete, 61 Minn. 464, 63 N. W. 1027. See Webb v. Barnard, 36 Minn. 336, 31 N. W. 214.
[7] Scott & Holston Lumber Co. v. Sharvy, 62 Minn. 528, 64 N. W. 1132.
[8] Kurtz v. St. Paul etc. Ry. Co. 65 Minn. 60, 67 N. W. 808.
[9] Bristol v. Schultz, 68 Minn. 106, 70 N. W. 872.
[10] Nelson v. Carlson, 54 Minn. 90, 55 N. W. 821
[11] Feltus v. Balch, 27 Minn. 357, 7 N. W. 688.
[12] Wells-Stone Mercantile Co. v. Bowman, 59 Minn. 364, 61 N. W. 135.
[13] Gardner v. Kellogg, 23 Minn. 463.
[14] Webb v. Barnard, 36 Minn. 336, 31 N. W. 214.
[15] Sheffield v. Mullin, 28 Minn. 251, 9 N. W. 756.
[16] Keegan v. Minneapolis etc. Ry. Co. 76 Minn. 90, 78 N. W. 965.
[17] State v. Durnam, 73 Minn. 150, 75 N. W. 1127.
[18] Wester v. Hedberg, 68 Minn. 434, 71 N. W. 616.
[19] State v. Madigan, 57 Minn. 425, 59 N. W. 490.
[20] Hull v. Minneapolis Street Ry. Co. 64 Minn. 402, 67 N. W. 218.
[21] Wintermute v. Stinson, 19 Minn. 394 Gil. 340.
[22] Beaulieu v. Parsons, 2 Minn. 37 Gil. 26.
[23] Otterness v. Botten, 80 Minn. 430, 83 N. W. 382.

Digitized by Google

[24] First Nat. Bank v. Steele, 58 Minn. 126, 59 N. W. 959.
[25] Wilcox v. Arbuckle, 50 Minn. 523, 52 N. W. 926.
[26] Zimmerman v. Lamb, 7 Minn. 421 Gil. 336.

FOR EXCESSIVE OR INADEQUATE DAMAGES

Under which section motion to be made.

§ 1020. Our statute regulating the matter of granting new trials for excessive or inadequate damages is very imperfect. It provides that a new trial may be granted for "excessive or inadequate and insufficient damages, appearing to have been given under the influence of passion or prejudice." [1] This provision is held to apply only to cases where the damages, being regulated by no fixed rules, are in a large measure left to the discretion of the jury.[2] In other words it is limited to actions for personal torts and cases where punitive damages are allowed. In all other cases motions for a new trial on account of excessive or inadequate damages are based on the ground that the verdict is not justified by the evidence.[3] It is very unfortunate that we have not one general ground on which to base all such motions. Certainly there is nothing in the nature of the subject matter which forbids it. In a large sense the matter of granting a new trial for excessive or inadequate damages is simply a branch of the general subject of granting new trials on the ground that the verdict is not justified by the evidence.[4] Indeed, our supreme court has practically, though not explicitly, held that in all cases, including actions for a personal tort, a new trial may be granted for excessive or inadequate damages when the motion is based on the ground that the verdict is not justified by the evidence.[5]

[1] See § 987.
[2] State v. Shevlin-Carpenter Co. 66 Minn. 217, 68 N. W. 973; Lane v. Dayton, 56 Minn. 90, 57 N. W. 328; Blume v. Scheer, 83 Minn. 409, 86 N. W. 446.
[3] First Nat. Bank v. City of St. Cloud, 73 Minn. 219, 75 N. W. 1054; State v. Shevlin-Carpenter Co. 66 Minn. 217, 68 N. W. 973 (action for conversion); Blume v. Scheer, 83 Minn. 409, 86 N. W. 446.
[4] Blume v. Scheer, 83 Minn. 409, 86 N. W. 446.
[5] Hall v. Chicago etc. Ry. Co. 46 Minn. 439, 49 N. W. 239; State v. Shevlin-Carpenter Co. 66 Minn. 217, 68 N. W. 973; Gray v. Minnesota Tribune Co. 81 Minn. 333, 84 N. W. 113.

A matter of discretion.

§ 1021. The matter of granting a new trial for excessive or inadequate damages rests almost wholly in the discretion of the trial court. What is said under § 1059 is applicable here. When the motion is made under the fourth subdivision of the statute, that is, in actions for personal tort or where punitive damages are allowable, the court should be particularly cautious in setting aside the verdict, for in such cases the question of damages is peculiarly one for the jury.[1] The duty of the court in this regard is to keep the jury within

Digitized by Google

the bounds of reason.[2] The court should only act for the relief of manifest injustice. To warrant the court in setting aside a verdict on this ground "the damages must be not merely more than the court would have awarded if it had tried the case, but they must so greatly and grossly exceed what would be adequate in the judgment of the court, that they cannot reasonably be accounted for, except upon the theory that they were awarded, not in a judicial frame of mind, but under the influence of passion,—that is to say, of excited feeling, rather than of sober judgment; or of prejudice,—that is to say, of a state of mind partial to the successful party, or unfair to the other. The damages must be so exorbitant as to shock the sense of the court, and satisfy it that, after making just allowance for difference of opinion among fair-minded men, they cannot be accounted for except upon the theory that in the particular case the fair-mindedness was wanting. It must be confessed that this expression of the principles upon which new trials should be granted for excessive damages is somewhat general and at large; but these are substantially the principles enunciated by text writers and in the adjudged cases; and the subject is one which, from its very nature, hardly admits of more specific treatment. A motion for a new trial on this ground, as on some other grounds, appeals in a measure to the discretion of the trial court. This does not mean that the motion is to be granted or denied at the mere pleasure or fancy or feeling of the court, but that, the matter being one which cannot be determined by the application of definite and precise rules, it is to be acted upon in the exercise of a sound practical judgment, in view of all the relevant facts of the particular case, or, to use a current expression, in view of the whole situation."[3] Although it is a delicate thing to set aside a verdict for excessive damages in a case where they are not susceptible of accurate measurement, the court must sometimes do it in order to prevent injustice.[4]

[1] Olson v. St. Paul etc. Ry. Co. 45 Minn. 536, 48 N. W. 445; Blume v. Scheer, 83 Minn. 409, 86 N. W. 446.

[2] Slette v. Great Northern Ry. Co. 53 Minn. 341, 55 N. W. 137; Peterson v. Western Union Tel. Co. 65 Minn. 18, 67 N. W. 646.

[3] Pratt v. Pioneer Press Co. 32 Minn. 217, 18 N. W. 816, 20 N. W. 87. See also, Woodward v. Glidden, 33 Minn. 108, 22 N. W. 127; Dennis v. Johnson, 42 Minn. 301, 44 N. W. 68; Blume v. Scheer, 83 Minn. 409, 86 N. W. 446.

[4] Woodward v. Glidden, 33 Minn. 108, 22 N. W. 127; McCarthy v. Niskern, 22 Minn. 90; Hall v. Chicago etc. Ry. Co. 46 Minn. 439, 49 N. W. 239; Peterson v. Western Union Tel. Co. 68 Minn. 18, 67 N. W. 646; Mitchell v. Mitchell, 60 Minn. 12, 61 N. W. 682; Blume v. Scheer, 83 Minn. 409, 86 N. W. 446.

Necessity of passion or prejudice.

§ 1022. When the motion is made under the fourth subdivision of the statute the trial court is not authorized to grant a new trial unless it is manifest that the damages were given under the influence of passion or prejudice.[1] It is not enough that the court would have

Digitized by Google

assessed them differently[2] or believes them unreasonably large.[3] Ordinarily the fact of prejudice or passion appears from the verdict being so large or small, when compared with what the evidence indicates it ought to be, that the court must conclude that the jury did not arrive at the amount upon a fair and impartial consideration of the evidence.[4] Affidavits are inadmissible to prove the existence of passion or prejudice. The court must base its decision solely on the evidence submitted on the trial.[5]

[1] Nelson v. Village of West Duluth, 55 Minn. 497, 57 N. W. 149; Pratt v. Pioneer Press Co. 32 Minn. 217, 18 N. W. 816, 20 N. W. 87; Martin v. Desnoyer, 1 Minn. 156 Gil. 131; Beaulieu v. Parsons, 2 Minn. 37 Gil. 26; City of St. Paul v. Kuby, 8 Minn. 154 Gil. 125; Chamberlain v. Porter, 9 Minn. 260 Gil. 244; Chapman v. Dodd, 10 Minn. 350 Gil. 277; Du Laurans v First Division St. Paul etc. Ry. Co. 15 Minn. 49 Gil. 29; Judson v. Reardon, 16 Minn. 431 Gil. 387; Shartle v. City of Minneapolis, 17 Minn. 308 Gil. 284; Meeks v. City of St. Paul, 64 Minn. 220, 66 N. W. 966; Peterson v. Western Union Tel. Co. 65 Minn. 18, 67 N. W. 646; Blume v. Scheer, 83 Minn. 409, 86 N. W. 446.

[2] Pratt v. Pioneer Press Co. 32 Minn. 217, 18 N. W. 816, 20 N. W. 87.

[3] Nelson v. Village of West Duluth, 55 Minn. 497, 57 N. W. 149.

[4] Nelson v. Village of West Duluth, 55 Minn. 497, 57 N. W. 149; Dennis v. Johnson, 42 Minn. 301, 44 N. W. 68.

[5] Moran v. Mackey, 32 Minn. 266, 20 N. W. 159; Blume v. Scheer, 83 Minn. 409, 86 N. W. 446.

§ 1023. When the motion is made under the fifth subdivision of the statute, that is, in cases where the damages are governed by fixed rules and are wholly compensatory for pecuniary loss the court is justified in granting a new trial more freely.

Hutchins v. St. Paul etc. Ry. Co. 44 Minn. 5, 46 N. W. 79 (death by wrongful act); Fixen v. Blake, 47 Minn. 540, 50 N. W. 612 (action for deceit); Ward v. Anderberg, 36 Minn. 300, 30 N. W. 890 (replevin); Whitely v. Mississippi etc. Co. 38 Minn. 523, 38 N. W. 753 (condemnation proceedings); Wyman v. Erickson, 35 Minn. 202, 28 N. W. 240 (action for goods sold and delivered—miscalculation); First Nat. Bank v. City of St. Cloud, 73 Minn. 219, 75 N. W. 1054 (water rental—contract price—deductions for incomplete performance); Grant v. Wolf, 34 Minn. 32, 24 N. W. 289 (contract—items of damage erroneously included); Becker v. Bohmert, 63 Minn. 403, 65 N. W. 403 (claim against estate of decedent); Hodge v. Eastern Ry. Co. 70 Minn. 193, 72 N. W. 1074 (action for conversion).

By supreme court.

§ 1024. Whether the motion is made under the fourth or the fifth subdivision of the statute the action of the trial court will rarely be reversed on appeal. What is said under §§ 1075–1077 is applicable here. The duty of the trial court is to keep the jury within the

Digitized by Google

bounds of reason; the duty of the appellate court is to keep the trial court within the bounds of judicial discretion. The two courts are not governed by the same rules except, possibly, where the motion is made under the fourth subdivision.[1] The action of the trial court will not be reversed on appeal except for a clear abuse of discretion.[2] It is not enough to justify a reversal that the appellate court would have been better satisfied with a smaller verdict.[3] It is to be remembered that in determining an application for a new trial on the ground of an excessive verdict, as on other grounds, the trial court occupies a position of practical advantage over an appellate court. There is a certain atmosphere of the trial, well known to the profession, which cannot be put upon paper.[4]

[1] Blume v. Scheer, 83 Minn. 409, 86 N. W. 446.

[2] Pratt v. Pioneer Press Co. 32 Minn. 217, 18 N. W. 816, 20 N. W. 87; Hardenbergh v. St. Paul etc. Ry. Co. 41 Minn. 200, 42 N. W. 933; Blakeman v. Blakeman, 31 Minn. 396, 18 N. W. 103; Peterson v. Western Union Tel. Co. 65 Minn. 18, 67 N. W. 646; Dennis v. Johnson, 42 Minn. 301, 44 N. W. 68.

[3] Flatt v. D. M. Osborne & Co. 33 Minn. 98, 22 N. W. 440; Blakeman v. Blakeman, 31 Minn. 396, 18 N. W. 103; Sobieski v. St. Paul etc. Ry. Co. 41 Minn. 169, 42 N. W. 863; Koch v. St. Paul City Ry. Co. 45 Minn. 407, 48 N. W. 491; Fulmore v. St. Paul City Ry. Co. 72 Minn. 448, 75 N. W. 589.

[4] Pratt v. Pioneer Press Co. 32 Minn. 217, 18 N. W. 816, 20 N. W. 87; Olson v. St. Paul etc. Ry. Co. 45 Minn. 536, 48 N. W. 445. But see Blume v. Scheer, 83 Minn. 409, 86 N. W. 446.

Hicks v. Stone not applicable.

§ 1025. It has been held, by a divided court, that where the motion is made under the fourth subdivision of the statute the rule laid down in Hicks v. Stone does not apply. In such cases the damages awarded must be so excessive as to shock the sense of the court and to satisfy it that, after making just allowance for the difference of opinion among fair minded, the amount cannot be accounted for except on the theory that the jury were actuated by passion or prejudice. "This question must be determined solely from the evidence in the case and the amount of the verdict. They must be compared, and if, from the evidence, it appears that the amount of the verdict was so excessive as to indicate passion or prejudice, the order appealed from must be affirmed; otherwise, it must be reversed. No outside matters are to be considered, and we are to pass upon it on the record solely, and as an original question. We cannot give weight to the fact that the court below saw the witnesses, listened to the testimony and had an opportunity to observe the feeling exhibited at the trial." [1]

[1] Blume v. Scheer, 83 Minn. 409, 86 N. W. 446.

Record on appeal—motion for new trial necessary.

§ 1026. The question of excessive or inadequate damages can only be raised on appeal upon a record which purports on its face or in the certificate of the judge to contain all of the evidence submit-

Digitized by Google

ted on the trial or at least all the evidence bearing on the question of damages.[1] Where the trial is by jury the question of damages can be raised on appeal only after a motion for a new trial on that ground has been passed upon by the trial court.[2]

[1] Moran v. Mackey, 32 Minn. 266, 20 N. W. 159; City of St. Paul v. Kurby, 8 Minn. 154 Gil. 125; Page v. Merwin, 54 Conn. 426.

[2] Spencer v. St. Paul etc. Ry. Co. 22 Minn. 29; Severns v. Brainerd, 61 Minn. 265, 63 N. W. 477; Bank of Commerce v. Smith, 57 Minn. 374, 59 N. W. 311; Fletcher v. German-American Ins. Co. 79 Minn. 33, 82 N. W. 647.

Remitting excess.

§ 1027. When the only objection to the verdict is the excessive amount of the damages awarded, it is within the sound discretion of the trial court to refuse a new trial upon condition that the prevailing party will remit the excess.[1] This should be done only where the verdict is otherwise unimpeachable.[2] In this state the court is authorized to exercise such a power even in cases where the damages were manifestly awarded under the influence of passion or prejudice.[3] "It may naturally be supposed that, in general, where other issues than merely the amount of damages arise in a case, the same passion and prejudice which is indicated by the awarding of excessive damages, may have affected the determination of the jury upon other issues also; and if this should be deemed the fact, a new trial should be awarded. But, while it may hence be considered that the trial court ought not generally to refuse a trial de novo, where a verdict is so excessive as to lead to the conviction that the jury has been influenced by passion or prejudice in awarding it, yet, in a particular case the court may feel satisfied that the verdict of the jury is right and ought to stand, only that it is excessive in amount; and where it does not appear that the court has exceeded the limits of discretion in such a case, its determination will not be disturbed."[4] If a verdict is so manifestly excessive as to show that it was rendered through passion or prejudice, the only safe rule is to set it aside altogether, at least in all cases where the evidence is conflicting, and the merits of the case doubtful; for it cannot be told but that this same passion or prejudice controlled the jury in finding on the other issues in the case.[5] The court may reduce the damages when the motion is based on the ground that the verdict is not justified by the evidence.[6]

[1] Craig v. Cook, 28 Minn. 232, 9 N. W. 712; Miller v. Hogan, 84 N. W. 40; Grant v. Wolf, 34 Minn. 32, 24 N. W. 289; Brown v. Doyle, 69 Minn. 543, 72 N. W. 814; Ladd v. Newell, 34 Minn. 107, 24 N. W. 366; Kopp v. Northern Pac. Ry. Co. 41 Minn. 310, 43 N. W. 73; Van Doren v. Wright, 54 Minn. 455, 56 N. W. 51; Arkansas Valley Land & Cattle Co. v. Mann, 130 U. S. 69.

[2] Craig v. Cook, 28 Minn. 232, 9 N. W. 712; Miller v. Hogan, 84 N. W. 40; Hall v. Chicago etc. Ry. Co. 46 Minn. 439, 49 N. W. 239.

Digitized by Google

[3] Craig v. Cook, 28 Minn. 232, 9 N. W. 712; Pratt v. Pioneer Press Co. 35 Minn. 251, 28 N. W. 708; Blume v. Scheer, 83 Minn. 409, 86 N. W. 446.

[4] Craig v. Cook, 28 Minn. 232, 9 N. W. 712; Trow v. Village of White Bear, 78 Minn. 432, 80 N. W. 1117.

[5] Hall v. Chicago etc. Ry. Co. 46 Minn. 439, 49 N. W. 239; McNamara v. McNamara (Wis.) 84 N. W. 901.

[6] Brown v. Doyle, 69 Minn. 543, 72 N. W. 814; Hodge v. Eastern Ry. Co. 70 Minn. 193, 72 N. W. 1074.

§ 1028. On a motion for a new trial for excessive damages a court has no authority to fix a certain sum as not excessive and enter judgment for that amount absolutely, without giving the party an option to take a new trial.

Kennon v. Gilmer, 131 U. S. 22.

§ 1029. Subject to the same limitations as the trial court the supreme court may grant a new trial unless the prevailing party consents to remit a specified part of the award.[1] This can only be done when the excess can be clearly ascertained from the record.[2]

[1] Ward v. Haws, 5 Minn. 440 Gil. 359; Hutchins v. St. Paul etc. Ry. Co. 44 Minn. 5, 46 N. W. 79; Fredrickson v. Johnson, 60 Minn. 337, 62 N. W. 337; Mitchell v. Mitchell, 60 Minn. 12, 61 N. W. 682; Becker v. Bohmert, 63 Minn. 403, 65 N. W. 728; Stickney v. Bronson, 5 Minn. 215 Gil. 172; Campbell v. Loeb, 72 Minn. 76, 74 N. W. 1024; Peterson v. Western Union Tel. Co. 75 Minn. 368, 77 N. W. 985; Gahagan v. Aermotor Co. 67 Minn. 252, 69 N. W. 914; Kleven v. Great Northern Ry. Co. 70 Minn. 79, 72 N. W. 828; Thompson v. Chicago etc. Ry. Co. 71 Minn. 89, 73 N. W. 707.

[2] Seeman v. Feeney, 19 Minn. 79 Gil. 54; Smith v. Dukes, 5 Minn. 373 Gil. 301; Bond v. Corbett, 2 Minn. 248 Gil. 209; Dodge v. Chandler, 13 Minn. 114 Gil. 105.

Setting aside successive verdicts.

§ 1030. A court should act with great caution in setting aside a second verdict on account of excessive damages. But where the verdict is irrational, unjust and manifestly the result of passion or prejudice it is the duty of the court to set it aside no matter how many similar verdicts have been vacated for the same cause, for justice must be administered according to reason, not passion.

Peterson v. Western Union Tel. Co. 65 Minn. 18, 67 N. W. 646; Bathke v. Krassin, 78 Minn. 272, 80 N. W. 950.

When granted as of course.

§ 1031. Where it is clear that the jury assessed the damages in accordance with an erroneous instruction [1] or where they evidently made a miscalculation [2] or included improper items of damage [3] a new trial should be granted as a matter of course unless the error can be corrected by a remittitur.

[1] Ward v. Anderberg, 36 Minn. 300, 30 N. W. 890.

[2] Wyman v. Erickson, 35 Minn. 202, 28 N. W. 240. See Bank of

Digitized by Google

Commerce v. Smith, 57 Minn. 374, 59 N. W. 311; Fletcher v. German-American Ins. Co. 79 Minn. 337, 82 N. W. 647.

[3] Grant v. Wolf, 34 Minn. 32, 24 N. W. 289.

For inadequate damages.

§ 1032. A new trial may be granted for inadequate damages. In passing on a motion for a new trial on this ground the court is governed by the same rules as when the motion is made for excessive damages.[1] Where the damages are governed by fixed rules and are wholly compensatory for pecuniary loss a court is justified in granting a new trial with greater freedom than where the damages are not governed by any fixed rules and are necessarily left in a large measure to the discretion of the jury.[2] The test here, as elsewhere, is one of reasonableness. It is the duty of the trial court to keep the jury within the bounds of reason. Is the verdict one which reasonable men might find upon a consideration of all the evidence? If it is manifest that the jury have failed to take into consideration all of the proper elements of damage a new trial should be awarded [3] even in an action for personal tort.[4] Where the jury find a verdict in favor of the plaintiff which determines issues in his favor that entitle him to substantial damages and the jury award him only nominal damages a new trial should be granted as a matter of course.[5]

[1] Hall v. The Emily Banning, 33 Cal. 522; McDonald v. Walter, 40 N. Y. 551; Boggess v. Met. St. Ry. Co. 118 Mo. 328.

[2] Fawcett v. Woods, 5 Iowa 400; Bishop v. Macon, 7 Ga. 200.

[3] Tauton Mfg. Co. v. Smith, 9 Pick. (Mass.) 11; Georgia Southern etc. Ry. Co. v. Jones, 90 Ga. 292.

[4] Henderson v. St. Paul Ry. Co. 52 Minn. 479, 55 N. W. 53; Phillips v. Southwestern Ry. Co. L. R. 4 Q. B. Div. 406; Mariani v. Dougherty, 46 Cal. 27; Berry v. Lake Erie etc. Ry. Co. 72 Fed. 488; Superstone v. Rochester Ry. Co. 25 App. Div. (N. Y.) 285; Morrissey v. Westchester Electric Ry. Co. 30 App. Div. (N. Y.) 424; Waufle v. McLellan, 51 Wis. 484; Brown v. Foster, 1 App. Div. (N. Y.) 578.

[5] Conrad v. Dobmeier, 57 Minn. 147, 58 N. W. 870; Welch v. McAllister, 13 Mo. App. 89; De La Torre v. Met. St. Ry. Co. 48 App. Div. (N. Y.) 126; Miller v. Delaware etc. Ry. Co. 58 N. J. L. 426.

§ 1033. A court may properly deny a motion for a new trial on the ground that the damages awarded by the verdict are inadequate if the moving party is not entitled to recover any damages.

Young v. Great Northern Ry. Co. 80 Minn. 123, 83 N. W. 32.

§ 1034. Although the question has never been definitely settled by the supreme court a party undoubtedly has the right to move for a new trial for inadequate damages under either the fourth or fifth subdivision of the statute. The fourth subdivision cannot be held exclusive even as to actions for a personal tort, for often in such cases a new trial should be granted although the verdict bears no evidence of passion or prejudice, for example, where the jury have evidently

Digitized by Google

made a miscalculation or failed to consider all the proper elements of damage.

Actions for personal injuries.

§ 1035. In the following personal injury cases the damages were held not excessive by the trial court but were held excessive on appeal:

Slette v. Great Northern Ry. Co. 53 Minn. 341, 55 N. W. 137 (plaintiff a section-man working for defendant at $35 per month —30 years old—transverse fracture of thigh bone—verdict, $4,100—reduced on appeal to $2,100); Kennedy v. St. Paul City Ry. Co. 59 Minn. 45, 60 N. W. 810 (plaintiff a laundryman —injury to ankle—verdict $3,100—reduced on appeal to $2,-100); Gahagan v. Aermotor Co. 67 Minn. 252, 69 N. W. 914 (plaintiff a boy 8 years old—two fingers mangled so that they had to be amputated—verdict, $1,800—reduced on appeal to $1,200); Johnson v. St. Paul City Ry. Co. 67 Minn. 260, 69 N. W. 900 (plaintiff a woman 75 years old—fracture of one of the bones on the outer side of the left ankle—tearing of lateral ligaments of the ankle and injury to joint—crutches permanently necessary—verdict $4,000—reduced on appeal to $2,500); Weiner v. Minneapolis Street Ry. Co. 80 Minn. 312, 83 N. W. 181 (plaintiff thrown from street car—no injuries requiring a physician—verdict $350—reduced on appeal to $200); Durose v. St. Paul City Ry. Co. 80 Minn. 512, 83 N. W. 397 (plaintiff a boy 15 years old—thrown from a wagon by a street car—slight abrasions on hip—no serious injury—verdict, $700—reduced on appeal to $400); Lammers v. Great Northern Ry. Co. 82 Minn. 120, 84 N. W. 728 (plaintiff a married woman—collision at railway crossing—no bones broken—no permanent injury—shoulder dislocated—cut on ear—confined to bed four weeks—verdict, $4,000—reduced on appeal to $2,500); Bennett v. Backus Lumber Co. 77 Minn. 198, 79 N. W. 682 (plaintiff a laboring man—sprained ankle—crutches necessary for a month—unable to work for several months—verdict, $2,000—reduced on appeal to $1,250); Torske v. Com. Lumber Co. (Minn.) 90 N. W. 532 (plaintiff a boy—loss of first joint of second and third toes of right foot and tendon of big toe severed—verdict $2,500—reduced on appeal to $1,500).

§ 1036. In the following personal injury cases the damages were held excessive by the trial court and its action was sustained on appeal:

Hall v. Chicago etc. Ry. Co. 46 Minn. 439, 49 N. W. 239 (able-bodied young man made a cripple and invalid for life—verdict, $40,143.33—reduced to $25,000); Dunn v. Burlington etc. Ry. Co. 35 Minn. 73, 27 N. W. 448 (child eight years old completely crippled and rendered helpless, both eyes burned out, both ears burned off and hands burned to a crisp—verdict, $50,000—reduced to $25,000); Barg v. Bousfield, 65 Minn. 355, 68 N. W. 355 (boy 16 years old lost three fingers—verdict, $5,125—re-

Digitized by Google

duced to $4,000); Kennedy v. Chicago etc. Ry. Co. 57 Minn. 227, 58 N. W. 878 (laboring man—hearing as to one ear destroyed—sight impaired—memory weakened—general health and strength broken—verdict, $5,000—reduced to $4,000); Howe v. Minneapolis etc. Ry. Co. 62 Minn. 71, 64 N. W. 102 (young man rendered a physical wreck for life—permanently deformed—verdict, $20,000—reduced to $14,500); Thompson v. Chicago etc. Ry. Co. 71 Minn. 89, 73 N. W. 707 (locomotive fireman—working power of right hand practically destroyed and internal injuries of uncertain extent—verdict $10,500—reduced by trial court to $8,000—reduced by supreme court to $6,500); Stiller v. Bohn Mfg. Co. 80 Minn. 1, 82 N. W. 981 (young man 20 years old—injury to hand—verdict $4,500—reduced to $3,500 by trial court—reduced to $2,500 on appeal); Palmer v. Winona etc. Co. 83 Minn. 85, 85 N. W. 941 (capacity for earning wages reduced from $60 to $40 per month—verdict $1,800—reduced to $1,200); Lawson v. Truesdale, 60 Minn. 410, 62 N. W. 546 (serious internal injuries—verdict, $7,150—reduced to $5,000).

§ 1037. In the following personal injury cases the damages were held not excessive by the trial court and its action was sustained on appeal:

Tierney v. Minneapolis etc Ry. Co. 33 Minn. 311, 23 N. W. 229 (trainman while coupling was knocked down by car and run over with loss of one leg—verdict, $10,000); Treise v. City of St. Paul, 36 Minn. 526, 32 N. W. 857 (defective street—woman thrown from carriage—rendered permanently weak—verdict, $3,000); Lowe v. Minneapolis Street Ry. Co. 37 Minn. 283, 34 N. W. 33 (serious injuries resulting from unsafe street railway tracks—verdicts, $5,000 and $2,000); Sobieski v. St. Paul etc. Ry. Co. 41 Minn. 169, 42 N. W. 863 (man 30 years old with family—loss of one arm below elbow—verdict, $7,000); Watson v. Minneapolis Street Ry. Co. 53 Minn. 551, 55 N. W. 742 (plaintiff a laboring man—injuries severe, lasting and liable to terminate fatally—verdict, $6,000); Delude v. St. Paul City Ry. Co. 55 Minn. 63, 56 N. W. 461 (conductor of street car—leg jammed while coupling grip car and trailer—verdict, $2,750); Galloway v. Chicago etc. Ry. Co. 56 Minn. 346, 57 N. W. 1058 (woman wounded in knee—nervous shock resulted—became a permanent invalid—verdict $10,000); Hannem v. Pence, 40 Minn. 127, 41 N. W. 657 (plaintiff walking along street—ice from gutter fell on his head—injuries serious and permanent—verdict, $5,500); Keller v. Sioux City etc. Ry. Co. 27 Minn. 178, 6 N. W. 486 (woman 67 years old injured while alighting from train—injuries not serious—verdict, $975); Waldron v. City of St. Paul, 33 Minn. 87, 22 N. W. 4 (defective sidewalk—accident resulted in an incurable affliction of the spinal cord seriously impairing the physical powers of the plaintiff and causing permanent suffering—verdict, $2,000); Bishop v. St. Paul Street Ry. Co. 48 Minn. 26, 50 N. W. 927 (passenger on street car—thrown down and injured about head—paralysis su-

Digitized by Google

pervened involving whole left side of body—verdict, $15,000); Brusch v. St. Paul etc. Ry. Co. 52 Minn. 512, 55 N. W. 57 (passenger on street car thrown from car while going around a curve—internal injuries requiring several months to cure—verdict, $1,000); Cooper v. St. Paul Street Ry. Co. 54 Minn. 379, 56 N. W. 42 (party injured stepping from street car—58 years of age—bookkeeper constantly employed—earning $70 per month—unable to work after accident—constant pain—condition incurable—verdict, $8,800); Greene v. Minneapolis etc. Ry. Co. 31 Minn. 248, 17 N. W. 378 (plaintiff locomotive engineer—collision—injuries very serious and probably permanent—verdict, $5,900); Macy v. St. Paul etc. Ry. Co. 35 Minn. 200, 28 N. W. 249 (serious and permanent injury to spine, rendering the plaintiff forever incapable of performing ordinary manual labor and subjecting him to constant pain—verdict, $2,500); Olson v. St. Paul etc. Ry. Co. 45 Minn. 536, 48 N. W. 445 (plaintiff 45 years old—carpenter earning good wages—injury to foot requiring amputation—verdict, $10,000); Rogers v. Chicago etc. Ry. Co. 65 Minn. 308, 67 N. W. 1003 (plaintiff a locomotive engineer—injury resulted in chronic inflammation of the knee joint—verdict, $3,000); Olson v. Great Northern Ry. Co. 68 Minn. 155, 71 N. W. 5 (plaintiff laboring man—46 years old—earning $40 to $50 per month—as a result of the accident his nervous system was permanently diseased—his recovery so as to be able to perform manual labor doubtful—verdict, $6,500); Christian v. City of Minneapolis, 69 Minn. 530, 72 N. W. 815 (plaintiff a woman—a sprained ankle—confined to her bed for several months—had to use crutches or canes for a long time—verdict, $3,000); Donnelly v. St. Paul City Ry. Co. 70 Minn. 278, 73 N. W. 157 (plaintiff a woman thrown against a seat in a street car—rib broken, penetrating the pleural cavity and the tissue of the lung—hemorrhages—blood poisoning—diseased condition of lung—verdict, $2,500); Fulmore v. St. Paul City Ry. Co. 72 Minn. 448, 75 N. W. 589 (woman 35 years old—mother of six children—a rib torn from cartilege—neuralgia of the tenth intercostal nerve—permanent weakness of side—verdict, $2,750); City of St. Paul v. Kurby, 8 Minn. 154 Gil. 125 (injury to child from defective sidewalk—verdict, $511); Thompson v. Great Northern Ry. Co. 79 Minn. 291, 82 N. W. 637 (loss of leg—conductor 40 year old earning $90 a month—verdict, $7,500); Durose v. St. Paul City Ry. Co. 80 Minn. 512, 83 N. W. 397 (father and son thrown from wagon by street car—bruised but not seriously—verdict, $900 for father and $400 for son); Schultz v. Faribault etc. Co. 82 Minn. 100, 84 N. W. 631 (arm paralyzed from shoulder to tips of fingers—injury permanent—laboring man—verdict, $7,200); Moran v. Eastern Ry. Co. 48 Minn. 46, 50 N. W. 930 (loss of arm and permanent injury to back—laboring man—verdict $13,000); Burrows v. Village of Lake Crystal, 61 Minn. 357, 63 N. W. 745 (shortening of left leg—sciatic nerve diseased—verdict, $1,000); Miller

Digitized by Google

v. St. Paul City Ry. Co. 66 Minn. 192, 68 N. W. 862 (injury causing septicaemia—verdict, $2,500); Sloniker v. Great Northern Ry. Co. 76 Minn. 306, 79 N. W. 168 (loss of leg by young girl—verdict $12,000); Thompson v. Minneapolis etc. Ry. Co. 79 Minn. 413, 82 N. W. 670 (head badly cut and bruised—verdict, $800); Fonda v. St. Paul City Ry. Co. 77 Minn. 336, 79 N. W. 1043 (loss of both legs—verdict, $20,000) Jackson v. St. Paul City Ry. Co. 74 Minn. 48, 76 N. W. 956 (boy eight years old thrown from street car and quite seriously injured—full recovery uncertain—verdict, $750); Hall v. City of Austin, 73 Minn. 134, 75 N. W. 1121 (plaintiff a laboring woman supporting a family—confined to bed seven weeks—great suffering—unable to walk five months after injury—injury permanent—chronic inflammation—verdict, $1,000); Graham v. City of Albert Lea, 48 Minn. 201, 50 N. W. 1108 (plaintiff rendered a physical wreck and permanently unable to perform manual labor—verdict, $4,000); Njus v. Chicago etc. Ry. Co. 47 Minn. 92, 49 N. W. 527 (laboring man—loss of left thumb—verdict $1,500); Johnson v. Northern Pacific Ry. Co. 47 Minn. 430, 50 N. W. 473 (cut and bruised about head—severe shock to nervous system—verdict, $1,500); Watson v. St. Paul City Ry. Co. 42 Minn. 46, 43 N. W. 904 (plaintiff 45 years old in good business—serious and painful injuries—capacity for business greatly impaired permanently—verdict $4,000); Macy v. St. Paul etc. Ry. Co. 35 Minn. 200, 28 N. W. 249 (plaintiff a yard-master—serious and permanent injury to spine rendering the plaintiff forever incapable of performing ordinary manual labor and subjecting him to constant pain—verdict, $2,500); Gray v. Red Lake Falls, 85 Minn. 24, 88 N. W. 24 (plaintiff a laboring man—foot crushed—two amputations necessary—verdict, $3,000); Gray v. Commutator Co. 85 Minn. 462, 89 N. W. 322 (hand and wrist torn—permanently injured—laboring man—verdict, $5,000); Herbert v. St. Paul City Ry. Co. 85 Minn. 341, 88 N. W. 996 (plaintiff a woman—slipped on icy street car step—internal injuries—severe nervous shock—considerable impairment of health—verdict, $1,000).

Actions for expulsion from train.

§ 1038. In the following cases the damages for expulsion from a train were held not excessive by the trial court and its action was sustained on appeal:

Du Laurans v. First Division St. Paul etc. Ry. Co. 15 Minn. 49 Gil. 29 (verdict, $500); Braun v. Northern Pacific Ry. Co. 79 Minn. 404, 82 N. W. 675 (verdict, $200); Guthier v. Minneapolis etc. Ry. Co. (Minn. 1902) 91 N. W. 1096 (verdict $1,375).

§ 1039. In the following cases the damages for expulsion from a train were held excessive:

Finch v. Northern Pac. Ry. Co. 47 Minn. 36, 49 N. W. 329 (verdict $650—reduced by trial court to $500—reduced on appeal to $250); Serwe v. Northern Pac. Ry. Co. 48 Minn. 78, 50 N. W.

Digitized by Google

1021 (verdict $775—reduced by trial court to $550—sustained on appeal); Hardenbergh v. St. Paul etc. Ry. Co. 41 Minn. 200, 42 N. W. 933 (verdict $800—reduced by the trial court to $400—action sustained on appeal); McLean v. Chicago etc. Ry. Co. 50 Minn. 485, 52 N. W. 966 (verdict $250—held not excessive by trial court and new trial denied—held excessive on appeal and a new trial ordered); Gisleson v. Minneapolis etc. Ry. Co. 85 Minn. 329, 88 N. W. 970 (verdict $225—reduced to $150 by trial court and its action sustained on appeal); Klevin v. Great Northern Ry. Co. 70 Minn. 79, 72 N. W. 828 (verdict, $225—reduced to $125); Pine v. St. Paul City Ry. Co. 50 Minn. 144, 52 N. W. 392 (expulsion from street car—verdict $400—new trial granted); Carsten v. Northern Pacific Ry. Co. 44 Minn. 454, 47 N. W. 49 (instruction that jury might find verdict for $1,000 held erroneous).

Actions for slander.

§ 1040. St. Martin v. Desnoyer, 1 Minn. 156 Gil. 131 (verdict, $212.50—held not excessive by trial court—its action sustained on appeal); Blakeman v. Blakeman, 31 Minn. 396, 18 N. W. 103 (plaintiff a woman—verdict $4,000—new trial denied by trial court—sustained on appeal); Fredrickson v. Johnson, 60 Minn. 337, 62 N. W. 388 (verdict, $5,000—held not excessive by trial court—reduced to $3,000 on appeal); Blume v. Scheer, 83 Minn. 409, 86 N. W. 447 (verdict $550—held excessive by trial court and reduced to $100—reversed on appeal); Earle v. Johnson, 81 Minn. 472, 84 N. W. 332 (verdict, $1,500—held not excessive by both courts).

Actions for libel.

§ 1041. Peterson v. Western Union Tel. Co. 65 Minn. 18, 67 N. W. 646 (verdict, $5,200—new trial denied by trial court—granted on appeal); Dennis v. Johnson, 42 Minn. 301, 44 N. W. 68 (verdict $5,000—new trial granted by trial court and its action sustained on appeal); Pratt v. Pioneer Press Co. 32 Minn. 217, 18 N. W. 816, 20 N. W. 87 (verdict, $5,000—new trial granted by trial court and its action sustained on appeal); Gray v. Times Newspaper Co. 78 Minn. 323, 81 N. W. 7 (verdict, $1,800—new trial granted by trial court and its action sustained on appeal); Gray v. Minnesota Tribune Co. 81 Minn. 333, 84 N. W. 113 (verdict $1,000—new trial granted by trial court and its action sustained on appeal); Sharpe v. Larson, 74 Minn. 323, 77 N. W. 233 (verdict, $750—held excessive on appeal); Dennis v. Johnson, 47 Minn. 56, 49 N. W. 383 (verdict, $8,500—reduced by trial court to $3,000).

Actions for breach of promise.

§ 1042. Johnson v. Travis, 33 Minn. 231, 22 N. W. 624 (verdict, $750—new trial denied by trial court and its action sustained on appeal); Hanson v. Elton, 38 Minn. 493, 38 N. W. 614 (verdict, $2,500—new trial denied by trial court and its action sustained on appeal); Clement v. Brown, 57 Minn. 314, 59 N. W. 198 (verdict, $13,042—reduced by trial court to $7,000—new trial granted by appellate court

Digitized by Google

on the ground that punitive damages were wrongly included); Hahn v. Bettingen, 84 Minn. 512, 88 N. W. 10 (verdict $6,000—reduced to $4,000 by trial court and its action sustained on appeal).

Actions for death by wrongful act.

§ 1043. O'Malley v. St. Paul etc. Ry. Co. 43 Minn. 289, 45 N. W. 440 (child 6 years old—verdict $3,000—held not excessive by both courts); Jacobson v. St. Paul etc. Ry. Co. 41 Minn. 206, 42 N. W. 932 (common laborer—verdict $5,000—held not excessive by both courts); Hutchins v. St. Paul etc. Ry. Co. 44 Minn. 5, 46 N. W. 79 (freight brakeman—39 years—unmarried—had assisted his mother slightly—thriftless habits—verdict, $3,500—new trial refused by trial court—reduced to $2,000 on appeal); Gunderson v. Northwestern Elevator Co. 47 Minn. 161, 49 N. W. 694 (boy 6 years old—father, sole heir, 40 years old working on a salary—verdict, $5,000—reduced to $3,000 by trial court—new trial granted on appeal); Siever v. Great Northern Ry. Co. 76 Minn. 269, 79 N. W. 95 (locomotive fireman—28 years old and unmarried—earning $60 or $70 per month—good health and thrifty habits—verdict $3,000—held not excessive by both courts); Bolinger v. St. Paul etc. Ry. Co. 36 Minn. 418, 31 N. W. 856 (strong, healthy man, 48 years old, earning good wages as a day laborer—head of a family—verdict $5,000—held not excessive by both courts); Gray v. St. Paul City Ry. Co. 91 N. W. 1106 (infant 5 years old—verdict, $2,750—held not excessive by both courts).

Actions for false imprisonment.

§ 1044. Woodward v. Glidden, 33 Minn. 108, 22 N. W. 127 (verdict, $2,917—new trial denied by trial court—granted on appeal); Judson v. Reardon, 16 Minn. 431 Gil. 387 (verdict, $800—held not excessive by both courts); Rauma v. Lamont, 82 Minn. 477, 85 N. W. 236 (verdict, $450—held not excessive by both courts).

Actions for tort—miscellaneous cases.

§ 1045. Schaffer v. City of St. Paul, 41 Minn. 310, 43 N. W. 65 (action for diverting stream of water which ran through a lot of plaintiff—verdict, $1,000—held excessive and new trial granted by trial court—its action sustained on appeal); Kopp v. Northern Pacific Ry. Co. 41 Minn. 310, 43 N. W. 73 (action for wrongful excavation on an adjoining lot—verdict, $3,500—reduced by trial court to $2,000—its action sustained on appeal); Pierce v. Wagner, 29 Minn. 355, 13 N. W. 170 (action for nuisance—verdict, $800—reduced to $500 by trial court—its action sustained on appeal); Huot v. Wise, 27 Minn. 68, 6 N. W. 425 (enticing away a wife—verdict $1,800—held not excessive by both courts); Getchell v. Lindley, 24 Minn. 265 (malpractice—verdict, $7,000—reduced to $5,200 by trial court—its action sustained on appeal); Lynd v. Picket, 7 Minn. 184 Gil. 128 (illegal levy—verdict, $150—held not excessive by both courts); Mitchell v. Mitchell, 60 Minn. 12, 61 N. W. 682 (action for malicious entry and assault—verdict $1,000—new trial denied by trial court—reduced to $500 on appeal); Lockwood v. Lockwood, 67 Minn. 476,

Digitized by Google

70 N. W. 784 (alienation of husband's affections—verdict, $15,000—held not excessive by both courts); Friburk v. Standard Oil Co. 66 Minn. 277, 68 N. W. 1090 (nuisance—verdict, $300—new trial denied by trial court—granted on appeal); Bathke v. Krassin, 78 Minn. 272, 80 N. W. 950 (alienation of wife's affection—verdict $5,000—new trial denied by trial court—granted on appeal); Cronfeldt v. Arrol, 50 Minn. 327, 52 N. W. 857 (action for wrongful attachment of exempt property—$138 as exemplary damages—held not excessive by both courts); Fiola v. McDonald, 85 Minn. 147, 88 N. W. 431 (action for malicious prosecution—verdict $750—held not excessive by both courts); Bathke v. Krassin, 82 Minn. 226, 84 N. W. 796 (action for alienation of wife's affection—verdict, $3,000—new trial denied by trial court—reduced to $1,500 on appeal); Rauma v. Lamont, 82 Minn. 477, 85 N. W. 236 (action for aiding and abetting in the illegal arrest and improper use of force in false imprisonment—verdict, $350—held not excessive by both courts); Hirschman v. Emme, 81 Minn. 99, 83 N. W. 482 (action for assault—striking on the head with a club—severe and probably permanent injury—verdict $1,000—reduced by trial court to $250—restored by supreme court); Tykeson v. Bowman, 60 Minn. 108, 61 N. W. 909 (action for malicious prosecution—verdict, $450—held not excessive by both courts); Lucy v. Chicago etc. Ry. Co. 64 Minn. 7, 65 N. W. 944 (action by passenger against railroad company for failure to protect female passenger against vile and abusive language of drunken fellow passenger—verdict, $250—held not excessive by both courts); Craig v. Cook, 28 Minn. 232, 9 N. W. 712 (action for trespass—forcibly ejecting from house—striking, beating and abusing a woman—verdict, $1,200—reduced to $900 by trial court and its action affirmed on appeal); McCarthy v. Niskern, 22 Minn. 90 (action against inn-keeper—improper ejection from inn with abusive language—verdict, $900—held excessive on appeal and new trial granted); Mueller v. Chicago, B. & N. Ry. Co. 75 Minn. 109, 77 N. W. 566 (action for threatening to put plaintiff off train for improper use of mileage ticket—verdict, $213.01—reduced to $123.21 by trial court—reduced to $73.21 on appeal); Smith v. Munch, 65 Minn. 256, 68 N. W. 19 (action for false imprisonment—verdict, $400—held excessive); Berger v. Minneapolis Gaslight Co. 60 Minn. 296, 62 N. W. 336 (12 actions brought for damages from crude petroleum escaping from the premises of the defendant into cellars and wells of plaintiffs—verdicts ranging from $185 to $375 held not excessive); Fredericksen v. Singer Mfg. Co. 38 Minn. 356, 37 N. W. 453 (action for assault—verdict, $500—held not excessive by both courts); Lightbody v. Truelson, 39 Minn. 310, 40 N. W. 67 (action for trespass—verdict, $1,800.33—reduced to $1,000 by trial court and its action approved on appeal); Anderson v. Chicago etc. Ry. Co. 85 Minn. 337, 88 N. W. 1001 (action for nuisance—verdict, $352—held not excessive).

Digitized by Google

FOR NEWLY DISCOVERED EVIDENCE

To be granted with extreme caution.

§ 1046. "Newly discovered evidence, upon certain conditions and under certain restrictions, is a ground for a new trial. But relief thus sought is in derogation of and an exception to the general rule which requires litigants to submit all their evidence in the first instance. Applications of this kind are regarded jealously, and construed with strictness. Motives of policy suggest good reasons for such a rule. To admit new evidence, after the party who has lost the suit has had an opportunity of discovering the points of his adversary's strength and of his own weakness, tends much to the introduction of perjury; and, were the rule not strictly enforced, it would tend to protract litigation, to the injury of both the parties and the public." [1] The defeated party is usually apt to think that he could make a stronger case on another trial, and, in order that there be an end of litigation, new trials should be very cautiously and sparingly granted on the ground of newly discovered evidence.[2]

[1] Lampsen v. Brander, 28 Minn. 526, 11 N. W. 94. Followed and approved in Peck v. Small, 35 Minn. 465, 29 N. W. 69; Cirkel v. Croswell, 36 Minn. 323, 31 N. W. 513.

[2] Nelson v. Carlson, 54 Minn. 90, 55 N. W. 821.

§ 1047. Motions for a new trial upon the ground of newly discovered evidence are not governed by any well defined rules but depend in a great degree upon the peculiar circumstances of each case. They are addressed to the sound discretion of the court, and whether they should be granted or refused involves the inquiry whether substantial justice has been done, the court having in view solely the attainment of that end.

Barrett v. Third Ave. Ry. Co. 45 N. Y. 632; State v. Lautenschlager, 23 Minn. 290. See § 1058.

By supreme court.

§ 1048. The matter of granting a new trial on the ground of newly discovered evidence is very largely addressed to the discretion of the trial court. Having heard the case tried and seen the witnesses and heard them testify, its means of judging of the propriety of granting a new trial, and as to whether the new evidence will be likely to change the result, are superior to those afforded to the appellate court by a mere statement of the evidence in the record. The inquiry of the appellate court will be, not whether upon the record a new trial apparently might have been properly granted, but whether the refusal of it involved the violation of a clear legal right or a manifest abuse of judicial discretion.

Lampsen v. Brander, 28 Minn. 526, 11 N. W. 94; Peterson v. Faust, 30 Minn. 22, 14 N. W. 64; Eldridge v. Minneapolis etc. Ry. Co. 32 Minn. 253, 20 N. W. 151; Peck v. Small, 35 Minn. 465, 29 N. W. 69; Cirkel v. Croswell, 36 Minn. 323, 31 N. W. 513; State v. Barrett, 40 Minn. 65, 41 N. W. 459; Hoye v.

Digitized by Google

Chicago etc. Ry. Co. 46 Minn. 269, 48 N. W. 1117; Bradley v. Norris, 67 Minn. 48, 69 N. W. 624; Jones v. Chicago etc. Ry. Co. 42 Minn. 183, 43 N. W. 1114; Layman v. Minneapolis Street Ry. Co. 66 Minn. 452, 69 N. W. 452; Thiel v. Kennedy, 82 Minn. 142, 84 N. W. 142; Benton v. Minneapolis etc. Co. 73 Minn. 498, 76 N. W. 265; O'Hara v. H. L. Collins Co. 84 Minn. 435, 87 N. W. 1023.

§ 1049. The action of the lower court will be sustained on appeal as a matter of course if the record does not contain all of the evidence submitted on the trial together with the newly discovered evidence.

[1] Scofield v. Walrath, 35 Minn. 356, 28 N. W. 926; Gardner v. Fidelity etc. Assoc. 67 Minn. 207, 69 N. W. 895; State v. Lautenschlager, 23 Minn. 290.

Motion for postponement condition precedent.

§ 1050. A motion for a new trial on the ground of newly discovered evidence will ordinarily be denied if the applicant knew of the existence of such evidence at the time of the trial and failed to apply for a postponement or continuance of the case.

Hendrickson v. Tracy, 53 Minn. 404, 55 N. W. 622; State v. Bagan, 41 Minn. 285, 43 Minn. 5; Lowe v. Minneapolis Street Ry. Co. 37 Minn. 283, 34 N. W. 33.

Showing on motion.

§ 1051. A party seeking a new trial on the ground of newly discovered evidence must show affirmatively and unequivocally by his affidavits on the motion that the new evidence was not in fact discovered until after the trial and that it could not have been discovered before the trial by the exercise of reasonable diligence. It is not sufficient for him to state in his affidavit that he used due diligence or his utmost efforts in the discovery of evidence before the trial or that the new evidence could not have been discovered before the trial by the exercise of reasonable diligence. He must state with particularity what he did to discover the new evidence before the trial so that the court may determine from the affidavit alone whether he exercised reasonable diligence.[1] He should ordinarily state the names of the persons from whom he sought information with the time and place.[2] He should state explicitly when, where, and how the new evidence was discovered.[3] The affidavit should be made by the party personally rather than by his attorney.[4]

[1] Bradley v. Norris, 67 Minn. 48, 69 N. W. 624; Meeks v. City of St. Paul, 64 Minn. 220, 66 N. W. 966; Revor v. Bageley, 76 Minn. 326, 79 N. W. 171; Wellendorf v. Tesch, 77 Minn. 512, 80 N. W. 629.

[2] Smith v. Wagaman, 58 Iowa 11; Moody v. Priest, 69 Iowa 23; Smith v. Williams, 11 Kans. 104.

[3] Bradley v. Norris, 67 Minn. 48, 69 N. W. 624.

[4] Broat v. Moor, 44 Minn. 468, 47 N. W. 55.

§ 1052. The applicant for a new trial on this ground must submit to the court the affidavit of the new witnesses setting forth verbatim

Digitized by Google

just what can be testified to in court.[1] Copies must be served on the opposite party with the notice of motion.[2] If it is impossible to submit such affidavits the reasons should be fully stated in the affidavit of the applicant.[3] Counter affidavits may be submitted by the opposing party.[4]

[1] Keough v. McNitt, 6 Minn. 513 Gil. 357; Eddy v. Caldwell, 7 Minn. 225 Gil. 166.

[2] See § 2059.

[3] Eddy v. Caldwell, 7 Minn. 225 Gil. 166.

[4] Finch v. Green, 16 Minn. 355 Gil. 315; Peterson v. Faust, 30 Minn. 22, 14 N. W. 64.

Evidence must not have been discoverable before trial.

§ 1053. Newly discovered evidence is no ground for a new trial if it could have been discovered before the trial by the exercise of reasonable diligence.[1] It must be made to appear affirmatively and unequivocally that the new evidence was not in fact discovered until after the trial [2] and that it could not have been discovered before the trial by the exercise of reasonable diligence. If the party knew of the existence of the evidence before the trial the fact that his counsel did not is not enough to justify a new trial.[4] If it be left even doubtful that the party knew of the evidence he will not succeed. A strict adherence to this rule is necessary to prevent imposition upon the court.[5] A new trial will not ordinarily be granted to enable a party to prove matter which was of public record at the time of the trial,[6] or to examine a person who was a witness on the trial and might then have been examined by the applicant.[7]

[1] Baze v. Arper, 6 Minn. 220 Gil. 142; Shaw v. Henderson, 7 Minn. 480 Gil. 386; Humphrey v. Havens, 9 Minn. 318 Gil. 301; Knoblauch v. Kronschnabel, 18 Minn. 300 Gil. 272; Wintermute v. Stinson, 19 Minn. 394 Gil. 340; Krassin v. Shearan, 24 Minn. 355; Evans v. Christopherson, 24 Minn. 330; Laurel v. State Nat. Bank, 25 Minn. 48; State v. Wagner, 23 Minn. 544; Fenno v. Chapin, 27 Minn. 519, 8 N. W. 762; Sheffield v. Mullin, 28 Minn. 251, 9 N. W. 756; Ward v. Hackett, 30 Minn. 150, 14 N. W. 578; Eldridge v. Minneapolis etc. Ry. Co. 32 Minn. 253, 20 N. W. 151; Austin v. Northern Pac. Ry. Co. 34 Minn. 351, 25 N. W. 798; Keith v. Briggs, 32 Minn. 185, 20 N. W. 91; Taylor v. Mueller, 30 Minn. 343, 15 N. W. 413; Farnsworth v. Robbins, 36 Minn. 369, 31 N. W. 349; Broat v. Moor, 44 Minn. 468, 47 N. W. 55; Hendrickson v. Tracy, 53 Minn. 404, 55 N. W. 622; Nelson v. Carlson, 54 Minn. 90, 55 N. W. 821; Elmborg v. St. Paul City Ry. Co. 51 Minn. 70, 52 N. W. 969; Tuman v. Pillsbury, 60 Minn. 520, 63 N. W. 104; Lathrop v. Dearing, 59 Minn. 234, 61 N. W. 24; Meeks v. City of St. Paul, 64 Minn. 220, 66 N. W. 966; Galvin v. City of St. Paul, 62 Minn. 145, 64 N. W. 147; Malmgren v. Phinney, 65 Minn. 25, 67 N. W. 649; Kurtz v. St. Paul etc. Ry. Co. 65 Minn. 60, 67 N. W. 808; Wherry v. Duluth etc. Ry. Co. 64 Minn. 415, 67 N. W. 223; Adamant Mfg. Co. v. Pete, 61 Minn. 464, 63 N.

Digitized by Google

W. 1024; Bradley v. Norris, 67 Minn. 48, 69 N. W. 624; Vosbeck v. Kellogg, 78 Minn. 176, 80 N. W. 957; Wellendorf v. Tesch, 77 Minn. 512, 80 N. W. 629.

[2] Knoblauch v. Kronschnabel, 18 Minn. 300 Gil. 272; Wintermute v. Stinson, 19 Minn. 394 Gil. 340; Galvin v. City of St. Paul, 62 Minn. 145, 64 N. W. 147; Adamant Mfg. Co. v. Pete, 61 Minn. 464, 63 N. W. 1027.

[3] Wintermute v. Stinson, 19 Minn. 394 Gil. 340; Nininger v. Knox, 8 Minn. 140 Gil. 110; Broat v. Moor, 44 Minn. 468, 47 N. W. 55; Bradley v. Norris, 67 Minn. 48, 69 N. W. 624; Meeks v. City of St. Paul, 64 Minn. 220, 66 N. W. 966; Revor v. Bagley, 76 Minn. 326, 79 N. W. 171; Wellendorf v. Tesch, 77 Minn. 512, 80 N. W. 629; Kurtz v. St. Paul etc. Ry. Co. 65 Minn. 60, 67 N. W. 808; Evans v. Christopherson, 24 Minn. 330; Wherry v. Duluth etc. Ry. Co. 64 Minn. 415, 67 N. W. 223; Vosbeck v. Kellogg, 78 Minn. 176, 80 N. W. 957.

[4] Broat v. Moor, 44 Minn. 468, 47 N. W. 55.

[5] Nininger v. Knox, 8 Minn. 140 Gil. 110; Broat v. Moor, 44 Minn. 468.

[6] Galvin v. City of St. Paul, 62 Minn. 145, 64 N. W. 147; Laurel v. State Nat. Bank, 25 Minn. 48.

[7] Taylor v. Mueller, 30 Minn. 343, 15 N. W. 413; Wherry v. Duluth etc. Ry. Co. 64 Minn. 415, 67 N. W. 223. But see Humphrey v. Havens, 9 Minn. 318 Gil. 301.

Evidence must not be merely contradictory or impeaching.

§ 1054. Newly discovered evidence which merely contradicts or impeaches a witness is no ground for a new trial except in extraordinary cases.[1] Of course if it is made to appear that a verdict has been corruptly obtained by deliberate perjury, suborned by the successful party, it is the duty of the court to grant a new trial and a refusal to do so cannot be justified on the ground that the newly discovered evidence is merely impeaching.[2] If the new evidence has a direct bearing on a material issue and would be likely to change the result a new trial may be granted although such evidence would also tend to impeach the adverse party or his witnesses.[3]

[1] Peck v. Small, 35 Minn. 465, 29 N. W. 69; Cirkel v. Croswell, 36 Minn. 323, 31 N. W. 513; State v. Dumphey, 4 Minn. 438 Gil. 340; Mead v. Constans, 5 Minn. 171 Gil. 134; State v. Wagner, 23 Minn. 544; Gardner v. Kellogg, 23 Minn. 463; Gilmore v. Brost, 39 Minn. 190, 39 N. W. 139; Brazil v. Peterson, 44 Minn. 212, 46 N. W. 331; State v. Barrett, 40 Minn. 65, 41 N. W. 459; State v. Bagan, 41 Minn. 285, 43 N. W. 5; Jones v. Chicago etc. Ry. Co. 42 Minn. 183, 43 N. W. 1114; Bristol v. Schultz, 68 Minn. 106, 70 N. W. 872; Revor v. Bagley, 76 Minn. 326, 79 N. W. 171; Granning v. Swenson, 49 Minn. 381, 52 N. W. 30; State v. Brooks, 84 Minn. 276, 87 N. W. 779.

[2] Hoye v. Chicago etc. Ry. Co. 46 Minn. 269, 48 N. W. 1117.

[3] Cairns v. Keith, 50 Minn. 32, 52 N. W. 267.

Digitized by Google

Evidence must not be merely cumulative.

§ 1055. A new trial will not ordinarily be granted for newly discovered evidence which is merely cumulative or corroborative of the evidence introduced on the trial.

State v. Dumphey, 4 Minn. 438 Gil. 340; Mead v. Constans, 5 Minn. 171 Gil. 134; Nininger v. Knox, 8 Minn. 140 Gil. 110; Johnson v. Coles, 21 Minn. 108; State v. Wagner, 23 Minn. 544; State v. Barrett, 40 Minn. 65, 41 N. W. 459; Gilmore v. Brost, 39 Minn. 190, 39 N. W. 139; Farnsworth v. Robbins, 36 Minn. 369, 31 N. W. 349; Lowe v. Minneapolis etc. Ry. Co. 37 Minn. 283, 34 N. W. 33; State v. Cantieny, 34 Minn. 1; Schacherl v. St. Paul City Ry. Co. 42 Minn. 42, 43 N. W. 837; Jones v. Chicago etc. Ry. Co. 42 Minn. 183, 43 N. W. 1114; Brazil v. Peterson, 44 Minn. 212, 46 N. W. 331; Nelson v. Finseth, 55 Minn. 417, 57 N. W. 141; Elmborg v. St. Paul City Ry. Co. 51 Minn. 70, 52 N. W. 969; Meeks v. City of St. Paul, 64 Minn. 220, 66 N. W. 966; Laurel v. State Nat. Bank, 25 Minn. 48; Revor v. Bagley, 76 Minn. 326, 79 N. W. 171; Vosbeck v. Kellogg, 78 Minn. 176, 80 N. W. 957; State v. Durnam, 73 Minn. 150, 75 N. W. 150; Kennedy v. St. Paul City Ry. Co. 59 Minn. 45, 60 N. W. 810; Griswold v. Eastman, 51 Minn. 189, 53 N. W. 542.

§ 1056. Cumulative evidence is additional evidence of the same kind and to the same point as that given on the first trial.[1] The term point as here used means an evidential fact. Evidence is not cumulative merely because it tends to prove the same issuable fact.[2] It is not cumulative if it relates to distinct and independent facts of a different character though tending to establish the same ground of claim or defence.[3] It is not cumulative if it is of a different kind, for example, positive and direct evidence where the evidence on the trial was wholly circumstantial;[4] written evidence where the evidence on the trial was oral;[5] unequivocal admissions of a party where the evidence on the trial was circumstantial,[6] but applications for a new trial on the ground of newly discovered oral admissions of a party against whom they are to be used are viewed with disfavor.[7]

[1] Nininger v. Knox, 8 Minn. 140 Gil. 110; Lyman v. Minneapolis Street Ry. Co. 66 Minn. 452, 69 N. W. 329; Bradley v. Norris, 67 Minn. 48, 69 N. W. 624; Gilmore v. Brost, 39 Minn. 190, 39 N. W. 139; Schacherl v. St. Paul City Ry. Co. 42 Minn. 42, 43 N. W. 837; Lowe v. Minneapolis Street Ry. Co. 37 Minn. 283, 34 N. W. 33.

[2] Parker v. Hardy, 24 Pick. (Mass.) 246; Able v. Frazier, 43 Iowa 177; Waller v. Graves, 20 Conn. 305.

[3] Lyman v. Minneapolis Street Ry. Co. 66 Minn. 452, 69 N. W. 329; Bradley v. Norris, 67 Minn. 48, 69 N. W. 624; Waller v. Graves, 20 Conn. 305; Dierolff v. Winterfield, 26 Wis. 175; Casey v. State, 20 Neb. 138.

[4] Guyot v. Butts, 4 Wend. (N. Y.) 579; Gardner v. Gardner, 2 Gray (Mass.) 434.

[5] Mercer v. Mercer, 87 Ky. 21.

Digitized by Google

[6] Parker v. Hardy, 24 Pick. (Mass.) 246; Gardner v. Gardner, 2 Gray (Mass.) 434; Guyot v. Butts, 4 Wend. (N. Y.) 579; Cairns v. Keith, 50 Minn. 32, 52 N. W. 267; Preston v. Otey, 88 Va. 491.

[7] Lampsen v. Brander, 28 Minn. 526, 11 N. W. 94; Mueller v. Grand Grove, 72 Minn. 70, 72 N. W. 48.

§ 1057. According to the better view the rule against granting a new trial for newly discovered cumulative evidence is not inflexible but yields to the demands of justice. If new cumulative evidence makes it clear that a grave injustice has been done a new trial may be granted.[1] The court should act with great caution in such cases and not grant a new trial unless the new evidence is well-nigh conclusive.[2] It is proper to act with greater prudence in a criminal case.[3]

[1] Wilcox Silver Plate Co. v. Barclay, 48 Hun (N. Y.) 54; Clegg v. New York Newspaper Union, 51 Hun (N. Y.) 232; Bulkin v. Ehret, 29 Abb. New Cases (N. Y.) 62; Vollkommer v. Nassau Electric Ry. Co. 23 N. Y. App. Div. 88; Smith v. Grover, 74 Wis. 171; Myers v. Brownell, 2 Aik. (Vt.) 407; Windham County Bank v. Kendall, 7 R. I. 77; Schreckengast v. Early, 16 Neb. 510; Keet v. Mason, 167 Mass. 154; Hart v. Brainerd, 68 Conn. 50; Hosford v. Rowe, 41 Minn. 245, 42 N. W. 1018.

[2] Irwin v. Morrell, Dudley (Ga.) 72; Petefish v. Kiles & Co. 124 Ill. 384; Levitsky v. Johnson, 35 Cal. 41.

[3] Anderson v. State, 43 Conn. 514.

Evidence must be decisive.

§ 1058. A new trial will not be granted on the ground of newly discovered evidence except to remedy manifest injustice. It is not enough that the new evidence is material. "It has been said that the newly discovered evidence must be such as ought to be decisive and productive, on another trial, of an opposite result on the merits, and that a new trial will not be granted unless it appears probable that injustice has been done, and that the new evidence is of such a controlling character that it will probably correct the injustice. Again, that it must be so material that it would probably produce, or would be likely to produce, a different result; or that the question is not whether a jury might be induced to give a different verdict, but whether the legitimate effect of the newly discovered evidence would be to require a different verdict. It is perhaps impossible to state an invariable rule on this point, to be applied to all cases. Much must depend upon the nature of the issue, what transpired at the trial, the nature of the evidence proposed, as well as of that submitted. But all the cases concur that it is not enough to entitle a party to a new trial that the new evidence is material, but that the court must take into account its importance, and whether, in connection with the evidence already introduced, it will be likely to affect the result." [1] The matter of granting a new trial for this cause "generally involves an exercise of judicial discretion upon a full consideration of all the evidence given on the trial, and the legitimate effect

Digitized by Google

which the new evidence, taken in connection therewith, ought, upon legal principles, to have towards producing a different result."[2] It is the duty of the court to consider the credibility of the new witnesses.[3] The determination of the question does not involve the application of any fixed legal rules. Each case must be determined with reference to its own peculiar circumstances and the court should act only for the relief of manifest injustice.[4]

[1] Lampsen v. Brander, 28 Minn. 526, 11 N. W. 94. See Grace v. McArthur, 76 Wis. 641.

[2] State v. Lautenschlager, 23 Minn. 290.

[3] Wherry v. Duluth etc. Ry. Co. 64 Minn. 415, 67 N. W. 223; Bristol v. Schultz, 68 Minn. 106, 70 N. W. 872; State v. Tall, 43 Minn. 273, 45 N. W. 449.

[4] Mead v. Constans, 5 Minn. 171 Gil. 134; Eddy v. Caldwell, 7 Minn. 225 Gil. 166; Sharpe v. Fraver, 8 Minn. 273 Gil. 239; Scofield v. Walrath, 35 Minn. 356, 28 N. W. 926; Peck v. Small, 35 Minn. 465, 29 N. W. 69; Smith v. Chapel, 36 Minn. 180, 30 N. W. 660; Finch v. Green, 16 Minn. 355 Gil. 315; Hosford v. Rowe, 41 Minn. 245, 42 N. W. 1018; State v. Tall, 43 Minn. 273, 45 N. W. 449; Brazil v. Peterson, 44 Minn. 212, 46 N. W. 331; Knoblauch v. Kronschnabel, 18 Minn. 300 Gil. 272; Peterson v. Faust, 30 Minn. 22, 14 N. W. 64; Cummings v. Taylor, 24 Minn. 429; Schacherl v. St. Paul City Ry. Co. 42 Minn. 42, 43 N. W. 837; Cirkel v. Croswell, 36 Minn. 323, 31 N. W. 513; Bishop v. St. Paul City Ry. Co. 48 Minn. 26, 50 N. W. 927; Elmborg v. St. Paul City Ry. Co. 51 Minn. 70, 52 N. W. 969; Smith v. Fletcher, 75 Minn. 189, 77 N. W. 800; Schultz v. Faribault etc. Co. 82 Minn. 100, 84 N. W. 631; Griswold v. Eastman, 51 Minn. 189, 53 N. W. 542.

FOR INSUFFICIENCY OF EVIDENCE

By district court—general rules.

§ 1059. In considering motions for a new trial on the ground that the verdict is not justified by the evidence, trial "courts should rarely take upon themselves to decide as to the weight of evidence where it is conflicting. Where they do so, they might with truth be charged with usurping the privileges of the jury. A court ought to exercise not merely a cautious, but a strict and sure judgment before setting aside a verdict in such a case. Hence the general rule is, that a verdict will not be set aside unless clearly and palpably against the evidence."[1] The duty of the court in this regard is to keep the jury within the bounds of reason.[2] If reasonable men might have found the verdict upon a consideration of all the evidence a new trial should not be granted.[3] The test is one of reasonableness, but the question for the court is not what reasonable men ought to find but what they might find without overstepping the bounds of reason. A court is never justified in granting a new trial simply because it is dissatisfied with the verdict and would have found differently.[4] In nearly every

Digitized by Google

case, where there is conflicting testimony, there is a wide latitude for honest difference of opinion within which the court has no right to impose its judgment on the jury. The best general rule for the practical guidance of trial courts is this: If different persons might reasonably draw different conclusions from the evidence the verdict should not be disturbed.[5] A new trial should be granted only in cases of manifest injustice.[6] Every doubt should be resolved in favor of the verdict. It is not enough that the evidence slightly preponderates against the verdict.[7] A new trial should not be granted upon conflicting evidence unless the verdict is so manifestly contrary to the preponderance of the evidence as to warrant the inference that the jury failed to consider all the evidence or acted under some mistake or from some improper motive, bias, feeling or caprice, instead of dispassionately and honestly exercising their judgment upon all the evidence.[8] Verdicts cannot rest on mere possibility, speculation or conjecture.[9]

[1] Rheiner v. Stillwater etc. Co. 29 Minn. 147, 12 N. W. 449; Laflin v. Pomeroy, 11 Conn. 440; Jackson v. Loomis, 12 Wend. (N. Y.) 27; Culver v. Avery, 7 Wend. (N. Y.) 380; Palmer v. Hyde, 4 Conn. 426.

[2] Thayer, Prel. Treatise on Evidence, 208.

[3] Lord Halsbury in the leading case of Metropolitan Ry. Co. v. Wright, 11 App. Cases, 152. See also, Australian Newspaper Co. v. Bennett, 6 Reports (P. C.) 484; Wright v. Southern Express Co. 80 Fed. 85.

[4] Metropolitan Ry. Co. v. Wright, 11 App. Cases, 152; Rheiner v. Stillwater etc. Co. 29 Minn. 147, 12 N. W. 449; Laflin v. Pomeroy, 11 Conn. 440; Cunningham v. Magoun, 18 Pick. (Mass.) 13; Serles v. Serles, 35 Or. 289; Wright v. Southern Express Co. 80 Fed. 85.

[5] Johnson v. Winona etc. Ry. Co. 11 Minn. 296 Gil. 204; Eich v. Taylor, 17 Minn. 172 Gil. 145; Hinkle v. Lake Superior etc. Co. 18 Minn. 297 Gil. 270; Linn v. Rugg, 19 Minn. 181 Gil. 145; Ohlson v. Manderfeld, 28 Minn. 390; 10 N. W. 418; Kansas Pac. Ry. Co. v. Kunkel, 17 Kans. 145.

[6] State v. Miller, 10 Minn. 313 Gil. 246; Johnson v. Winona etc. Ry. Co. 11 Minn. 296 Gil. 204; Laflin v. Pomeroy, 11 Conn. 440; Carstairs v. Stein, 4 M. & S. 192.

[7] Laflin v. Pomeroy, 11 Conn. 440; Kansas Pac. Ry. Co. v. Kunkel, 17 Kans. 145; Jackson v. Loomis, 12 Wend. (N. Y.) 27.

[8] Johnson v. Winona etc. Ry. Co. 11 Minn. 296 Gil. 204; Schmeltzer v. St. Paul City Ry. Co. 80 Minn. 50, 82 N. W. 1092; Alsop v. Commercial Ins. Co. 1 Sumner (U. S.) 451, 472; Corning v. Troy Factory, 44 N. Y. 577, 594; Baker v. Briggs, 8 Pick. (Mass.) 122; Cunningham v. Magoun, 18 Pick. (Mass.) 13; Morss v. Sherill, 63 Barb. (N. Y.) 21.

[9] Minneapolis etc. Co. v. Great Northern Ry. Co. 83 Minn. 370, 86 N. W. 451; Ellison v. Truesdale, 49 Minn. 240, 51 N. W. 918.

§ 1060. In passing on a motion for a new trial on the ground that the verdict is not justified by the evidence the court may properly

Digitized by Google

take into consideration the probability that on another trial stronger evidence might be adduced, provided it is of the opinion that the preponderance of the evidence was against the verdict.

Emerson v. Hennessy, 47 Minn. 461, 50 N. W. 603.

§ 1061. Although there may be some evidence reasonably tending to support the verdict it should be set aside if manifestly unreasonable in view of all the evidence.

Rheiner v. Stillwater etc. Co. 29 Minn. 147, 12 N. W. 449; Buenemann v. St. Paul etc. Co. 32 Minn. 390, 20 N. W. 379; Voge v. Penney, 74 Minn. 525, 77 N. W. 422; Martin v. Courtney, 75 Minn. 255, 79 N. W. 583; Messenger v. St. Paul City Ry. Co. 77 Minn. 34, 79 N. W. 583.

§ 1062. In passing on a motion for a new trial it is the duty of the court to weigh the evidence and not to adopt inconsiderately the opinion of the jury.[1] "Every motion of this kind is addressed largely to the sound discretion of the trial court, and is to be determined with reference to promoting the interests of substantial justice, as disclosed upon a view of the whole case. Its right decision often involves an inquiry into the credibility of witnesses, the weight of oral testimony, and whether the verdict was influenced by any surrounding circumstances likely to affect the result."[2] It is improper to consider evidence excluded although it was erroneously excluded.[3]

[1] McCord v. Knowlton, 76 Minn. 391, 79 N. W. 397; Johnson v. Howard, 25 Minn. 558; Serles v. Serles, 35 Or. 289; Kansas Pac. Ry. Co. v. Kunkle, 17 Kans. 145; Wright v. Southern Express Co. 80 Fed. 85.

[2] Johnson v. Howard, 25 Minn. 558. See Barrett v. Third Ave. Ry. Co. 45 N. Y. 632.

[3] Sauer v. Flynt, 61 Minn. 109, 63 N. W. 252.

§ 1063. Where a motion for a new trial on the ground of the insufficiency of the evidence to justify the verdict is made before a judge other than the one who tried the cause, it is his right and duty to exercise the same discretion in determining whether the motion should be granted as if the cause had been tried by himself, with the proviso or qualification, that such discretion must be exercised entirely with reference to the evidence disclosed by the record, as he can know nothing else as to what occurred or appeared at the trial.

Hughley v. City of Wabasha, 69 Minn. 245, 72 N. W. 78; Reynolds v. Reynolds, 44 Minn. 132, 46 N. W. 236; Koktan v. Knight, 44 Minn. 304, 46 N. W. 354; Price v. Churchill, 84 Minn. 519, 88 N. W. 11.

Upon a dismissal.

§ 1064. A dismissal on the trial for insufficiency of evidence is a "decision" within the meaning of the statute and the motion for a new trial may be made on a settled case.

Volmer v. Stagerman, 25 Minn. 234; Thorp v. Lorenz, 34 Minn. 350, 25 N. W. 712; Dunham v. Byrnes, 36 Minn. 106, 30 N. W. 402.

Digitized by Google

After trial by court.

§ 1065. Where a cause is tried by the court without a jury a new trial may be granted on the ground that the findings of fact are not justified by the evidence.

Groh v. Bassett, 7 Minn. 325 Gil. 254; Ashton v. Thompson, 28 Minn. 330, 9 N. W. 876; Knappen v. Swensen, 40 Minn. 171, 41 N. W. 948.

§ 1066. In actions of an equitable nature where the main issues are first tried, leaving ancillary issues for future trial, a new trial of the main issues may be granted before a decision on the ancillary issues.

Ashton v. Thompson, 28 Minn. 330, 9 N. W. 876. See Mealey v. Finnegan, 46 Minn. 507, 49 N. W. 207.

§ 1067. Erroneous findings of fact afford no ground for a new trial when it is apparent that if such findings had been different the result would necessarily have been the same.

Scheufler v. Grand Lodge, 45 Minn. 256, 47 N. W. 799; Fidelity & Casualty Co. v. Crays, 76 Minn. 450, 79 N. W. 531; Clark v. Dewey, 71 Minn. 108, 73 N. W. 639; Newport v. Smith, 61 Minn. 277, 63 N. W. 734; Union Bank v. Shea, 57 Minn. 180, 58 N. W. 985.

§ 1068. "A general finding that each and all allegations of the complaint are untrue is equivalent to a special finding as to each allegation that it is untrue. Hence, if the finding is justified by the evidence as to one allegation, which, alone and independently of the others, would justify the conclusions of law in favor of defendant, the fact that the finding as to some other allegation is unsupported by the evidence is error without prejudice."

Fidelity & Casualty Co. v. Crays, 76 Minn. 450, 79 N. W. 531.

After trial by a referee.

§ 1069. The district court may vacate the findings of a referee on the ground that they are not justified by the evidence and grant a new trial.[1] In such a case it is the right and duty of the judge who passes on the motion to exercise the same discretion in determining whether the motion should be granted as if the cause had been tried by himself, with the proviso or qualification that such discretion must be exercised entirely with reference to the evidence disclosed by the record.[2]

[1] Koktan v. Knight, 44 Minn. 304, 46 N. W. 354; Thayer v. Barney, 12 Minn. 502 Gil. 406; Cochrane v. Halsey, 25 Minn. 52.

[2] Hughley v. City of Wabasha, 69 Minn. 245, 72 N. W. 78; First Nat. Bank v. City of St. Cloud, 73 Minn. 219.

After denial of motion to dismiss.

§ 1070. A new trial for insufficiency of the evidence may be granted although the court refused on the trial to dismiss or direct a verdict on that ground.

Abbett v. Chicago etc. Ry. Co. 30 Minn. 482, 16 N. W. 266.

Digitized by Google

After successive verdicts.

§ 1071. In the absence of statutory restriction there is no limit to the number of new trials of the same cause which may be granted for insufficiency of the evidence.[1] The decisions in this state are not entirely harmonious but no hard and fast rule has been laid down.[2] The better view is that successive verdicts merely impose on the judge the duty of exercising a more cautious judgment because they tend to show that there is ground for reasonable difference of opinion.[3] No number of successive verdicts should force the judge to abdicate. Justice must be administered according to reason and not passion. It follows that any number of concurrent verdicts must be set aside if they are manifestly the result of passion or prejudice.[4]

[1] Clark v. Jenkins, 162 Mass. 397; Richolson v. Freeman, 56 Kans. 463.

[2] Van Doren v. Wright, 65 Minn. 80, 67 N. W. 668, 68 N. W. 22; Buenemann v. St. Paul etc. Ry. Co. 32 Minn. 390, 20 N. W. 379; Wilcox v. Landberg, 30 Minn. 93, 14 N. W. 365; Bathke v. Krassin, 78 Minn. 272, 80 N. W. 950; Park v. Electric Thermostat Co. 75 Minn. 349, 77 N. W. 988; Cable v. Byrne, 38 Minn. 534, 38 N. W. 620; Netzer v. City of Crookston, 66 Minn. 355, 68 N. W. 1099.

[3] Buenemann v. St. Paul etc. Ry. Co. 32 Minn. 390, 20 N. W. 379.

[4] Bathke v. Krassin, 78 Minn. 272, 80 N. W. 950.

Remitting excess.

§ 1072. When the amount of the verdict is clearly not justified by the evidence the trial court may grant a new trial unless the successful party consents to a remission of the excess.[1] In such cases the supreme court may also grant a new trial conditionally.[2]

[1] Brown v. Doyle, 69 Minn. 543, 72 N. W. 814.

[2] Hodge v. Eastern Ry. Co. 70 Minn. 193, 72 N. W. 1074.

Conditionally.

§ 1073. "Where an action is for the recovery of different articles of personal property, the issues in respect to which are severable, or the several items of damages claimed are distinct and separate, and a general verdict is rendered for the defendant, which is supported by the evidence except as to particular items the amount or value of which clearly appears upon the record, the court may, in the exercise of a sound discretion, deny a motion for a new trial based on the ground that the verdict is against evidence, upon the condition that the defendant stipulates to allow a recovery for the property or damages to which plaintiff appears to be entitled."

Ladd v. Newell, 34 Minn. 107, 24 N. W. 366.

§ 1074. A trial court cannot, by granting or denying a motion for a new trial conditionally, substitute its judgment upon the issues of fact for the judgment of the jury as expressed in the verdict.

Miller v. Hogan, 81 Minn. 312, 84 N. W. 40.

Digitized by Google

By the supreme court.

§ 1075. Trial and appellate courts are not governed by the same rules in the matter of granting new trials on the ground that the verdict is not justified by the evidence.[1] The duty of the trial court is to keep the jury within the bounds of reason; the duty of the appellate court is to keep the trial court within the bounds of judicial discretion. The trial court is as well able to determine the preponderance of the evidence and the justice of the cause as the jury. It hears all the evidence submitted, observes the general appearance of the witnesses and their demeanor on the stand, hears the arguments of counsel, is able to judge the intelligence of the jury, knows of any circumstances of the trial calculated to influence the jury improperly, knows the things that were not done in the course of the trial as well as the things that were done and is conscious of what has been happily described as the atmosphere of the trial. All of this knowledge and experience properly influences the trial court in passing on a motion for a new trial, but only a small part of it is susceptible of being incorporated in the record on appeal.[2] The knowledge of the appellate court is derived solely from this record and is therefore very imperfect. A new trial should only be granted in furtherance of substantial justice but it is often impossible for an appellate court to learn whether injustice has been done by merely reading a transcript of the evidence. "It often happens that a verdict or decision which by the settled case appears to be contrary to the great weight of the evidence is very satisfactory to every disinterested person who was present at the trial, saw the witnesses and heard them testify." [3] It is principally because of their extreme liability to err from imperfect knowledge of the trial that appellate courts are inclined to defer to the judgment of the trial court. Our supreme court has described its duty in this regard as "difficult, embarrassing and delicate." [4]

[1] Rheiner v. Stillwater etc. Co. 29 Minn. 147, 12 N. W. 449.

[2] Marsh v. Webber, 13 Minn. 109 Gil. 99; Hicks v. Stone, 13 Minn. 434 Gil. 398; Ohlson v. Manderfeld, 28 Minn. 390, 10 N. W. 418; Rheiner v. Stillwater etc. Co. 29 Minn. 147, 12 N. W. 449; Karsen v. Milwaukee etc. Ry. Co. 29 Minn. 13, 11 N. W. 122; Johnson v. Howard, 25 Minn. 558; Chesley v. Mississippi etc. Co. 39 Minn. 83, 38 N. W. 769; Reynolds v. Reynolds, 44 Minn. 132, 42 N. W. 236; Henzel v. Chicago etc. Ry. Co. 37 Minn. 87, 33 N. W. 329; Hughley v. City of Wabasha, 69 Minn. 245, 72 N. W. 78.

[3] McCord v. Knowlton, 76 Minn. 391, 79 N. W. 397.

[4] Hicks v. Stone, 13 Minn. 434 Gil. 398.

When order granting new trial reversed.

§ 1076. The supreme court will rarely reverse the order of a trial court granting a new trial on the ground that the verdict was not justified by the evidence.[1] In an early case, which has ever since been followed without modification, the supreme court laid down the following rule for their government in such cases: We should not be warranted in reversing an order of this kind simply because if

Digitized by Google

the judge below had refused to grant a new trial we should have felt bound to sustain him; nor because there was evidence reasonably tending to support the verdict; nor because, if the motion for a new trial had been made before us in the first instance, we should, upon a consideration of the evidence and its preponderance, have denied the motion. But if, upon a careful perusal of the testimony, and upon mature reflection, we feel satisfied that the preponderance of the evidence is manifestly and palpably in favor of the verdict, we should then deem it our duty to reverse an order granting a new trial."[2] An appellate court will not necessarily sustain an order granting a second or third new trial because it has sustained one granting a first.[3]

[1] Marsh v. Webber, 13 Minn. 109 Gil. 99.

[2] Hicks v. Stone, 13 Minn. 434 Gil. 398. Approved in Rheiner v. Stillwater etc. Co. 29 Minn. 147, 12 N. W. 449; Pratt v. Pioneer Press Co. 30 Minn. 42, 14 N. W. 62; Wilcox v. Landberg, 30 Minn. 94, 14 N. W. 365; Chesley v. Mississippi etc. Co. 39 Minn. 86, 38 N. W. 769; Reynolds v. Reynolds, 44 Minn. 133, 46 N. W. 236; Henzel v. Chicago etc. Ry. Co. 37 Minn. 87, 33 N. W. 329; Woods v. Wulf, 84 Minn. 299, 87 N. W. 840.

[3] Wilcox v. Landberg, 30 Minn. 93, 14 N. W. 365.

When order denying new trial reversed.

§ 1077. Where a motion for a new trial, upon the ground that the verdict is not justified by the evidence, is denied by the trial court, the order denying a new trial will be reversed on appeal only in cases where there was no evidence reasonably tending to sustain the verdict or where it is most manifestly and palpably against the weight of the evidence.[1] The question for an appellate court in such a case is not whether a new trial might not have been properly granted, but whether the court below violated a clear legal right of the appellant or abused its judicial discretion in refusing to grant a new trial.[2] If different persons might reasonably draw different conclusions from the evidence the verdict will be sustained.[3] If, upon any reasonable theory of the evidence, the verdict of a jury can be upheld, it is the duty of an appellate court to sustain it.[4] A verdict will not be set aside on appeal where there is any evidence reasonably tending to support it[5]—unless there is a manifest preponderance of the evidence against it.[6]

[1] Ohlson v. Manderfeld, 28 Minn. 390, 10 N. W. 418; Dixon v. Merritt, 6 Minn. 160 Gil. 98; State v. Miller, 10 Minn. 313 Gil. 246; Morris v. St. Paul etc. Ry. Co. 21 Minn. 91.

[2] Karsen v. Milwaukee etc. Ry. Co. 29 Minn. 13, 11 N. W. 122; Flatt v. D. M. Osborne & Co. 33 Minn. 98, 22 N. W. 440; Cleland v. Minneapolis etc. Ry. Co. 29 Minn. 170, 12 N. W. 461; Morris v. St. Paul etc. Ry. Co. 21 Minn. 91.

[3] Johnson v. Winona etc. Ry. Co. 11 Minn. 296 Gil. 204; Eich v. Taylor, 17 Minn. 172 Gil. 145; Linn v. Rugg, 19 Minn. 181 Gil. 145; State v. Herrick, 12 Minn. 132 Gil. 75; Califf v. Hillhouse, 3 Minn. 311 Gil. 217.

Digitized by Google

[4] Benz v. Geissell, 24 Minn. 169; Cleland v. Minneapolis etc. Ry. Co. 29 Minn. 170.

[5] Egan v. Faendel, 19 Minn. 231 Gil. 191; Hinkle v. Lake Superior etc. Co. 18 Minn. 297 Gil. 270; St. Anthony Falls Water Power Co. v. Eastman, 20 Minn. 277 Gil. 249; Foot v. Mississippi etc. Co. 70 Minn. 57, 72 N. W. 732.

[6] Voge v. Penney, 74 Minn. 525, 77 N. W. 423; Messenger v. St. Paul City Ry. Co. 77 Minn. 34, 79 N. W. 34; Koralewski v. Great Northern Ry. Co. 88 N. W. 410; Schmeltzer v. St. Paul City Ry. Co. 80 Minn. 50, 82 N. W. 1092; Gammons v. Gulbranson, 78 Minn. 21, 80 N. W. 779; Brennan Lumber Co. v. Great Northern Ry. Co. 77 Minn. 360, 79 N. W. 1032; Lennon v. White, 61 Minn. 150, 63 N. W. 620.

When rule of Hicks v. Stone applicable.

§ 1078. The two foregoing rules (§§ 1076, 1077) apply when the verdict or finding was based in whole or in part on written evidence;[1] when the trial was by the court[2] or a referee;[3] when issues of fact are submitted to a jury in an action of an equitable nature;[4] when the motion was granted or denied by a judge other than the one who tried the cause;[5] when the motion was made on the ground of excessive damages under the fifth subdivision of the statute;[6] when the verdict was on an issue in probate proceedings appealed to the district court.[7] They do not apply when the motion is made under the fourth subdivision of the statute.[8]

[1] Humphrey v. Havens, 12 Minn. 298 Gil. 196; Dayton v. Buford, 18 Minn. 126 Gil. 111; McLachlan v. Branch, 39 Minn. 101, 38 N. W. 703; Cornish etc. Co. v. Antrim etc. Assoc. 82 Minn. 215, 84 N. W. 724.

[2] Knappen v. Swensen, 40 Minn. 171, 41 N. W. 948; Knoblauch v. Kronschnabel, 18 Minn. 300 Gil. 272; Greenleaf v. Egan, 30 Minn. 316, 15 N. W. 254; Carver v. Bagley, 79 Minn. 114, 81 N. W. 757; Moran v. Small, 68 Minn. 101, 70 N. W. 850; Foot v. Mississippi etc. Co. 70 Minn. 57, 72 N. W. 732.

[3] First Nat. Bank v. City of St. Cloud, 73 Minn. 219, 75 N. W. 1054; Koktan v. Knight, 44 Minn. 304; Berkey v. Judd, 22 Minn. 286.

[4] Marvin v. Dutcher, 26 Minn. 391, 4 N. W. 685.

[5] Hughley v. City of Wabasha, 69 Minn. 245, 72 N. W. 78; Price v. Churchill, 84 Minn. 519, 88 N. W. 11.

[6] Gray v. Minnesota Tribune Co. 81 Minn. 333, 84 N. W. 113.

[7] Pinney's Will, 27 Minn. 280, 6 N. W. 791, 7 N. W. 144.

[8] Blume v. Scheer, 83 Minn. 409, 86 N. W. 446.

Supreme court need not review evidence.

§ 1079. It is not the duty of an appellate court to demonstrate by a review and discussion of the evidence returned on appeal the absolute correctness of the findings made by the trial court.

Carver v. Bagley, 79 Minn. 114, 81 N. W. 757; Price v. Churchill, 88 N. W. 11; Minnesota etc. Co. v. St. Anthony Falls etc. Co. 82 Minn. 505, 85 N. W. 520.

Digitized by Google

Theory of trial.

§ 1080. Where a case is tried upon the theory that the only issue is as to one question of fact, and the court, without objection by the party, instructs the jury that this is the only question submitted to them, and that their verdict is to depend exclusively upon their determination of the question, the party thereby consents that the case may be tried and determined upon that one issue and cannot afterwards urge that the evidence upon some other question of fact was insufficient to justify the verdict.

Engstad v. Syverson, 72 Minn. 188, 75 N. W. 125.

WHEN VERDICT CONTRARY TO LAW

General statement.

§ 1081. The phrase "contrary to law" is very comprehensive and was no doubt designed to cover a great variety of errors which could not well be specified. It has been held, in a case somewhat discredited, that the phrase means contrary to the instructions and that it is not enough to justify a new trial that a principle of law not embodied in an instruction was disregarded by the jury.[1] On the other hand it has been held that a motion for a new trial on the ground that the verdict is contrary to law is somewhat in the nature of a demurrer to the evidence; that is, conceding all that the evidence tends to prove, the verdict is not supported by the principles of law applicable to the facts.[2] No doubt a new trial may be granted on this ground because of irregularity in the verdict.[3] A decision is contrary to law when the findings are not responsive to the issues [4] or inconsistent.[5] An appellate court, when considering the question whether a verdict is contrary to law, must assume that state of facts most favorable to the verdict which, under the charge, the jury were at liberty to find.[6]

[1] Valerius v. Richard, 57 Minn. 443, 59 N. W. 534.
[2] First Nat. Bank v. Strait, 71 Minn. 69, 73 N. W. 645.
[3] See Cummings v. Taylor, 21 Minn. 366; Meighen v. Strong, 6 Minn. 177 Gil. 111.
[4] Wilson v. City Nat. Bank, 51 Neb. 87.
[5] Langan v. Langan, 89 Cal. 198.
[6] Alden v. City of Minneapolis, 24 Minn. 254.

FOR ERRORS OF LAW ON THE TRIAL

What are errors on the trial.

§ 1082. It is only errors of law occurring at the trial that may be made the basis of a motion for a new trial under the seventh subdivision of the statute. Errors of law may of course occur before and after trial but the remedy in such cases is either an appeal from the judgment [1] or a motion for a new trial under the first subdivision of the statute.[2] The phrase "at the trial" means during the course of the trial. The trial begins, within the meaning of the statute, when a cause is called for the trial of issues of fact, and

Digitized by Google

any erroneous and prejudicial order or ruling thereafter made is ground for a new trial.[3] When the trial is by jury the trial continues until the jury are discharged.[4] When the trial is by a court or referee the trial terminates with the final submission of the case.[5]

[1] City of Winona v. Minnesota Railway Construction Co. 27 Minn. 415, 6 N. W. 795, 8 N. W. 148; 29 Minn. 68, 11 N. W. 228; Schumann v. Mark, 35 Minn. 379, 28 N. W. 927; Minneapolis etc. Ry. Co. v. Home Ins. Co. 64 Minn. 61, 66 N. W. 132.

[2] St. Paul etc. Ry. Co. v. Gardner, 19 Minn. 132 Gil. 99; Mead v. Billings, 43 Minn. 239, 45 N. W. 228.

[3] Hine v. Myrick, 60 Minn. 518, 62 N. W. 1125. See Lueck v. St. Paul etc. Ry. Co. 57 Minn. 30, 58 N. W. 821.

[4] Tarbox v. Gotzian, 20 Minn. 139 Gil. 122; Reilly v. Bader, 46 N. W. 212, 48 N. W. 909; Hudson v. Minneapolis etc. Ry. Co. 44 Minn. 52, 46 N. W. 314; Manny v. Griswold, 21 Minn. 506; Varco v. Chicago etc. Ry. Co. 30 Minn. 18, 13 N. W. 921; Nichols, Shepard & Co. v. Wadsworth, 40 Minn. 547, 42 N. W. 541.

[5] See Volmer v. Stagerman, 25 Minn. 234.

§ 1083. When a cause is called for the trial of issues of fact any erroneous and prejudicial order or ruling thereafter made by the court is ground for a new trial.[1] Thus a new trial may be awarded for an erroneous order granting or denying a motion for dismissal,[2] for judgment on the pleadings [3] or for a directed verdict.[4]

[1] Hine v. Myrick, 60 Minn. 518, 62 N. W. 1125.

[2] See § 1064.

[3] Hine v. Myrick, 60 Minn. 518, 62 N. W. 1125; McAllister v. Welker, 39 Minn. 535, 41 N. W. 107.

[4] Thompson v. Pioneer Press Co. 37 Minn. 285, 33 N. W. 856.

FOR ERROR IN ADMITTING OR EXCLUDING EVIDENCE

Erroneous admission of evidence—general rule.

§ 1084. The erroneous admission of evidence which, it is reasonable to suppose, may have affected the determination of the jury, is a ground for a new trial; and this is so although sufficient competent evidence was introduced to justify the verdict.

Lowry v. Harris, 12 Minn. 255 Gil. 166; Steele v. Etheridge, 15 Minn. 501 Gil. 413; Dallemand v. Swensen, 54 Minn. 32, 55 N. W. 815; Adams v. Mille Lacs Lumber Co. 32 Minn. 216, 19 N. W. 735; State v. Spaulding, 34 Minn. 361, 25 N. W. 793; Smith v. Barringer, 37 Minn. 94, 33 N. W. 116.

Erroneous exclusion of evidence—general rule.

§ 1085. The erroneous exclusion of evidence so material that it might reasonably have affected the jury, if it had been admitted, is ground for a new trial.

Tunnell v. Larson, 37 Minn. 258, 34 N. W. 29; Steele v. Thayer, 36 Minn. 174, 30 N. W. 758; Allen v. Fortier, 37 Minn. 218, 34 N. W. 21; Christian v. Klein, 77 Minn. 116, 79 N. W. 602.

Digitized by Google

Necessity of an offer.

§ 1086. The exclusion of evidence not obviously relevant and material is no ground for a new trial. When a question is objected to and the objection is sustained in taking an exception it must be made to appear that something material was proposed to be proved.[1] Unless the materiality and relevancy of the evidence sought to be introduced is apparent from the question asked, to put the court in error and make a record for a motion for a new trial or an appeal, a party must state fully what he intends to prove by the witness. Such an offer of evidence must be so full and explicit that the court can see from it, in connection with the evidence already introduced, that something material will be disclosed by the evidence offered and if the admissibility of the offered evidence depends upon the preliminary proof of other facts an offer to prove such facts must be made.[2] The offer must be explicit. A general offer to prove the facts stated in the pleading is not proper.[3] It is not error to reject an offer of evidence a part of which is inadmissible.[4] If an offer is objected to on a specific ground and the evidence is admissible on another ground a second offer should be made obviating the objection raised.[5]

[1] State v. Staley, 14 Minn. 105 Gil. 75; Warner v. Fischbach, 29 Minn. 262, 13 N. W. 47; Scofield v. Walrath, 35 Minn. 356, 28 N. W. 926; Weaver v. Mississippi etc. Co. 31 Minn. 74, 16 N. W. 494; State v. Herrick, 12 Minn. 132 Gil. 75.

[2] Austin v. Robertson, 25 Minn. 431; Follansbee v. Johnson, 28 Minn. 311, 9 N. W. 882; Walter v. Greenwood, 29 Minn. 87, 12 N. W. 145; Lucy v. Wilkins, 33 Minn. 441, 23 N. W. 861; Norris v. Clark, 33 Minn. 476, 24 N. W. 128; Conlan v. Grace, 36 Minn. 276, 30 N. W. 880; McAlpine v. Foley, 34 Minn. 251, 25 N. W. 452; Jackson v. Kansas City Packing Co. 42 Minn. 382, 44 N. W. 126; State v. Scott, 41 Minn. 365, 43 N. W. 62; Peterson v. Mille Lacs Lumber Co. 51 Minn. 90, 52 N. W. 1082; Gardner v. Fidelity Mutual Life Assoc. 67 Minn. 207, 69 N. W. 895; Nichols & Shepard Co. v. Wiedemann, 72 Minn. 344, 75 N. W. 208; Knatvold v. Wilkinson, 83 Minn. 265, 86 N. W. 99; Lane v. Minnesota State Agricultural Soc. 67 Minn. 65, 69 N. W. 463; Wolford v. Farnham, 47 Minn. 95, 49 N. W. 528; Le May v. Brett, 81 Minn. 506, 84 N. W. 339.

[3] Alexander v. Thompson, 42 Minn. 498, 44 N. W. 534; King v. City of Duluth, 81 Minn. 182, 83 N. W. 526.

[4] Reynolds v. Franklin, 47 Minn. 145, 49 N. W. 648; Stees v. Leonard, 20 Minn. 494 Gil. 448; Mueller v. Jackson, 39 Minn. 431, 40 N. W. 565; State v. Spaulding, 34 Minn. 361, 25 N. W. 793; Beard v. First Nat. Bank, 41 Minn. 153, 43 N. W. 7; Hamberg v. St. Paul etc. Ins. Co. 68 Minn. 335, 71 N. W. 335; Graham v. Graham, 84 Minn. 325, 87 N. W. 923.

[5] Rhodes v. Pray, 36 Minn. 392, 32 N. W. 86.

Immaterial evidence.

§ 1087. Error in the admission or exclusion of evidence so immaterial that it is perfectly obvious that it could not have affected the

Digitized by Google

determination of the jury is no ground for a new trial.[1] "The object of a new trial is to afford a fair trial; and if the court can see that there is no reasonable ground to apprehend that injustice was done by the reception of immaterial testimony, or to apprehend that the jury were misled by it to the substantial prejudice of the objecting party, a new trial should not be granted."[2]

[1] Bond v. Corbett, 2 Minn. 248 Gil. 209; Lynd v. Pickett, 7 Minn. 184 Gil. 128; St. Anthony etc. Co. v. Eastman, 20 Minn. 277 Gil. 249; Illingworth v. Greenleaf, 11 Minn. 235 Gil. 154; Lowry v. Harris, 12 Minn. 255 Gil. 166; Wass v. Atwater, 33 Minn. 83, 22 N. W. 8; Prosser v. Hartley, 35 Minn. 340, 29 N. W. 156; Duncan v. Kohler, 37 Minn. 379, 34 N. W. 594; Torinus v. Matthews, 21 Minn. 99; Howard v. Barton, 28 Minn. 116, 9 N. W. 584; Yale v. Edgerton, 14 Minn. 194 Gil. 144; Drews v. Ann River Logging Co. 53 Minn. 199, 54 N. W. 1110; Howe v. Cochran, 47 Minn. 403, 50 N. W. 368; Keyes v. Minneapolis etc. Ry. Co. 36 Minn. 290, 30 N. W. 888; De Laittre v. Jones, 36 Minn. 519, 32 N. W. 709; Cedar Rapids etc. Ry. Co. v. Ryan, 37 Minn. 38, 33 N. W. 6; Akers v. Thwing, 52 Minn. 395, 54 N. W. 194.

[2] Cole v. Maxfield, 13 Minn. 235 Gil. 220.

Of facts otherwise proved.

§ 1087a. Error in admitting or excluding evidence of a fact otherwise satisfactorily proved by admissible evidence, or inadmissible evidence unobjected to, is no ground for a new trial.

Lowry v. Harris, 12 Minn. 255 Gil. 166; Huot v. McGovern, 27 Minn. 84, 6 N. W. 426; Taylor v. City of Austin, 32 Minn. 247, 20 N. W. 157; Meyenberg v. Eldred, 37 Minn. 508, 35 N. W. 371; Beard v. First Nat. Bank, 41 Minn. 153, 43 N. W. 7; In re Yetter's Estate, 55 Minn. 452, 57 N. W. 147; Olson v. Nonenmacher, 63 Minn. 425, 65 N. W. 425; Breault v. Merrill & Ring Lumber Co. 72 Minn. 143, 75 N. W. 122; Selover v. First Nat. Bank, 77 Minn. 140, 79 N. W. 666; Laib v. Brandenburg, 34 Minn. 367, 25 N. W. 803; Stone v. Evans, 32 Minn. 243, 20 N. W. 149; People's Bank v. Howes, 64 Minn. 457, 67 N. W. 355; Larson v. Lombard Invest. Co. 51 Minn. 141, 53 N. W. 179; Fonda v. St. Paul City Ry. Co. 77 Minn. 336, 79 N. W. 1043; Klein v. Funk, 82 Minn. 3, 84 N. W. 460; First Nat. Bank v. Strait, 75 Minn. 396, 78 N. W. 101.

Error in order of proof.

§ 1088. No irregularity in the order in which evidence is introduced is ground for a new trial.

Beaulieu v. Parsons, 2 Minn. 37 Gil. 26; Cooper v. Stinson, 5 Minn. 201 Gil. 160; Woodbury v. Larned, 5 Minn. 339 Gil. 271; Baze v. Arper, 6 Minn. 220 Gil. 142; Lynd v. Picket, 7 Minn. 184 Gil. 128; Foster v. Berkey, 8 Minn. 351 Gil. 310; Caldwell v. Bruggerman, 8 Minn. 286 Gil. 252; State v. Staley, 14 Minn. 105 Gil. 75; Madigan v. De Graff, 17 Minn. 52 Gil. 34; Groff v. Ramsey, 19 Minn. 44 Gil. 24; Griffiths v. Wolfram, 22 Minn.

Digitized by Google

185; Plummer v. Mold, 22 Minn. 15; Crandall v. McIlrath, 24 Minn. 127; State v. Cantieny, 34 Minn. 1, 24 N. W. 458; McDonald v. Peacock, 37 Minn. 512, 35 N. W. 370; St. Paul Distilling Co. v. Pratt, 45 Minn. 215, 47 N. W. 789; Rosquist v. D. M. Gilmore Furniture Co. 50 Minn. 192, 52 N. W. 385; Romer v. Conter, 53 Minn. 171, 54 N. W. 1052; Hart v. Kessler, 53 Minn. 546, 55 N. W. 742; Nelson v. Finseth, 55 Minn. 417, 57 N. W. 141; Johnson v. City of Stillwater, 62 Minn. 60, 64 N. W. 95; State v. Hayward, 62 Minn. 474, 65 N. W. 63; Hale v. Life Indemnity & Invest. Co. 65 Minn. 548, 68 N. W. 182.

Evidence calculated to prejudice jury.

§ 1089. Error in the admission of evidence of a nature calculated to prejudice the jury is ground for a new trial and especially so in a criminal case.

Hoberg v. State, 3 Minn. 262 Gil. 181; State v. Hoyt, 13 Minn. 132 Gil. 125; Simmons v. Holster, 13 Minn. 249 Gil. 232; State v. Pierce, 85 Minn. 101, 88 N. W. 417.

When the verdict is right.

§ 1090. Error in the admission or exclusion of evidence, however material, is no ground for a new trial when, taking into consideration all the evidence in the case, including that erroneously excluded and excluding that erroneously admitted, the verdict rendered was the only one warranted by the law applicable to the case[1] or was supported by so manifest a preponderance of the evidence that it would have been the obvious duty of the court to set aside a contrary verdict as not justified by the evidence.[2]

[1] Lewis v. St. Paul etc. Ry. Co. 20 Minn. 260 Gil. 234; Hewitt v. Blumenkranz, 33 Minn. 417, 23 N. W. 858; Gammon v. Ganfield, 42 Minn. 368, 44 N. W. 125; Fay v. Chicago etc. Ry. Co. 72 Minn. 192, 75 N. W. 192; Harrington v. St. Paul etc. Ry. Co. 17 Minn. 215 Gil. 188, 206; Winslow Brothers Co. v. Herzog Mfg. Co. 46 Minn. 452, 49 N. W. 234; Bank of Montreal v. Richter, 55 Minn. 362, 57 N. W. 61.

[2] Duncan v. Kohler, 37 Minn. 379, 34 N. W. 594; Larson v. Lombard Invest. Co. 51 Minn. 141, 53 N. W. 179; Fowlds v. Evans, 60 Minn. 513, 63 N. W. 102; Teipner v. Bank of Waterville, 59 Minn. 392, 61 N. W. 336; I. L. Elwood Mfg. Co. v. Betcher, 72 Minn. 103, 75 N. W. 103; Fulmore v. St. Paul City Ry. Co. 72 Minn. 448, 75 N. W. 448; Williams v. Griffin Wheel Co. 87 N. W. 773.

Evidence of fact admitted, undisputed or presumed.

§ 1091. Error in admitting or excluding evidence of a fact which is admitted[1] or undisputed[2] or which in the absence of evidence would be presumed,[3] is no ground for a new trial.

[1] Benton v. Nicoll, 24 Minn. 221; Carlson v. Small, 32 Minn. 492, 21 N. W. 737; Miller v. Irish Catholic Assoc. 36 Minn. 357, 31 N. W. 215; Harding v. Great Northern Ry. Co. 77 Minn. 417,

Digitized by Google

80 N. W. 358; Dodge v. Chandler, 13 Minn. 114 Gil. 105; Hahn v. Penney, 62 Minn. 116, 63 N. W. 843; Evenson v. Keystone Mfg. Co. 83 Minn. 164, 86 N. W. 8.

[8] Allis v. Lash, 23 Minn. 261; Stone v. Evans, 32 Minn. 243, 20 N. W. 149; Laib v. Brandenberg, 34 Minn. 367, 25 N. W. 803.

[8] Horton v. Williams, 21 Minn. 187; State v. Levy, 23 Minn. 104; Yale v. Edgerton, 14 Minn. 194 Gil. 144; Miller v. Irish Catholic Colonization Assoc. 36 Minn. 357, 31 N. W. 215; Brakken v. Minneapolis etc. Ry. Co. 32 Minn. 425, 21 N. W. 414.

Evidence to impeach witness.

§ 1092. Error in refusing to allow a witness to be impeached by evidence of contradictory statements on a material point is ground for a new trial.

Swift v. Withers, 63 Minn. 17, 65 N. W. 85; Tunell v. Larson, 37 Minn. 258, 34 N. W. 29; Yoki v. First State Bank, (Minn. 1902) 91 N. W. 1101.

Evidence to disprove fact not proved.

§ 1093. Error in admitting evidence to disprove a fact which there is no evidence to establish is no ground for a new trial.

Illingworth v. Greenleaf, 11 Minn. 235 Gil. 154.

Where there are several causes.

§ 1094. Where the complaint contains two causes of action and there is a general verdict for the plaintiff for damages, if there was material error in admitting evidence of one of the causes of action a new trial must be granted.

Simmons v. Holster, 13 Minn. 249 Gil. 232. See Moldenhauer v. Minneapolis Street Ry. Co. 80 Minn. 426, 83 N. W. 381.

Where there is a special verdict.

§ 1095. Where upon a special verdict upon one issue the party is entitled to the judgment rendered error in the admission of evidence bearing on another issue is no ground for a new trial.

Whitaker v. Culver, 9 Minn. 295 Gil. 279.

Exclusion of evidence subsequently admitted.

§ 1096. The erroneous exclusion of evidence subsequently admitted is no ground for a new trial.

Lynd v. Picket, 7 Minn. 184 Gil. 128; Weaver v. Mississippi etc. Co. 31 Minn. 74, 16 N. W. 494; Sanborn v. Sturtevant, 17 Minn. 200 Gil. 174; Merriam v. Pine City Lumber Co. 23 Minn. 314; Carlson v. Small, 32 Minn. 492, 21 N. W. 737; Hale v. Life Indemnity & Invest. Co. 65 Minn. 548, 68 N. W. 182; Finley v. Quirk, 9 Minn. 194 Gil. 179; Minnesota State Agricultural Society v. Swanson, 48 Minn. 231, 51 N. W. 117; Chapman v. Dodd, 10 Minn. 350 Gil. 277; Young v. Otto, 57 Minn. 307, 59 N. W. 199; Alexander v. Chicago etc. Ry. Co. 41 Minn. 515, 43 N. W. 481; Peck v. Snow Church & Co. 47 Minn. 398, 50 N. W. 470; Rosted v. Great Northern Ry. Co. 76 Minn. 123, 78 N. W. 971.

Digitized by Google

§ 1097. Error in admitting evidence is no ground for a new trial if the complaining party subsequently introduced substantially the same evidence.

Coit v. Waples, 1 Minn. 134 Gil. 110; Anderson v. St. Croix Lumber Co. 47 Minn. 24, 49 N. W. 407; McLennan v. Minneapolis etc. Elevator Co. 57 Minn. 317, 59 N. W. 628; Weide v. Davidson, 15 Minn. 327 Gil. 258.

Miscellaneous rules.

§ 1098. The exclusion of a question on cross-examination as to a fact which the jury found did not exist is no ground for a new trial.

Hayward v. Knapp, 23 Minn. 430.

§ 1099. Where evidence admitted was admissible but not on the ground on which its admission was urged by counsel a new trial will not be granted unless it is obvious that prejudice resulted.

Nininger v. Knox, 8 Minn. 140 Gil. 110.

§ 1100. A new trial will not be granted to a party on account of the admission of evidence which was elicited by his own examination.

Shelley v. Lash, 14 Minn. 498 Gil. 373.

§ 1101. When evidence is offered with a statement that it is offered for a particular purpose, its rejection is not reversible error, because it was admissible for another purpose not called to the attention of the court, especially where such other purpose is wholly inconsistent with the theory upon which the proponent is trying the action.

Mareck v. Minneapolis Trust Co. 74 Minn. 538, 77 N. W. 428.

§ 1102. Error in admitting oral evidence to prove the contents of a written instrument is no ground for a new trial if the instrument is subsequently introduced.

Cooper v. Breckenridge, 11 Minn. 341 Gil. 241. See Steel v. Etheridge, 15 Minn. 501 Gil. 413.

§ 1103. Error in admitting evidence is no ground for a new trial if substantially the same evidence has already been introduced without objection.

Shrimpton v. Philbrick, 53 Minn. 366, 55 N. W. 551; Holman v. Kempe, 70 Minn. 422, 73 N. W. 186; Lane v. Minnesota State Agricultural Soc. 67 Minn. 65, 69 N. W. 463.

§ 1104. With a view to a new trial the admissibility of evidence must be considered with reference to the theory of the case adopted by the moving party on the trial.

Earl Fruit Company v. Thurston Cold-Storage & Warehouse Co. 60 Minn. 351, 62 N. W. 439; Peteler Portable Ry. Mfg. Co. v. N. W. Adamant Mfg. Co. 60 Minn. 127, 61 N. W. 1024; Mareck v. Minneapolis Trust Co. 74 Minn. 538, 77 N. W. 428.

§ 1105. Where it is not apparent that the parties consented to try an issue not made by the pleadings, evidence that might be proper upon such an issue is not to be considered in respect to it.

White v. Western Assurance Co. 52 Minn. 352, 54 N. W. 195.

Digitized by Google

§ 1106. The exclusion of evidence in support of a counterclaim subsequently withdrawn is no ground for a new trial.

Illingworth v. Greenleaf, 11 Minn. 235 Gil. 154.

§ 1107. The exclusion of evidence is harmless if the fact which it tended to prove is subsequently conclusively disproved by other evidence.

Thielen v. Randall, 75 Minn. 332, 77 N. W. 992.

§ 1108. When there are several issues and a general verdict the erroneous admission of evidence on any one of the issues necessitates a new trial.

Moldenhauer v. Minneapolis Street Ry. Co. 80 Minn. 426, 83 N. W. 381.

§ 1109. The erroneous admission of substantive evidence which subsequently becomes competent as impeaching evidence is ground for a new trial unless the court instructs the jury to consider it for impeachment only and in order to save his rights the aggrieved party is not required to request the court for such instruction.

Rosted v. Great Northern Ry. Co. 76 Minn. 123, 78 N. W. 971.

§ 1110. The admission of evidence not strictly admissible when received, if from all the evidence in the case it appears to be proper, is no ground for a new trial.

Madigan v. De Graff, 17 Minn. 52 Gil. 34.

§ 1111. An improper question propounded a witness is no ground for a new trial if the answer, being not responsive, is proper.

In re Pinney's Will, 27 Minn. 280, 6 N. W. 791, 7 N. W. 144; Chalmers v. Whittemore, 22 Minn. 305; Bridgeman v. Hallberg, 52 Minn. 376, 54 N. W. 752; Towle v. Sherer, 70 Minn. 312, 73 N. W. 180; McCormick v. Miller, 19 Minn. 443 Gil. 384.

When the trial is by the court.

§ 1112. When the trial is by the court without a jury a new trial is granted for error in admitting or excluding evidence as in actions tried by a jury.[1] The decision of a trial court cannot be sustained on a statement of the court that its decision was unaffected by evidence improperly admitted,[2] but a new trial will not be granted if it is obvious that such evidence was disregarded.[3] If material evidence is improperly admitted a new trial will be granted although there is sufficient competent evidence to justify the findings.[4] But if the competent evidence is such as to require the findings made the admission of other and incompetent evidence is error without prejudice.[5] A new trial will not be granted for the improper admission of evidence pertinent to an issue upon which the findings were in favor of the moving party.[6] The exclusion of evidence which could not have changed the result if it had been admitted is not a ground for a new trial.[7] If inadmissible evidence is received subject to a future ruling and the findings show that it was disregarded there is no error.[8]

[1] Lowry v. Harris, 12 Minn. 228 Gil. 166.

Digitized by Google

[2] Farmers' Union Elevator Co. v. Syndicate Inv. Co. 40 Minn. 152, 41 N. W. 547.
[3] Barber v. Robinson, 82 Minn. 112, 84 N. W. 732, and cases under (8).
[4] Lowry v. Harris, 12 Minn. 255 Gil. 166.
[5] Fowlds v. Evans, 60 Minn. 513, 63 N. W. 102; Rothchild v. Burritt, 47 Minn. 28, 49 N. W. 393; Elwood Mfg. Co. v. Betcher, 72 Minn. 103, 75 N. W. 113.
[6] Torinus v. Matthews, 21 Minn. 99.
[7] Greenleaf v. Egan, 30 Minn. 316, 15 N. W. 254.
[8] Voak v. Nat. Investment Co. 51 Minn. 450, 53 N. W. 708; Ryan v. Ryan, 58 Minn. 91, 59 N. W. 974; Cullman v. Bottcher, 58 Minn. 381, 59 N. W. 971.

FOR ERRONEOUS INSTRUCTIONS

General statement.

§ 1113. Error in a charge is ground for a new trial unless it is manifest, from a consideration of the evidence and the charge as a whole, that the complaining party has not been materially prejudiced.[1] "Where there is evidence sufficient to sustain the verdict aside from that to which the erroneous part of the charge refers, and especially where the evidence is of such a nature, that it is scarcely possible that the objectionable part of the charge could have had any influence on the finding, we do not think the verdict should be disturbed on such ground."[2] All the exceptions or modifications of a legal proposition cannot be stated in one sentence, and need not, necessarily, be stated in the same connection. If the proper modifications and exceptions to the general rule are made, there is no ground for reversal unless there is something in the charge so obscure, absurd, or contradictory as to tend to mislead or confound the jury.[3] The charge must be construed as a whole.[4] An instruction which, standing alone, bears upon its face a meaning legally erroneous and prejudicial to a party furnishes no ground for a new trial, if, taken in connection with the whole charge, no error appears, and it is clear that the jury cannot have been misled.[5]

[1] Coit v. Waples, 1 Minn. 134 Gil. 110; Pinney v. First Division St. Paul etc. Ry. Co. 19 Minn. 251 Gil. 211; Beebe v. Wilkinson, 30 Minn. 548, 16 N. W. 450; Fairchild v. Rogers, 32 Minn. 269, 20 N. W. 191; Pence v. Gale, 20 Minn. 257 Gil. 231; Rollins v. St. Paul Lumber Co. 21 Minn. 5; Morish v. Mountain. 22 Minn. 564; Ames v. First Division etc. Ry. Co. 12 Minn. 412 Gil. 295; Stearns v. Johnson, 17 Minn. 142 Gil. 116; Pevey v. Schulenburg-Boeckeler Lumber Co. 33 Minn. 45, 21 N. W. 844; State v. Gut, 13 Minn. 341 Gil. 315; Hughes v. Meehan, 81 Minn. 482, 84 N. W. 331.
[2] Woodbury v. Larned, 5 Minn. 339 Gil. 271.
[3] Gates v. Manny, 14 Minn. 21 Gil. 13; Brakken v. Minneapolis etc. Ry. Co. 31 Minn. 45, 16 N. W. 459.

Digitized by Google

[4] Spencer v. Tozer, 15 Minn. 146 Gil. 112; Laurel v. State Nat. Bank, 25 Minn. 48; Peterson v. Chicago etc. Ry. Co. 38 Minn. 511, 39 N. W. 485; Barbo v. Bassett, 35 Minn. 485, 29 N. W. 198; Johnston Harvester Co. v. Clark, 31 Minn. 165, 17 N. W. 111; State v. Brown, 41 Minn. 319, 43 N. W. 69; Smith v. Maben, 42 Minn. 516, 44 N. W. 792; Deisen v. Chicago etc. Ry. Co. 43 Minn. 454, 45 N. W. 864; Brakken v. Minneapolis etc. Ry. Co. 31 Minn. 45, 16 N. W. 459; Merriam v. Pine City Lumber Co. 23 Minn. 314.

[5] Farnham v. Thompson, 32 Minn. 22, 18 N. W. 833; Colvill v. Langdon, 22 Minn. 565; Johnson v. Wallower, 18 Minn. 288 Gil. 262; Simpson v. Krumdick, 28 Minn. 352, 10 N. W. 18.

§ 1114. In one of our early cases it was said that in a criminal action "where there has been any error or irregularity that could possibly prejudice the defendant" a new trial should be granted.[1] This is altogether too extreme doctrine for the efficient administration of criminal justice. The true rule in criminal as well as civil cases is that error is presumptively prejudicial and ground for a new trial unless it is manifest, from a consideration of the evidence and the charge as a whole, that the party has not been materially prejudiced. There never was a trial absolutely free from error and no charge is ever ideally perfect. The question of prejudice must therefore be regarded with reference to the practical administration of justice. There is this important distinction, however, between a civil and a criminal case: In a criminal action the court cannot direct a verdict against the defendant or grant a new trial to the state, however conclusive the evidence may be against the defendant. The jury have an absolute power to acquit the accused regardless of the evidence. In no case can the court determine the weight of the evidence as against the accused. It follows that an appellate court in reviewing an erroneous instruction cannot, as in a civil case, refuse a new trial on the ground that the verdict was the only one warranted by the evidence. The doctrine of error without prejudice is not as frequently applicable to criminal as to civil cases.

[1] State v. Gut, 13 Minn. 341 Gil. 315.

How far discretionary—question on appeal.

§ 1115. The matter of granting new trials for error in the charge is governed by no fixed rules, but is largely a matter of judicial discretion.[1] Whether a charge was practically prejudicial or not is a question of fact which the trial court is in a far better position to pass upon than an appellate court.[2] When the trial court grants a new trial on this ground its decision is practically final. "It should require a clear case of error or abuse of discretion to warrant the reversal of an order of a trial court awarding a new trial for apprehended misconception on the part of the jury of the law of the case."[3]

[1] Demueles v. St. Paul etc. Ry. Co. 44 Minn. 436, 46 N. W. 912.

[2] Braley v. Byrnes, 21 Minn. 482.

[3] Fairchild v. Rogers, 32 Minn. 269, 20 N. W. 191. See also, Demueles v. St. Paul etc. Ry. Co. 44 Minn. 436, 46 N. W. 912;

Digitized by Google

Braley v. Byrnes, 21 Minn. 482; Nelson v. Thompson, 23 Minn. 508.

§ 1116. "Instructions of a trial court should be viewed by an appellate court, so far as possible, from the standpoint of the jury. It will not do to construe them in the light of strict, abstract legal principles. The real question in all cases where exception is taken to the charge is, what might the jury have understood from the language of the court? An instruction may be analyzed and made clear and consistent with the rules of law applicable to the case, and at the same time, when viewed from a practical, common sense standpoint, appear clearly misleading and prejudicial."

Mailand v. Mailand, 83 Minn. 453, 86 N. W. 445.

Indefinite and ambiguous instructions.

§ 1117. Mere indefiniteness in the charge is no ground for a new trial unless obviously misleading and the court refused a timely request of counsel to make it more definite. If a party apprehends danger from the generality or indefiniteness or ambiguity of the charge he must seasonably request the court to make it more specific and definite and if he fails to do so he cannot raise the objection on a motion for a new trial or on appeal.[1] This rule has not been changed by Laws 1901 ch. 113 abrogating exceptions.[2]

[1] Hunter v. Jones, 13 Minn. 307 Gil. 282; Baldwin v. Blanchard, 15 Minn. 489 Gil. 403; Connolly v. Davidson, 15 Minn. 519 Gil. 428; Warner v. Myrick, 16 Minn. 91 Gil. 81; Jaspers v. Lano, 17 Minn. 296 Gil. 273; Egan v. Faendel, 19 Minn. 231 Gil. 191; Le Clair v. First Division St. Paul etc. Ry. Co. 20 Minn. 9 Gil. 1; Siebert v. Leonard, 21 Minn. 442; Hartson v. First Division St. Paul etc. Ry. Co. 21 Minn. 517; Erd v. City of St. Paul, 22 Minn. 443; Gardner v. Kellogg, 23 Minn. 463; Farnham v. Thompson, 32 Minn. 22, 18 N. W. 833; Holm v. Sandberg, 32 Minn. 427, 21 N. W. 416; Evans v. St. Paul etc. Ry. Co. 30 Minn. 489, 16 N. W. 271; Ziebarth v. Nye, 42 Minn. 541, 44 N. W. 1027; McKnight v. Chicago etc. Ry. Co. 44 Minn. 141, 46 N. W. 294; Clapp v. Minneapolis etc. Ry. Co. 36 Minn. 6, 29 N. W. 340; Larrabee v. Minnesota Tribune Co. 36 Minn. 141, 30 N. W. 462; Bowen v. St. Paul etc. Ry. Co. 36 Minn. 522, 32 N. W. 751; Lyons v. City of Red Wing, 76 Minn. 20, 78 N. W. 868; Cumbey v. Lovett, 76 Minn. 227, 79 N. W. 99; State v. Johnson, 37 Minn. 493, 35 N. W. 373; State v. Bagan, 41 Minn. 285, 43 N. W. 5; Bathke v. Krassin, 82 Minn. 226, 84 N. W. 796; McCormick v. Louden, 64 Minn. 509, 67 N. W. 366; Germolus v. Sausser, 83 Minn. 141, 85 N. W. 946; Brown v. Radebaugh, 84 Minn. 347, 87 N. W. 937.

[2] Steinbauer v. Stone, 85 Minn. 274, 88 N. W. 754; Torske v. Com. Lumber Co. (Minn.) 90 N. W. 532; State v. Lewis (Minn.) 90 N. W. 318; Applebee v. Perry, (Minn.) 91 N. W. 893.

§ 1118. Where the charge as a whole is correct, but it is desired to prevent possible misapprehension on the part of the jury from

Digitized by Google

the omission of a proper qualification in a part of the charge the attention of the court should be called particularly to that omission and a failure to do so will constitute a waiver of the defect.

McKnight v. Chicago etc. Ry. Co. 44 Minn. 141, 46 N. W. 294.

Presumption as to ambiguous charge.

§ 1119. When an instruction is given which is open to two constructions, one of which is correct and the other incorrect, as a proposition of law, the former will be presumed to have been the sense in which it was given and understood, unless the ambiguity was particularly called to the attention of the court, with a request to correct the same.

Erd v. City of St. Paul, 22 Minn. 443; Siebert v. Leonard, 21 Minn. 442.

Omission to charge.

§ 1120. It is the general rule that the mere omission to charge on a particular point, in the absence of a request from counsel, is not a ground for a new trial.

Chamberlain v. Porter, 9 Minn. 260 Gil. 244; State v. Lawlor, 28 Minn. 216, 9 N. W. 698; Mobile Fruit & Trading Co. v. Potter, 78 Minn. 487, 81 N. W. 392; McCarvel v. Phenix Ins. Co. 64 Minn. 193, 66 N. W. 367; Brown v. Radebaugh, 84 Minn. 347, 87 N. W. 937; J. I. Case etc. Co. v. Hoffman (Minn.) 90 N. W. 5; Applebee v. Perry, (Minn.) 91 N. W. 893.

Inconsistent and contradictory instructions.

§ 1121. Where the instructions are manifestly inconsistent and contradictory on a material issue a new trial should ordinarily be granted. It is not for the jury to select from contradictory instructions those which correctly express the law.

McCormick v. Kelly, 28 Minn. 135, 9 N. W. 675; Gortz v. Pinske, 82 Minn. 456, 85 N. W. 215; Hughley v. City of Wabasha, 69 Minn. 245, 72 N. W. 78; State v. Grear, 28 Minn. 426, 10 N. W. 472; Eich v. Taylor, 17 Minn. 172 Gil. 145.

When there are several issues—error as to one.

§ 1122. Where there are several material issues tried and the verdict is a general one it cannot be upheld if the trial court gave the jury an erroneous charge upon any one of the issues.

Peterson v. Chicago etc. Ry. Co. 36 Minn. 399, 31 N. W. 515; Funk v. St. Paul City Ry. Co. 61 Minn. 435, 63 N. W. 1099; Grover v. Bach, 82 Minn. 299, 84 N. W. 909; Avery Planter Co. v. Peck, 80 Minn. 519, 83 N. W. 455, 1083; First Nat. Bank v. Strait, 71 Minn. 69, 73 N. W. 645; Fidelity & Casualty Co. v. Crays, 76 Minn. 450, 79 N. W. 531; Moldenhauer v. Minneapolis Street Ry. Co. 80 Minn. 426, 83 N. W. 381. See Nelson v. Thompson, 23 Minn. 508.

§ 1123. An erroneous and prejudicial statement of the law in the charge is a ground for a new trial although the court merely adopted the interpretation of the law agreed upon by counsel. It is the

Digitized by Google

duty of the court to apply and administer the law according to its own understanding of it and not to abdicate in favor of counsel.

Fitzgerald v. St. Paul etc. Ry. Co. 29 Minn. 336, 13 N. W. 168.

Charge in accord with theory of trial.

§ 1124. Where a case has been tried by the parties, and submitted to the jury by the court without objection, upon a certain construction of the pleadings, such construction will be conclusive on the parties.

Keyes v. Minneapolis etc. Ry. Co. 36 Minn. 290, 30 N. W. 888; Fritz v. McGill, 31 Minn. 536, 18 N. W. 753; Peteler Portable Ry. Mfg. Co. v. N. W. Adamant Mfg. Co. 60 Minn. 127, 61 N. W. 1024.

§ 1125. A party is concluded by an instruction given at his own request.[1] And a party at whose request an erroneous instruction is given cannot complain of an erroneous qualification of it.[2]

[1] Cummings v. Baars, 36 Minn. 350, 31 N. W. 449.

[2] Simmons v. St. Paul etc. Ry. Co. 18 Minn. 184 Gil. 168.

§ 1126. A party is concluded by an instruction given in accordance with the theory upon which he conducted his case.

Engler v. Schneider, 66 Minn. 388, 69 N. W. 139; Perine v. Grand Lodge, 48 Minn. 82, 50 N. W. 1022; Haslam v. First Nat. Bank, 79 Minn. 1, 81 N. W. 535; Engstad v. Syverson, 72 Minn. 188, 75 N. W. 125; Peteler Portable Ry. Mfg. Co. v. N. W. Adamant Mfg. Co. 60 Minn. 127, 61 N. W. 1024, Moquist v. Chapel, 62 Minn. 258, 64 N. W. 567; Papooshek v. Winona etc. Ry. Co. 44 Minn. 195, 46 N. W. 329; Davis v. Jacoby, 54 Minn. 144, 55 N. W. 908; Haslam v. First Nat. Bank, 79 Minn. 1, 81 N. W. 535.

§ 1127. Where a case is tried upon the theory that the only issue is as to one question of fact, and the court, without objection by the party, instructs the jury that this is the only question submitted to them, and that their verdict is to depend exclusively upon their determination of the question, the party thereby consents that the case may be tried and determined upon that one issue, and cannot afterwards urge that the evidence upon some other question of fact was insufficient to justify the verdict.

Engstad v. Syverson, 72 Minn. 188, 75 N. W. 188; Engler v. Schneider, 66 Minn. 388, 69 N. W. 139; McCarvel v. Phenix, 64 Minn. 193, 66 N. W. 367.

§ 1128. A party is concluded by an instruction to which he made no objection on the trial.[1] An instruction unobjected to becomes the law of the case, however erroneous it may be. The jury are bound to accept the law as given to them by the court and by not objecting to the charge a party consents that the weight and sufficiency of the evidence and the issues in the case shall be determined by the jury in accordance with the law as given by the court; and whether the charge is right or wrong it must, for the purposes of an appeal, be taken as the law of the case.[2] There are, however,

Digitized by Google

ill-defined limitations to this rule.[3] To what extent this doctrine is affected by Laws 1901 ch. 113 is undetermined as yet.

[1] Valerius v. Richard, 57 Minn. 443, 59 N. W. 534.

[2] Smith v. Pearson, 44 Minn. 397, 46 N. W. 849; Loudy v. Clarke, 45 Minn. 477, 48 N. W. 25; Coburn v. Life Indemnity & Invest. Co. 52 Minn. 424, 54 N. W. 373; Bergh v. Sloan, 53 Minn. 116, 54 N. W. 943; Moquist v. Chapel, 62 Minn. 258, 64 N. W. 567. Bates v. Richards Lumber Co. 56 Minn. 14, 57 N. W. 218; Davis v. Jacoby, 54 Minn. 144, 55 N. W. 908; Redmond v. St. Paul etc. Ry. Co. 39 Minn. 248, 40 N. W. 64; Green v. St. Paul etc. Ry. Co. 55 Minn. 192, 56 N. W. 752; Wilson v. Minnesota etc. Ins. Assoc. 36 Minn. 112, 30 N. W. 401; Powell v. Heisler, 45 Minn. 549, 48 N. W. 411; Johnson v. Sherwood, 45 Minn. 9, 47 N. W. 262.

[3] See Maceman v. Equitable Life Assurance Society, 69 Minn. 285, 72 N. W. 111; Johnson v. St. Paul City Ry. Co. 67 Minn. 260, 69 N. W. 900; Crich v. Williamsburg City Fire Ins. Co. 45 Minn. 441, 48 N. W. 198; Fitzgerald v. St. Paul etc. Ry. Co. 29 Minn. 336, 13 N. W. 168; White v. Western Assurance Co. 52 Minn. 352, 54 N. W. 195.

When the verdict is right.

§ 1129. A new trial should not be granted in a civil action however erroneous the charge may have been if the verdict was the only one warranted by the law applicable to the case [1] or was supported by so manifest a preponderance of the evidence that it would have been the obvious duty of the court to set aside a contrary verdict as not justified by the evidence.[2]

[1] Colter v. Mann, 18 Minn. 96 Gil. 79; Lewis v. St. Paul etc. Ry. Co. 20 Minn. 260 Gil. 234; Gross v. Diller, 33 Minn. 424, 23 N. W. 837; Smithson v. Chicago etc. Ry. Co. 71 Minn. 216, 73 N. W. 853; Hurt v. St. Paul etc. Ry. Co. 39 Minn. 485, 40 N. W. 613; Strong v. Baker, 25 Minn. 442; Magner v. Truesdale, 53 Minn. 436, 55 N. W. 607; Germolus v. Sausser, 83 Minn. 141, 85 N. W. 946; King v. City of Duluth, 78 Minn. 155, 80 N. W. 874; Pioneer Savings & Loan Co. v. Freeburg, 59 Minn. 230, 61 N. W. 25; Bank of Montreal v. Richter, 55 Minn. 362, 57 N. W. 61; Fogarty v. Wilson, 30 Minn. 289, 15 N. W. 175; Petsch v. Biggs, 31 Minn. 392, 18 N. W. 101; Ryder v. Neitge, 21 Minn. 70.

[2] Beebe v. Wilkinson, 30 Minn. 548, 16 N. W. 450; Woodbury v. Larned, 5 Minn. 339 Gil. 271; Arine v. Minneapolis etc. Ry. Co. 76 Minn. 201, 78 N. W. 201; Smithson v. Chicago etc. Ry. Co. 71 Minn. 216, 73 N. W. 853.

§ 1130. Where upon all the evidence the court would have been justified in directing a verdict for the party in whose favor the verdict was rendered a new trial will not be granted however erroneous the charge.

Arine v. Minneapolis etc. Ry. Co. 76 Minn. 210, 78 N. W. 1108; Smithson v. Chicago etc. Ry. Co. 71 Minn. 216, 73 N. W. 853.

Digitized by Google

§ 1131. Where it is obvious that the jury disregarded an erroneous instruction a new trial should not be granted.

Gaslin v. Bridgman, 26 Minn. 442, 4 N. W. 1111; Dike v. Pool, 15 Minn. 315 Gil. 245; Howe v. Cochran, 47 Minn. 403, 50 N. W. 368; Cannon v. Moody, 78 Minn. 68, 80 N. W. 842; Klimple v. Boelter, 44 Minn. 172, 46 N. W. 306; Colter v. Mann, 18 Minn. 96 Gil. 79.

§ 1132. Where, upon the evidence, the successful party is entitled, upon a particular issue, to the verdict actually rendered, the charge as to other issues being correct, an inaccuracy in the charge as to that issue will not vitiate the verdict.

Strong v. Baker, 25 Minn. 442.

§ 1133. Where an issue in the case has been submitted to the jury and they have made a special finding on the same, which is conclusive of the rights of the parties, if that finding must stand, it is immaterial that the court may have erred in its manner of submitting to the jury another separate and distinct issue.

Elwood v. Saterlie, 68 Minn. 173, 71 N. W. 13; Maceman v. Equitable Life Assurance Soc. 69 Minn. 285, 72 N. W. 111; Peterson v. Chicago etc. Ry. Co. 36 Minn. 399, 31 N. W. 515; Whitacre v. Culver, 9 Minn. 295 Gil. 279.

Impertinent abstract instructions.

§ 1134. An erroneous instruction on an abstract proposition of law not pertinent to the case is no ground for a new trial where it is manifest that no prejudice resulted to the party complaining.[1] But where such instruction relates to facts which, though not in themselves material, are so closely connected in time and sequence with the real issues that the jury might very well believe, from the fact of the court stating the law applicable to them, that they had a material bearing on the issues a new trial should be granted unless it is manifest that the moving party was not prejudiced.[2]

[1] Brown v. Nagel, 21 Minn. 415; Blackman v. Wheaton, 13 Minn. 326 Gil. 299; Braley v. Byrnes, 21 Minn. 482.

[2] Braley v. Byrnes, 21 Minn. 482. See Gorstz v. Pinske, 82 Minn. 456, 85 N. W. 215.

Complainant must be prejudiced.

§ 1135. A party cannot complain of an instruction which was more favorable to him than it ought to have been.

Spencer v. Tozer, 15 Minn. 146 Gil. 112; State v. Grear, 29 Minn. 221, 13 N. W. 140; Weber v. Winona etc. Ry. Co. 63 Minn. 66, 65 N. W. 93.

No evidence or conclusive evidence.

§ 1136. It is prejudicial error for the court to submit a case to the jury upon a point upon which there is no evidence [1] or where the evidence admits of only one reasonable inference.[2]

[1] Van Doren v. Wright, 65 Minn. 80, 67 N. W. 668, 68 N. W. 22; Rugland v. Tollefson, 53 Minn. 267, 55 N. W. 123.

Digitized by Google

[2] Wilkinson v. City of Crookston, 75 Minn. 184, 77 N. W. 797; Cannon River etc. Assoc. v. Rogers, 51 Minn. 388, 53 N. W. 759; Reed v. Lammel, 40 Minn. 397, 42 N. W. 202.

Withdrawing issue from jury improperly.

§ 1137. It is prejudicial error and ground for a new trial for the court in its charge to withdraw from the jury issues of fact properly determinable by them.

Wilkinson v. City of Crookston, 75 Minn. 184, 77 N. W. 797.

Curing error in charge.

§ 1138. If the court, either on its own motion or on motion of counsel, withdraws an erroneous instruction absolutely and explicitly instructs the jury to disregard it the error is cured.[1] But an erroneous statement of the law clearly applicable to the facts of the case is not cured by subsequent correct instructions which do not specifically correct the misstatement. It is the duty of the court in its instructions to apply the law to the essential facts in a practical and concrete form and if it errs in this respect a correct abstract proposition on the same subject will not cure the previous error. On appeal correct abstract propositions in the charge will be considered in connection with the whole charge and it will be presumed, when contradictory instructions are given, that those of practical application to the evidence were more effective than others of an abstract nature.[2] Where the court erroneously charges the jury to disregard certain evidence the error is not cured by a general charge to consider all the evidence in the case.[3]

[1] Goodsell v. Taylor, 41 Minn. 207, 42 N. W. 873; Eldridge v. Hawley, 115 Mass. 410; Com. v. Clifford, 145 Mass. 97; Greenfield v. People, 85 N. Y. 91.

[2] Gorstz v. Pinske, 82 Minn. 456, 85 N. W. 215.

[3] Eich v. Taylor, 17 Minn. 172 Gil. 145.

FOR ERROR IN IMPANELING THE JURY

General statement.

§ 1139. An error of the court in connection with the challenging of jurors and their examination on the voir dire may be a ground for a new trial if prejudicial.[1] But inasmuch as a party is not entitled to have any particular juror selected but only to have an impartial jury and as it will be presumed that the jury were impartial in the absence of a showing to the contrary it is rare that a new trial can be secured for such an error.[2] In the absence of fraud, or collusion, in the selection of a jury, an objection to the array, or to a single juror, is too late after verdict; unless it is shown that the party objecting was prejudiced by the irregularity.[3] If a challenge for general disqualification is erroneously disallowed and the party subsequently challenges the juror peremptorily, and a jury is obtained without the party having exhausted his peremptory challenges, the error is without prejudice.[4]

Digitized by Google

[1] Morrison v. Lovejoy, 6 Minn. 319 Gil. 224; State v. Bresland, 59 Minn. 281, 61 N. W. 450.

[2] State v. Kluseman, 53 Minn. 541, 55 N. W. 741; State v. Smith, 56 Minn. 78, 57 N. W. 325; Perry v. Minneapolis Street Ry. Co. 69 Minn. 165, 72 N. W. 55; State v. Lawlor, 28 Minn. 216, 9 N. W. 698; State v. Frelinghuysen, 43 Minn. 265, 45 N. W. 432; State v. Hanley, 34 Minn. 430, 26 N. W. 397; State v. Durnam, 73 Minn. 150, 75 N. W. 1127; State v. Lautenschlager, 22 Minn. 514; State v. Brown, 12 Minn. 538 Gil. 448.

[3] Steele v. Maloney, 1 Minn. 347 Gil. 257; State v. Thomas, 19 Minn. 484 Gil. 418.

[4] State v. Lawlor, 28 Minn. 216, 9 N. W. 698.

SECOND TRIAL OF RIGHT IN ACTIONS FOR THE RECOVERY OF REAL PROPERTY.

The statute.

§ 1140. "Any person against whom a judgment is recovered in an action for the recovery of real property, may, within six months after written notice of such judgment, upon payment of all costs and damages recovered thereby, demand another trial, by notice in writing to the adverse party, or his attorney in the action; and thereupon the action shall be retried, and may be brought to trial by either party: provided, that in all causes in which an appeal shall be taken from such judgment to the supreme court, such demand for another trial may be made at any time within six months after written notice of the determination of such appeal, and thereupon the action shall be retried, and may be brought to trial by either party. Provided, that unless such notice of demand for a new trial, with proof of service thereof, be filed with the clerk of the court in which judgment has been or shall be recovered in such action, within two years after the entry of such judgment, or in case of appeal to the supreme court, within two years from the date of filing in the district court a remittitur from said supreme court, showing the final determination of said appeal, no retrial shall be had of such action hereunder." [1] * * * "The judgment given on a trial to be had under the last section shall be annexed to the judgment-roll of the former trial, and the judgment last given shall be the final determination of the rights of the parties. If a prior judgment has been executed, restitution shall be ordered as the last judgment may determine the rights of the parties, and the same may be enforced by execution." [2]

[1] G. S. 1894 § 5845 as amended by Laws 1901 ch. 344.

[2] G. S. 1894 § 5846.

Origin and justification of statute.

§ 1141. At the common law, the fiction in an action of ejectment, by which John Doe and Richard Roe were made respectively the plaintiff and the defendant, permitted any number of trials after

Digitized by Google

verdict and judgment between the same parties in interest on the same question of title, by the use of other fictitious names, and other allegations of demise, entry and ouster.[1] The evil of this want of conclusiveness in the result of this form of action led to the interposition of a court of equity, in which, after repeated verdicts and judgments in favor of the same party and upon the same title, that court would enjoin the unsuccessful party from further disturbance of the one who had recovered these judgments.[2] There was, perhaps, another reason why the English common law refused to concede to the action of ejectment, which is a personal action, that conclusive effect which it gave to all other actions, namely, the peculiar respect, almost sanctity, which the feudal system attached to the tenure by which real estate was held. So peculiarly sacred was the title to land with our ancestors, that they were not willing that the claim to it should, like all other claims, be settled forever by one trial in an ordinary personal action, but permitted the unsuccessful party to have other opportunity of establishing his title. They, however, did concede to those solemn actions, the writ of right and the writ of assize, the same force as estoppels, which they did to personal actions in other cases.[3]

[1] Equator Co. v. Hall, 106 U. S. 86; Miles v. Caldwell, 2 Wall. (U. S.) 35; Doyle v. Hallam, 21 Minn. 515; Lewis v. Hogan, 51 Minn. 221, 53 N. W. 367.

[2] Equator Co. v. Hall, 106 U. S. 86; Miles v. Caldwell, 2 Wall. (U. S.) 35; Baze v. Arper, 6 Minn. 220 Gil. 142.

[3] Miles v. Caldwell, 2 Wall. (U. S.) 35; Iron Silver Mining Co. v. Campbell, 61 Fed. 932.

§ 1142. Since the abolition of the fictions attending the common-law action of ejectment, and the adoption of the practice of requiring all actions to be prosecuted in the names of the real parties in interest, and upon real, and not fictitious issues, judgments in actions for the recovery of real property have come to be conclusive as to the issues involved, as they are in other actions, except where the statute declares otherwise.

Lewis v. Hogan, 51 Minn. 221, 53 N. W. 367; Doyle v. Hallam, 21 Minn. 515; Schmitt v. Schmitt, 32 Minn. 130, 19 N. W. 649.

§ 1143. The justification of our statute providing for a second trial of right in actions for the recovery of real property is historical rather than rational. The statute "is a relic of the fictions of the old common-law action of ejectment, which had their foundations, in part, at least, in the old feudal idea that the title to real property is too sacred to be concluded by the result of one trial, or even one action."[1] It was an effort to retain some of the privileges connected with the trial of title to real estate under the old common law.[2] "There may have been two reasons for the statute. At common law the judgment in ejectment was not conclusive on the question of title. The statute makes the last judgment in the action final. In ejectment the pleadings simply alleged or denied title, without stating any particulars, and either party might be taken by surprise

Digitized by Google

by the evidence introduced by his adversary under the naked allegation of title. To guard against this, the right to a second trial is given the defeated party." [3] The statute "only cuts off the common law right that the defeated party in ejectment had to contest the right of possession as often as he saw fit until arrested by a decree of the court of chancery. The statute limits this right to two trials and declares the second judgment final." [4]

[1] Kremer v. Chicago etc. Ry. Co. 54 Minn. 157, 55 N. W. 928.
[2] Connecticut Mut. Life Ins. Co. v. King, 80 Minn. 76, 82 N. W. 1103.
[3] Somerville v. Donaldson, 26 Minn. 75, 1 N. W. 808. But see, Howes v. Gillett, 10 Minn. 316 Gil. 316.
[4] Baze v. Arper, 6 Minn. 220 Gil. 142.

Construed liberally.

§ 1144. Although the supreme court have several times questioned the expediency of the statute [1] they nevertheless hold that it is remedial in its nature and to be construed liberally.[2]

[1] Kremer v. Chicago etc. Ry. Co. 54 Minn. 157, 55 N. W. 928; Connecticut Mut. Life Ins. Co. v. King, 80 Minn. 76, 82 N. W. 1103.
[2] Gahre v. Berry, 79 Minn. 20, 81 N. W. 537; Finnegan v. Brown, 81 Minn. 508, 84 N. W. 343.

Statute limited to actions in nature of ejectment.

§ 1145. The phrase "action for the recovery of real property," as used in this statute was intended to refer to an action in the nature of the common law action of ejectment, that is, an action for the recovery of real property.[1] The court, to determine the right to a second trial in any given case, will look to the substance of the action, and, whatever may be the form of the pleadings, if the action is one in which either party seeks to recover the possession of real property, the right to a second trial will be conceded.[2] "Any action, whatever its form, which is in the nature of a common law ejectment, comes within the statute giving a second trial as a matter of right. But no other action comes within it." [3]

[1] Ferguson v. Kumler, 25 Minn. 183; Schmitt v. Schmitt, 32 Minn. 130, 19 N. W. 649; Somerville v. Donaldson, 26 Minn. 75, 1 N. W. 808; Godfrey v. Valentine, 50 Minn. 284, 52 N. W. 643.
[2] Eastman v. Linn, 20 Minn. 433 Gil. 387; Ferguson v. Kumler, 25 Minn. 183; Schmitt v. Schmitt, 32 Minn. 130, 19 N. W. 649; City of St. Paul v. Chicago etc. Ry. Co. 49 Minn. 88, 51 N. W. 662; Gahre v. Berry, 79 Minn. 20, 81 N. W. 537; Finnegan v. Brown, 81 Minn. 508, 84 N. W. 343.
[3] Somerville v. Donaldson, 26 Minn. 75, 1 N. W. 808; Schmitt v. Schmitt, 32 Minn. 130, 19 N. W. 649; Knight v. Valentine, 35 Minn. 367, 29 N. W. 3.

§ 1146. In our statutory action to determine adverse claims the parties are not ordinarily entitled to a new trial as of right because the primary object of such action is to try the title to real property

Digitized by Google

and not to secure the recovery of its possession.[1] Where only the title is in question and recovery of possession is not sought the action is not for the recovery of real property within the meaning of the statute.[2] If the legislature had intended to give a new trial as of right in all actions where the title to real property is involved and determined it would have used very different language.[3] If, in an action to determine adverse claims, the plaintiff is in possession and the defendant in his answer alleges ownership in himself and possession by plaintiff and a withholding and demands possession, the action becomes in substance an action for the recovery of real property and either party has a right to a new trial under the statute.[4] In Gahre v. Berry[5] "the complaint alleged that the plaintiff was the owner in fee and in possession of certain land, describing it, and that the defendant claimed some estate or interest therein adverse to plaintiff, but that she had no title to or interest therein whatever. The relief prayed for, so far as here material, was that it be adjudged that the plaintiff was the owner of the land, and entitled to the possession thereof, that the defendant had no title to or interest therein, and for general relief. The answer denied the allegations of the complaint, except as admitted, and affirmatively alleged that the defendant was the owner in fee of the land and entitled to the possession thereof; that the plaintiff claimed some title or interest therein, but that he had no title to or interest therein whatever; and prayed, among other things, that the defendant be adjudged the owner in fee of the land and entitled to the possession thereof." It was held that the defendant had a right to a new trial under the statute. In Finnegan v. Brown[6] the plaintiff alleged that he was the owner and in possession of the land in dispute. The defendant denied the allegations of the complaint and for an affirmative defence alleged that he was the owner in fee and in actual possession of the premises and prayed that title be adjudged in him and that the adverse claim of plaintiff be declared null and void and that the owner be entitled to the possession of the land and for general relief. It was held, following Gahre v. Berry, that the action was within the statute. These two cases are palpably inconsistent with several former decisions of the same court and seem to the present writer an unfortunate departure.[7] The vice in the argument of the court in both cases lies in the assumption that an action in the nature of ejectment is made out when a party alleges that he is the owner and entitled to the possession of certain real property in the possession of the opposite party and prays that he be adjudged the owner and entitled to the possession thereof. It is difficult to see how such a pleading can be held to state a cause of action in ejectment for the reason that it does not include an allegation of ouster or withholding.[8] Furthermore, in determining the nature of an action, it is proper to refer to the prayer for relief. An action should not be held to come within the statute unless there is a prayer for the recovery of the possession of the premises.[9] It is not sufficient to pray that the party be adjudged the owner and entitled to the possession. In a case where the court found as a

Digitized by Google

conclusion of law "that the plaintiffs were the absolute owners of the premises and entitled to the quiet, peaceable and uninterrupted possession and control thereof" it was held that such a conclusion "did not authorize the entry of any judgment for the recovery of possession, and no writ of possession could have been issued on the judgment."[10] The supreme court has several times expressed its disapproval of this statute and yet it has now given to it an extraordinarily liberal construction. Of course, where the land is in fact vacant, a new trial cannot be had whatever may be the allegations of the pleadings.

[1] Knight v. Valentine, 35 Minn. 367, 29 N. W. 3; Godfrey v. Valentine, 50 Minn. 284, 52 N. W. 643; McRoberts v. McArthur, 69 Minn. 506, 72 N. W. 796.

[2] Knight v. Valentine, 35 Minn. 367, 29 N. W. 3.

[3] Godfrey v. Valentine, 50 Minn. 284, 52 N. W. 643.

[4] Eastman v. Linn, 20 Minn. 433 Gil. 387; Godfrey v. Valentine, 50 Minn. 284, 52 N. W. 643.

[5] 79 Minn. 20, 81 N. W. 537.

[6] 81 Minn. 508, 84 N. W. 343.

[7] Knight v. Valentine, 35 Minn. 367, 29 N. W. 3; Godfrey v. Valentine, 50 Minn. 284, 52 N. W. 643; McRoberts v. McArthur, 69 Minn. 506, 72 N. W. 796; Schons v. Village of Kellogg, 61 Minn. 128, 63 N. W. 257; Somerville v. Donaldson, 26 Minn. 75, 1 N. W. 808.

[8] Holmes v. Williams, 16 Minn. 164 Gil. 146; McKinlay v. Tuttle, 42 Cal. 570; Van Voorhis v. Kelly, 31 Hun (N. Y.) 293.

[9] Godfrey v. Valentine, 50 Minn. 284, 52 N. W. 643; Schons v. Village of Kellogg, 61 Minn. 128, 63 N. W. 257; McRoberts v. McArthur, 69 Minn. 506, 72 N. W. 796.

[10] McRoberts v. McArthur, 69 Minn. 506, 72 N. W. 796.

§ 1147. An action in the nature of a bill in equity, although the decree may affect the title to real property, does not come within either the language or apparent reason of the statute. In an action to set aside a conveyance of real property on the ground of fraud it was held that the defeated party had no right to a new trial under the statute.

Somerville v. Donaldson, 26 Minn. 75, 1 N. W. 808.

§ 1148. A cause of action substantially in ejectment does not lose the right to a second trial, merely because, either properly or improperly, joined with a cause of action to which that right does not apply.[1] So, also, the right to a second trial under the statute is not affected by the fact that the party in his pleading sought other relief in addition to the recovery of possession.[2]

[1] Schmitt v. Schmitt, 32 Minn. 130.

[2] City of St. Paul v. Chicago etc. Ry. Co. 49 Minn. 88, 51 N. W. 91; Kremer v. Chicago etc. Ry. Co. 54 Minn. 157, 55 N. W. 928.

§ 1149. The statute does not ordinarily apply to actions under the forcible entry and unlawful detainer act.[1] But where, in an

Digitized by Google

action begun under such act, title is involved and the case is certified to the district court, the statute applies if the action is in the nature of ejectment.[2]

[1] Whitaker v. McClung, 14 Minn. 170 Gil. 131.

[2] Ferguson v. Kumler, 25 Minn. 183.

Payment of costs and damages.

§ 1150. The payment of all costs and damages recovered by the judgment is a condition precedent of the right to a new trial and is enforced with strictness.[1] The court has no authority to excuse a party from the performance of such condition. In a case where, a part only of such costs having been paid, the adverse party noticed the cause for retrial and caused it to be entered on the calendar, both parties supposing that all costs had been paid, it was held that there was no waiver of the statutory requirement and that no right to a second trial was thereby acquired. The time for performing the statutory conditions having expired the court could not relieve from the default.[2] A party does not waive the right to object that the action is not within the statute by accepting payment of costs although such payment was made with the avowed purpose of securing a second trial.[3]

[1] Davidson v. Lamprey, 16 Minn. 445 Gil. 403; Dawson v. Shillock, 29 Minn. 189, 12 N. W. 526; Western Land Association v. Thompson, 79 Minn. 423, 82 N. W. 677.

[2] Dawson v. Shillock, 29 Minn. 189, 12 N. W. 526.

[3] Whitaker v. McClung, 14 Minn. 170 Gil. 131.

Authority of attorney to waive right.

§ 1151. An attorney for a party in an action in the nature of ejectment has authority to bind his client by a stipulation to dismiss a demand for a second trial under the statute.

Bray v. Doheny, 39 Minn. 355, 40 N. W. 262.

Only one new trial of right.

§ 1152. Only one new trial as of right is allowed in a single action. In a case where the first trial resulted in a judgment for the plaintiff the defendant availed himself of the right to a new trial under the statute. The second trial resulted in favor of the defendant. It was held that the plaintiff did not have a right to another trial under the statute.

Lewis v. Hogan, 51 Minn. 221, 53 N. W. 367.

§ 1153. Whether the remedy afforded by this statute is pro tanto exclusive has never been explicitly decided in this state. The statute itself seems to decide the question in the negative. Apparently a party has the right to reserve his statutory privilege until a judgment has been rendered against him which is free from error. At least that has been the practical construction in this state.[1] Suppose, for example, that A. sues B. in ejectment and recovers a judgment, B. ignoring the statute, moves for a new trial for cause. His motion is denied and he appeals. On appeal he is granted a new trial and the second trial also results in a verdict for A. Can B. then

Digitized by Google

have another trial as of right? Our statute certainly seems to authorize it and there is high judicial authority to the same effect.[2] The statute declares the second judgment final—that is, final so far as to bar another action for the same cause; but like all other final judgments it may be reviewed for errors committed on the trial.[3] Any number of new trials may be granted in ejectment for cause as in other civil actions.[4]

[1] Cochran v. Stewart, 66 Minn. 152, 68 N. W. 972; Great Northern Ry. Co. v. Stewart, 65 Minn. 514, 68 N. W. 1102; King v. McCarthy, 54 Minn. 190, 55 N. W. 96; City of St. Paul v. Chicago etc. Ry. Co. 63 Minn. 330, 63 N. W. 267; Connecticut Mut. Ins. Co. v. King, 80 Minn. 76, 82 N. W. 1103.

[2] People v. Judge Circuit Court, 21 Mich. 373; Iron Silver Mining Co. v. Campbell, 61 Fed. 932.

[3] Baze v. Arper, 6 Minn. 220 Gil. 142.

[4] Emmons v. Bishop, 14 Ill. 153.

In action against railroad company.

§ 1154. The statute does not apply to an action brought for the recovery of real property on the failure of a railroad company to pay compensation for the taking of the same.

[Laws 1895 ch. 52; G. S. 1894 §§ 2657–2662]

In case of default.

§ 1155. A party is not entitled to another trial under the statute where he has failed to answer and has allowed judgment to be rendered against him by default. The statute presupposes that there is some issue to be tried. But where the defendant has failed to answer, there is no issue, and nothing to try, until the default is opened, and he is permitted to answer. Applications for such relief are addressed to the discretion of the court.

Hallam v. Doyle, 35 Minn. 337, 29 N. W. 130.

New trial unaffected by prior trial.

§ 1156. In a second trial upon the same state of facts in an action of ejectment, taken under the statute, does the decision in the former appeal control the second trial according to the doctrine of res judicata, or does such decision stand only upon the rule of stare decisis? "Considering the history and purpose of the act, its natural and logical construction leads to the conclusion that the second trial should be, in the full sense, another trial. The application of the rule of res judicata would restrict the parties to such a narrow compass upon the second trial that it would practically annul the purpose of the statute in many cases. It is argued with much force that, where the facts are the same upon the second trial, there is no good reason why the first decision should not be considered as final. But even under such circumstances we think the parties should be at liberty to present the same facts a second time, and that the former decision should be considered merely as a precedent under the rule of stare decisis, to the same extent as though the case had arisen between different parties." [1]

[1] Connecticut Mut. Ins. Co. v. King, 80 Minn. 76, 82 N. W. 1103.

Digitized by Google

Necessity of filing demand and proof of service.

§ 1157. The payment of all costs and damages and the service of a written demand for another trial secures the absolute right to a retrial although the demand and proof of service are not filed in the office of the clerk of the court. The legal effect of the payment of all costs and damages and the service of a written demand for another trial deprives the judgment entered as the result of the first trial of all force as a final judgment.

Hunt v. O'Leary, 78 Minn. 281, 80 N. W. 1120. This case is limited by subsequent amendment of statute. See § 1140 supra.

Applies to both parties.

§ 1158. Under the statute as originally enacted only the defendant was entitled to a new trial.[1] The amendment of 1867 placed both parties on the same footing.[2]

[1] Howes v. Gillett, 10 Minn. 397 Gil. 316.

[2] Davidson v. Lamprey, 16 Minn. 445 Gil. 402.

The demand.

§ 1159. The service of a written demand as prescribed by the statute is a condition precedent of the right of a second trial.[1] The demand may be made by the party himself and a notice embodying such demand, made in his name by an agent authorized by him to make such demand is sufficient. A party may employ another attorney in place of the one who acted for him on the first trial and no formal consent and substitution of attorneys is necessary.[2]

[1] Davidson v. Lamprey, 16 Minn. 445 Gil. 402.

[2] West v. St. Paul etc. Ry. Co. 40 Minn. 189, 41 N. W. 1031.

Who entitled to right.

§ 1160. The right to a new trial given by this statute is not a purely personal right but descends to the personal representatives of a party.[1] It would undoubtedly be held in this state to extend to all persons in privity with the parties.

[1] Stocking v. Hanson, 22 Minn. 542.

Improvements.

§ 1161. Whether, on the second trial, a party may recover for improvements made by him while in possession under a judgment in his favor on the first trial, is an open question.

Gahre v. Berry, 82 Minn. 200, 84 N. W. 733.

Right to a jury trial.

§ 1162. Where a party secures a new trial under the statute he is entitled to a jury trial although he may have waived a jury on the first or prior trials.

Cochran v. Stewart, 66 Minn. 152, 68 N. W. 972.

Notice of judgment.

§ 1163. The time within which the defeated party may demand a second trial does not begin to run until the service of written notice of the entry of judgment. Actual knowledge of the entry of judg-

Digitized by Google

ment is insufficient to set the statute in motion. Written notice, however, may be waived by the party entitled thereto, and conduct on his part which clearly indicates an intention to proceed without notice will constitute such waiver. The delivery to the judgment debtor of a satisfaction of the judgment upon payment by him of the amount thereof, the same not being intended as a notice of the entry of the judgment, is not a compliance with the statute, nor such written notice of the judgment as will set the statute in motion.

Maurin v. Carnes, 80 Minn. 524, 83 N. W. 415.

Digitized by Google

CHAPTER XIV

COSTS

Definition.

§ 1164. "The right of a party to agree with an attorney or counsel for his compensation, is unrestricted, and the measure and mode of such compensation is left to the agreement, express or implied, of the parties; but there may be allowed, to the prevailing party, certain sums by way of indemnity for his expenses in the action, which allowances are termed costs."[1] The costs thus defined by statute are in practice termed statutory costs.[2] As commonly used the term costs includes both statutory costs and disbursements.[3]

[1] G. S. 1894 § 5497.

[2] Van Meter v. Knight, 32 Minn. 205, 20 N. W. 142.

[3] Woolsey v. O'Brien, 23 Minn. 71; Bayard v. Klinge, 16 Minn. 249 Gil. 221; Board of County Com'rs v. Board County Com'rs, 84 Minn. 267, 87 N. W. 846.

Purely statutory.

§ 1165. The right to recover costs and disbursements in an action or judicial proceeding is purely statutory, so that, where no statute allows it, they cannot be recovered.

Kroshus v. County of Houston, 46 Minn. 162, 48 N. W. 770; Andrews v. Town of Marion, 23 Minn. 372; Bayard v. Klinge, 16 Minn. 249 Gil. 221; State v. Cantieny, 34 Minn. 1, 24 N. W. 458.

An incident of the judgment.

§ 1166. Costs are a mere incident of the judgment and go as a matter of course with every judgment in an action of a legal nature without special directions and regardless of the regularity or correctness of the judgment.[1] A judgment is not affected by the taxation of costs until they are entered in it.[2]

[1] McRoberts v. McArthur, 66 Minn. 74, 68 N. W. 770.

[2] Leyde v. Martin, 16 Minn. 38 Gil. 24.

Legislative control.

§ 1167. The allowance and regulation of costs is a matter properly within the reasonable discretion of the legislature. At the common law no costs were allowed eo nomine, but in actions where the plaintiff recovered damages, the jury were allowed to include his expenses, though the defendant, in case he prevailed, had no indemnity for his. At an early day the matter became a subject of legislative enactment. The chief purpose of the allowance of costs is compensation or indemnity for expenses incurred in enforcing a legal, or resisting an illegal, claim, though in some cases the legislature is properly influenced by considerations of public policy. The principle that governs the allowance of costs does not require that they

Digitized by Google

should be uniform in all actions, nor the same to each of the litigants; and so double or extra costs are sometimes allowed to plaintiffs or defendants, as the case may be, because deemed proper from the nature and circumstances of certain species of litigation. Of the propriety and justice of such enactments, within reasonable limits, the legislature must judge.

Johnson v. Chicago etc. Ry. Co. 29 Minn. 425, 13 N. W. 673; Schimmele v. Chicago etc. Ry. Co. 34 Minn. 216, 25 N. W. 347; Cameron v. Chicago etc. Ry. Co. 63 Minn. 384, 65 N. W. 652.

Special proceedings.

§ 1168. The general statutes relating to costs apply only to ordinary civil actions. No costs are allowable in special proceedings unless expressly authorized by statute. The court has no discretion in the matter.

Bayard v. Klinge, 16 Minn. 249 Gil. 221; Andrews v. Town of Marion, 23 Minn. 372 (statute since enacted); Kroshus v. County of Houston, 46 Minn. 162, 48 N. W. 770.

Court without jurisdiction.

§ 1169. It is the general rule that a court has no authority to award a judgment for costs when it is without jurisdiction of the subject matter of the action.[1] But when the want of jurisdiction does not appear on the face of the summons or complaint and is only disclosed by the introduction of evidence the court may award costs.[2]

[1] McGinty v. Warner, 17 Minn. 41 Gil. 23. See McRoberts v. McArthur, 66 Minn. 74, 68 N. W. 770; Ross v. Evans, 30 Minn. 206, 14 N. W. 897.

[2] The City of Florence, 56 Fed. Rep. 236; Bitz v. Meyer, 40 N. J. L. 252.

Stipulations as to costs.

§ 1170. The court cannot disregard a stipulation of the parties as to costs.

Dorr v. Steichen, 18 Minn. 26 Gil. 10; Herrick v. Butler, 30 Minn. 156, 14 N. W. 794.

Ownership.

§ 1171. A judgment for costs and disbursements is the property of the party recovering it and not of his attorney, subject, however, to the lien of the latter for his services.

Davis v. Swedish-American Nat. Bank, 78 Minn. 408, 80 N. W. 953, 81 N. W. 210.

In case of nominal damages.

§ 1172. The right to costs does not ordinarily depend upon the amount of recovery. A party is entitled to costs although he recovers only nominal damages.

Potter v. Mellen, 36 Minn. 122, 30 N. W. 438; Harris v. Kerr, 37 Minn. 537, 35 N. W. 379; Farmer v. Crosby, 43 Minn. 459,

Digitized by Google

45 N. W. 866; United States Express Co. v. Koerner, 65 Minn. 540, 68 N. W. 181.

Where there are several parties.

§ 1173. In an action for tort against several defendants upon a verdict in favor of some of them but against the others, those succeeding are entitled to costs. Where several defendants who appear by the same attorney unite in the same answer and there is one trial as to all they are entitled jointly to statutory costs and not severally.[1] Where several defendants in an action, whether ex contractu or ex delicto, in good faith appear by separate attorneys and interpose separate defences by separate answers, each is entitled, on a recovery in his favor, to a separate bill of costs.[2] In actions of an equitable nature our statute provides that "when there are several defendants, not united in interest, and making separate defences by separate answers, and the plaintiff fails to recover judgment against all, the court may award costs to such of the defendants as have judgment in their favor, or any of them."[3]

[1] Barry v. McGrade, 14 Minn. 286 Gil. 214.

[2] Slama v. Chicago etc. Ry. Co. 57 Minn. 167, 58 N. W. 989; Loveland v. Cooley, 59 Minn. 258, 61 N. W. 139.

[3] See § 1178.

Costs of prior trial.

§ 1174. When a new trial is ordered, nothing being said about the costs of the first trial, such costs are recoverable by the party who ultimately succeeds.[1] There is neither a statute nor a rule of court requiring the payment of costs as a condition of granting a new trial on the merits.[2] The failure of the plaintiff to pay costs awarded against him in a former action is ground for a stay of proceedings.[3]

[1] Walker v. Barron, 6 Minn. 508 Gil. 353; Myers v. Irvine, 4 Minn. 553 Gil. 435. See McRoberts v. McArthur, 66 Minn. 74, 68 N. W. 770.

[2] Park v. Electric Thermostat Co. 75 Minn. 349, 77 N. W. 988.

[3] Gerrish v. Pratt, 6 Minn. 53 Gil. 14.

Two actions tried together.

§ 1175. Actions were brought by different plaintiffs, husband and wife, against the same defendant, to recover for injuries received in the same accident. By consent of all parties the cases were tried together, separate verdicts being rendered. The wife had a verdict. Her costs and disbursements were taxed, judgment entered and paid. In the other action the verdict was for the defendant. It was held that the defendant being the prevailing party in the latter action was entitled to recover ten dollars statutory costs. It was also held that the defendant was entitled to recover disbursements paid or incurred as fees for witnesses who were subpœnaed and attended in that action, although it was admitted that the witnesses were as necessary and material in one case as in the other, and would have been produced and sworn in both, had there been separate trials.[1] Whether,

Digitized by Google

if proper application had been made, the court might have apportioned the costs between the two actions was left undetermined, but the power of the court to do so is unquestioned.[2]

[1] Schuler v. Minneapolis Street Ry. Co. 76 Minn. 48, 78 N. W. 881.

[2] Blake v. Michigan etc. Ry. Co. 17 How. Pr. (N. Y.) 228; Wilkinson v. Johnson, 4 Hill (N. Y.) 47; Dunning v. Auburn Bank, 19 Wend. (N. Y.) 23; Lindsey v. Wayland, 17 Ark. 385.

General rule as to amount of costs in legal actions.

§ 1176. "Costs are allowed to the prevailing party, in actions commenced in the district court, as follows:

(1) To the plaintiff, upon a judgment in his favor of one hundred dollars or more, in an action for the recovery of money only, when no issue of fact or law is joined, five dollars. When an issue is joined, ten dollars.

(2) In all other actions, except as hereinafter otherwise provided, ten dollars.

(3) To the defendant, upon discontinuance or dismissal, five dollars.

(4) When judgment is rendered in his favor on the merits, ten dollars."

[G. S. 1894 § 5498]

§ 1177. No general rule can be laid down as to who is the prevailing party.[1] Costs are a mere incident of the judgment and go to the party in whose favor the judgment is rendered.[2] Where the court, when plaintiff rests, dismisses the action upon motion of defendant on the ground that no cause of action has been established, the judgment is one of dismissal and not upon the merits, and the defendant is entitled to only five dollars costs.[3] But where there is a regular trial of the cause and findings of fact and conclusions of law are made, upon which a judgment of dismissal is entered for the defendant, it is a judgment on the merits entitling the defendant to ten dollars costs.[4]

[1] See Dorr v. Steichen, 18 Minn. 26 Gil. 10; Barry v. McGrade, 14 Minn. 286 Gil. 214; Harbo v. Board of County Com'rs, 63 Minn. 238, 65 N. W. 457; Gilman v. Maxwell, 79 Minn. 377, 82 N. W. 377; Katz v. American Bonding etc. Co. (Minn.) 90 N. W. 376.

[2] See § 1166.

[3] Conrad v. Bauldwin, 44 Minn. 406, 46 N. W. 850. See Cameron v. Chicago etc. Ry. Co. 51 Minn. 153, 53 N. W. 199.

[4] Winnebago Paper Mills v. N. W. Printing & Pub. Co. 61 Minn. 373, 63 N. W. 1024.

Costs in actions of an equitable nature.

§ 1178. "In equitable actions, costs may be allowed, or not; and, if allowed, may be apportioned between the parties on the same or adverse sides, in the discretion of the court. When there are several defendants, not united in interest, and making separate defences by separate answers, and the plaintiff fails to recover judgment against

Digitized by Google

all, the court may award costs to such of the defendants as have judgment in their favor, or any of them."

[G. S. 1894 § 5502] See Wallrich v. Hall, 19 Minn. 383 Gil. 329.

§ 1179. In an action of an equitable nature the prevailing party is entitled to his disbursements as a matter of right. The discretion of the court is limited to the allowance of statutory costs.

Van Meter v. Knight, 32 Minn. 205, 20 N. W. 142.

Costs on motions and demurrers—statute.

§ 1180. "Costs may be allowed on a motion or demurrer, in the discretion of the court or judge, not exceeding ten dollars, and may be absolute, or directed to abide the event of the action."

[G. S. 1894 § 5506] See §§ 985, 986, 1424.

§ 1181. Costs allowed a party on motion may be included in the costs allowed him upon the entry of final judgment.

Wentworth v. Griggs, 24 Minn. 450; Horn v. Grand Rapids Fire Ins. Co. 80 Minn. 146, 83 N. W. 1118.

§ 1182. No provision is made in our statutes for the allowance of disbursements on a motion. The term "costs" as used in this section is limited to statutory costs.

See Concklin v. Taylor, 68 N. Y. 221.

§ 1183. If the parties appear and a motion is considered on the merits costs may be allowed in the discretion of the court whether asked for in the notice of motion or order to show cause or not.

Banta v. Marcellus, 2 Barb. (N. Y.) 373; Jones v. Cook, 11 Hun (N. Y.) 230; Guth v. Lubach, 73 Wis. 131.

§ 1184. No general rules can be laid down as to when costs should be allowed on a motion and it is for that very reason that the whole subject is left to the discretion of the trial court. Generally costs are allowed to the prevailing party when he is given relief from the acts or omissions of the opposite party or from errors of the court committed at the instance of the opposite party. On the other hand costs are not generally given to the prevailing party when the opposite party is free from fault. When the prevailing party is granted relief from his own acts or omissions, as a matter of favor, costs are generally taxed against him, especially if the opposite party is free from fault. Costs are not allowed on ex parte motions;[1] nor upon default unless asked for in the notice of motion,[2] even though the notice contains a clause asking for other and further relief;[3] nor where the moving party succeeds in part and is defeated in part;[4] nor where it is clear that the motion is made solely for costs;[5] nor where the questions raised are new and difficult;[6] nor where a party has been misled by conflicting decisions,[7] or by the dictum of a judge upon a new question,[8] or by a defectively reported decision;[9] nor where several motions are made on separate papers when the question might as well have been presented in a single set of papers, only single costs being allowed in such cases.[10]

[1] Edlefson v. Duryee, 21 Hun (N. Y.) 607; Bowne v. Anthony, 13 How. Pr. (N. Y.) 301.

Digitized by Google

[8] Chase v. Chase, 29 Hun (N. Y.) 527.
[8] Northrop v. Van Dusen, 5 How. Pr. (N. Y.) 134.
[4] Corbin v. George, 2 Abb. Pr. (N. Y.) 465; Bates v. Loomis, 5 Wend. (N. Y.) 78; Whipple v. Williams, 4 How. Pr. (N. Y.) 28.
[5] Kane v. Van Vranken, 5 Paige (N. Y.) 62; Stiles v. Fisher, 3 How. Pr. (N. Y.) 52.
[6] Rathbun v. Markham, 43 How. Pr. (N. Y.) 271; Morrison v. Ide, 4 How. Pr. (N. Y.) 304.
[7] Tindall v. Jones, 11 Abb. Pr. (N. Y.) 258.
[8] Silliman v. Eddy, 8 How. Pr. (N. Y.) 122.
[9] Kitching v. Diehl, 40 Barb. (N. Y.) 433.
[10] McCoun v. N. Y. etc. Ry. Co. 50 N. Y. 176; Cortland etc. Ins. Co. v. Lathrop, 2 How. Pr. (N. Y.) 146.

§ 1185. In some cases, costs of a motion are allowed as "costs of the action" or "costs in the cause"; in which case they are to be added to the costs allowed on the recovery of judgment, if the party to whom they are granted recovers final costs, or deducted from such costs if his opponent finally succeeds. Sometimes costs of a motion are granted to abide the event of the action; in which case they are allowed as costs in the action, to the party finally prevailing in the action. Sometimes they are granted to one party to abide the event, in which case, if that party is successful, he is entitled to tax costs of the motion and if he is not successful, no costs are taxed by either party.

See 2 Rumsey's Practice 474; 3 Wait's Practice 506.

On appeal from justice court.

§ 1186. "In civil actions tried before a justice of the peace, if the plaintiff appeals from a judgment in his favor, and does not recover, in the district court, a greater sum as damages than he recovered by the first judgment, the defendant is entitled to costs and disbursements; if the defendant appeals, and the amount of the plaintiff's recovery before the justice is reduced one half or more in the district court, the defendant is entitled to costs and disbursements; in all other cases of appeal from the judgment of a justice of the peace in such actions, the successful party is entitled to costs and disbursements."

[G. S. 1894 § 5511]

§ 1187. "In comparing the sums recovered by the two judgments, for the purposes specified in the preceding section, the interest accrued on the plaintiff's demand, after the first judgment, shall not be considered."

[G. S. 1894 § 5512]

§ 1188. If the plaintiff appeals from a judgment in his favor and is the successful party in the district court but fails to enlarge the judgment the defendant is entitled to costs and disbursements; if on such an appeal the defendant is the successful party he is of course entitled to costs and disbursements. If the plaintiff appeals from a judgment against him, the party who recovers judgment in the dis-

Digitized by Google

trict court is entitled to costs and disbursements without regard to any question as to the reduction of damages. If the defendant appeals from a judgment in his favor, the party who recovers judgment in the district court is entitled to costs and disbursements without regard to any question as to the reduction of damages. If the defendant appeals from a judgment against him and succeeds in reducing it one half or more, he is entitled to costs and disbursements although the unsuccessful party,[1] and although he made default in the justice court;[2] and if, on such an appeal, he is the successful party he is entitled to costs and disbursements although he does not reduce the judgment one half;[3] but if the defendant, on such an appeal, is the unsuccessful party and does not reduce the judgment one half or more the plaintiff is entitled to costs and disbursements.[4]

[1] Conrad v. Swanke, 80 Minn. 438, 83 N. W. 383.

[2] Id.

[3] Foster v. Hansman, 55 Minn. 157, 56 N. W. 592.

[4] Watson v. Ward, 27 Minn. 29, 6 N. W. 407; Flaherty v. Rafferty, 51 Minn. 341, 53 N. W. 644; Olson v. Rushfeldt, 81 Minn. 381, 84 N. W. 124 (the syllabus in this case is too broad); J. Thompson & Sons Mfg. Co. v. Ferch, 78 Minn. 520, 81 N. W. 520; Closen v. Allen, 29 Minn. 86, 12 N. W. 86.

§ 1189. "Where an appeal has been allowed by a justice of the peace in any case, and return thereof made to the district court, and said appeal shall be for any cause dismissed, the said district court shall nevertheless enter its judgment in said action affirming the judgment of the court below, and the costs of both courts may be taxed before the clerk of said district court and entered in said judgment, and the respondent have execution therefor against the appellant and his sureties upon the appeal bond, as in other cases."

[Laws 1895 ch. 24]

§ 1190. The clerk of the district court has no authority to review the taxation of costs by a justice of the peace. Any alleged error in such taxation should be brought to the notice of the court for correction upon the hearing of the appeal from the judgment.

State v. Reckards, 21 Minn. 47.

Action on domestic judgment.

§ 1191. "Costs cannot be allowed to the plaintiff in an action upon a judgment of a court of this state, between the same parties, unless such action was brought with previous leave of the court, for cause shown; but this prohibition does not apply to an action upon the judgment of a justice, brought in another county, or brought in the same county, in case of the summons not having been served on all the defendants, or the death of a party, or the death, resignation, incapacity to act, or removal from the county, of the justice, or the loss of his docket."

[G. S. 1894 § 5503] See Dunnell, Minn. Pl. §§ 1480–1487; Merchants' Nat. Bank v. Gaslin, 41 Minn. 552, 43 N. W. 483.

Digitized by Google

Action for services—double costs.

§ 1192. "If any person, partnership, or corporation, having employed any person to perform any labor, or render any services, shall neglect or refuse to pay the agreed price for such services or labor, if the price therefor has been agreed upon, or the reasonable value thereof, if the price has not been agreed upon, for thirty days after the same becomes due and payment has been demanded and the same shall be recovered by action, there shall be allowed and taxed for the plaintiff and included in the judgment in addition to his costs and disbursements as now allowed by law, five dollars costs, if the judgment be recovered in a justice or municipal court, and double the costs heretofore provided by law, if the judgment be recovered in a district court, or the supreme court of this state."

[Laws 1895 ch. 109]

§ 1193. The costs authorized by this action may be recovered by an assignee of the person rendering the labor or services.

Clifford v. Northern Pacific Ry. Co. 55 Minn. 150, 56 N. W. 590.

Action by or against executor, administrator or trustee.

§ 1194. "In an action prosecuted or defended by an executor, administrator, trustee of an express trust, or a person expressly authorized by statute, costs and disbursements may be recovered, as in an action by and against a person prosecuting or defending in his own right; but the same shall, by the judgment, be made chargeable only upon the estate, fund, or party represented, unless the court directs the same to be paid by the plaintiff or defendant personally, for mismanagement or bad faith in the action; but no costs or disbursements are recoverable in such action, unless it appears that the demand was first presented to the executor or administrator, verified by oath, and payment demanded."

[G. S. 1894 § 5509] See Lough v. Flaherty, 29 Minn. 295, 13 N. W. 131; Gilman v. Maxwell, 79 Minn. 377, 82 N. W. 669.

Relator entitled to and liable for costs.

§ 1195. "When an action or proceeding is instituted in the name of the state, on the relation of any citizen, such relator is entitled to and liable for costs and disbursements, in the same cases, and to the same extent, as if such action or proceeding had been instituted in his own name."

[G. S. 1894 § 5510] See State v. Probate Court, 67 Minn. 51, 69 N. W. 609, 908.

When guardian liable for costs.

§ 1196. "When costs are adjudged against an infant plaintiff, the guardian by whom he appears in the action is responsible for them, and judgment therefor may be entered against both the guardian and the infant."

[G. S. 1894 § 5507]

§ 1197. "The next friend of an infant plaintiff is responsible for the costs of suit, while in the case of the guardian ad litem of an in-

Digitized by Google

fant defendant, the responsibility for costs is upon the infant, not upon the guardian. Possibly this distinction may have regard to the fact that an infant plaintiff comes into court upon his own motion, while an infant defendant is forced into court."

Bryant v. Livermore, 20 Minn. 313 Gil. 271, 297.

Impounding money in court to pay costs.

§ 1198. In an action to compel a redemption from a foreclosure sale by executing a certificate of redemption, plaintiff made a tender and subsequently paid into court, under the order of the court, an amount of money equal to that tendered. He had in the meantime failed to keep his tender good, and the court, for that reason, found for the defendant. It was held that the plaintiff was then entitled to withdraw the money so paid into court, but that the defendant might, by order of the court, impound sufficient of the money so on deposit to pay his costs.

Dunn v. Hunt, 76 Minn. 196, 78 N. W. 1110.

Security for costs.

§ 1199. "When an action is commenced in the district court in the name of any plaintiff, who is committed and in execution for a crime, or wherein the plaintiff is a non-resident of this state, or wherein all of several plaintiffs are non-residents of this state, or in the name and behalf of any foreign corporation; or when any such action is brought into any district court on appeal by the defendant, such plaintiff shall file with the clerk of the court wherein such action is brought, in the district court, before the service of the summons therein, and in the appellate court, in case of an appeal by the defendant, within five days after the perfecting of the appeal, a bond in the penal sum of seventy-five dollars executed by one or more sureties, payable to the clerk of the court, for the benefit of parties who may become entitled to disbursements or costs in such action, and conditioned for the payment of all disbursements and costs that may be adjudged against the plaintiff in the action. If, after the commencement of the action, or the taking of an appeal, all the parties plaintiff therein become non-residents of this state, or the sureties in the bond above provided for remove from this state, or become insolvent, the defendant may on motion, by order of the court, require an additional bond to be filed, payable and conditioned as herein provided. Provided, the provisions of this act shall not apply to any action brought by the plaintiff for the recovery of wages, or claims for personal services."[1] * * * "If any party commences an action without filing a bond, or fails to provide an additional one, as above required, the court, on motion of the defendant, may order a stay of all proceedings in such action, or a dismissal of such action at the cost of the attorney commencing the same."[2] * * * "When judgment is entered against any party who has given security as above provided, and the disbursements and costs so adjudged against such party remain in whole or in part unpaid, for ten days after the entry of judgment, such bond may be put in suit, and prosecuted to final judgment and execution."[3] * * * "All actions

Digitized by Google

brought to recover on any bond for costs given by a non-resident plaintiff in any civil action as provided by section 5518 of the General Statutes of 1894, or on any security for costs given in justice court, shall be brought and tried in the county in which such bond for costs, or security for costs, is filed, unless the court for cause other than the place of residence of the defendants change the place of trial to any other county as now provided by law." [4]

[1] G. S. 1894 § 5518 as amended Laws 1899 ch. 186.
[2] G. S. 1894 § 5519. [3] G. S. 1894 § 5520. [4] Laws 1899 ch. 335.

§ 1200. The remedy for a failure to file security for costs, as required by this section, is a motion for a stay of proceedings or for a dismissal. The objection cannot be raised by answer. The court may allow a non-resident plaintiff to file security for costs nunc pro tunc after the action is commenced.

Henry v. Bruns, 43 Minn. 295, 45 N. W. 444.

§ 1201. The obligation assumed by giving the statutory security for costs in an action in a justice court extends to costs incurred in the district court upon appeal thereto.

Starlocki v. Williams, 34 Minn. 543, 26 N. W. 909.

TENDER AS AFFECTING COSTS

In actions ex contractu—statute.

§ 1202. "When, in an action on contract, express or implied, the defendant alleges in his answer, that, before the commencement of the action, he tendered to the plaintiff the full amount to which he was entitled, and thereupon deposits in court, for the plaintiff, the amount so tendered, and the allegation is found true, the defendant is entitled to costs and disbursements."

[G. S. 1894 § 5508]

§ 1203. In our practice a tender, in an action on contract, is ineffectual unless the money is accepted or is paid into court. If it is not accepted, in lieu of the acceptance and in order to make his tender available in law, the defendant may deposit the money in court. The payment into court is deemed equivalent to an acceptance by the plaintiff of the amount tendered. The payment into court is an admission of liability upon the cause of action alleged to the extent of the amount so paid in.[1] The fact that a defendant has made a tender upon the claim sued upon and has paid the sum tendered into court admits the contract or duty, and the right of plaintiff thereon to the sum tendered, but it goes no further and defendant may defend against any claims by the plaintiff beyond the sum tendered upon any ground consistent with an admission of the original contract or cause of action.[2] When money is brought into court under this statute it belongs to the plaintiff, and his title thereto cannot be disputed, whatever may be the result of the action. The plaintiff, in proceeding after a tender and deposit, simply runs the risk of paying defendant's costs, if the recovery falls short of the

Digitized by Google

amount tendered, while the defendant takes the risk of losing the amount tendered, in the event of his succeeding in the action.[3] The money so deposited at once becomes the property of the plaintiff and he may withdraw it without an order of the court and without waiting until judgment.[4] The defendant cannot withdraw the deposit.[5] If the plaintiff fails to establish a right to a greater sum than tendered the defendant is entitled to a dismissal or directed verdict,[6] and the plaintiff must pay defendant's costs and disbursements.[7] If the plaintiff establishes a right to a greater sum than tendered he is entitled to a verdict and judgment for the balance and costs.[8] The court should instruct the jury accordingly so that the judgment may follow the verdict. When the tender is brought into court for the plaintiff that amount is considered as stricken from the complaint, and if more is claimed the plaintiff proceeds only for the excess.[9] It is rarely advisable to make a tender and deposit under this statute because the same object can be attained by an offer of judgment, under which the defendant retains the right to defeat the claim altogether.[10]

[2] Taylor v. Brooklyn Elevated Ry. Co. 119 N. Y. 561; Wilson v. Doran, 39 Hun (N. Y.) 88.

[3] Wilson v. Doran, 110 N. Y. 101.

[4] Taylor v. Brooklyn Elevated Ry. Co. 119 N. Y. 561.

[5] Murray v. Bethune, 1 Wend. (N. Y.) 191; Mela v. Geis, 3 Civ. Pro. (N. Y.) 152; Taylor v. Brooklyn Elevated Ry. Co. 119 N. Y. 561; Irvin v. Gregory, 13 Gray (Mass.) 215.

[6] Murray v. Bethune, 1 Wend. (N. Y.) 191; Reed v. Armstrong, 18 Ind. 446; Dunn v. Hunt, 76 Minn. 196, 78 N. W. 196.

[7] Wilson v. Doran, 39 Hun (N. Y.) 88; Id. 110 N. Y. 101.

[8] Mela v. Geis, 3 Civ. Pro. (N. Y.) 152.

[9] Common law practice. See Columbia Bank v. Sutherland, 3 Cowen (N. Y.) 336; Dickenson v. Boyd, 82 Ill. App. 251; Drew v. Towle, 30 N. H. 531.

[10] Hubbard v. Knous, 7 Cush. (Mass.) 556; Dakin v. Dunning, 7 Hill (N. Y.) 30; Wilson v. Doran, 39 Hun (N. Y.) 88; Supply Ditch Co. v. Elliott, 10 Colo. 327.

[11] See § 1307.

In actions ex delicto—statute.

§ 1204. "When, in an action to recover damages for the commission of a tort, the defendant shall, at any time before the trial of such action, tender to the plaintiff a sum of money as damages or compensation for such tort, and, if such tender be made after the commencement of the action, in addition to such tender for damages or compensation, he shall also tender the costs and disbursements of the plaintiff then accrued, and the plaintiff in such action shall not recover a greater sum than the amount so tendered, the plaintiff shall recover no costs or disbursements, but shall pay the defendant's costs and disbursements. The fact of such tender having been made shall not be pleaded, nor given in evidence to the court or jury. In all such actions, when such tender shall be made, and the plaintiff

Digitized by Google

fails to recover a greater sum than the amount of such tender, if the amount of such recovery, and the costs and disbursements accrued and tendered, exceed the amount of the defendant's costs and disbursements, the court shall enter judgment against the defendant for such excess. If the amount of the defendant's costs and disbursements exceed the amount recovered by the plaintiff, and his costs and disbursements accrued and tendered, the court shall enter judgment against the plaintiff for such excess."

[G. S. 1894 §§ 5406, 5407]

In actions for specific performance.

§ 1205. In an action for specific performance it is error to award costs to the plaintiff if he failed to tender performance before bringing suit.

Minneapolis etc. Ry. Co. v. Chisholm, 55 Minn. 374, 57 N. W. 63.

Tender must be kept good.

§ 1206. A tender, in order to operate as a bar to subsequent damages and costs, must be kept good.

Balme v. Wambaugh, 16 Minn. 116 Gil. 106. See also, Moore v. Norman, 43 Minn. 428, 45 N. W. 857; Moore v. Norman, 52 Minn. 83, 53 N. W. 809.

Payment into court.

§ 1207. In order to constitute a payment into court the payment must be made under a rule or order of court or by virtue of a statute. Unless the payment is made under some special or general authorization of law it does not operate as an admission.

Davidson v. Lamprey, 16 Minn. 445 Gil. 402.

SPECIAL STATUTORY PROVISIONS

§ 1208. Double costs in actions against railroads for killing or injuring stock;[1] attorney's fees in actions brought under the statute to recover possession of land taken by a railroad without compensation;[2] forcible entry proceedings;[3] mandamus proceedings;[4] prohibition proceedings;[5] partition;[6] actions to determine adverse claims;[7] actions affecting real property—notice of no personal claim;[8] actions to determine boundaries;[9] in garnishment proceedings;[10] actions for divorce;[11] actions against telegraph companies;[12] actions to enforce liens on logs;[13] distraining beasts;[14] on appeal to district court in highway proceedings;[15] proceedings against sheriff for failure to pay over money;[16] proceedings for the erection of dams;[17] proceedings to open or vacate streets;[18] proceedings to collect taxes;[19] election contest;[20] appeal from order of railroad and warehouse commission;[21] prosecutions under the game laws;[22] on appeal from order of factory inspector;[23] objection to location of toll gate;[24] proceedings to compel repair of toll roads;[25] malicious prosecution against school director;[26] proceedings to collect damages in making government surveys;[27] proceed-

Digitized by Google

ings relating to official trusts;[28] actions against masters for abuse of apprentices;[29] proceedings by the attorney general to vacate the charters of corporations;[30] on appeal from the award of arbitrators;[31] on appeal in drainage proceedings;[32] in condemnation proceedings;[33] on appeal from county commissioners.[34]

[1] G. S. 1894 § 2694; Johnson v. Chicago etc. Ry. Co. 29 Minn. 425, 13 N. W. 673; Schimmele v. Chicago etc. Ry. Co. 34 Minn. 216, 25 N. W. 216; Croft v. Chicago etc. Ry. Co. 72 Minn. 47, 74 N. W. 898, 80 N. W. 628 (not applicable to supreme court); Hooper v. Chicago etc. Ry. Co. 37 Minn. 52, 33 N. W. 314 (action should not be commenced within 30 days of the accident).

[2] G. S. 1894 § 2660; Cameron v. Chicago etc. Ry. Co. 63 Minn. 384 (statute held constitutional); Pfaender v. Chicago etc. Ry. Co. (Minn.) 90 N. W. 393.

[3] G. S. 1894 § 6116. [4] G. S. 1894 §§ 5510, 5983.

[5] G. S. 1894 §§ 5510, 5992.

[6] G. S. 1894 §§ 5815, 5779; Hanson v. Ingwaldson, 84 Minn. 346, 87 N. W. 915. [7] G. S. 1894 §§ 5819, 5867.

[8] G. S. 1894 § 5867; Siebert v. Quesnel, 65 Minn. 107, 67 N. W. 803. [9] G. S. 1894 § 5828.

[10] G. S. 1894 §§ 5334–5337; Schwerin v. De Graff, 19 Minn. 414 Gil. 359; Woolsey v. O'Brien, 23 Minn. 71; McConnell v. Rakness, 41 Minn. 3, 42 N. W. 539; Mahoney v. McLean, 28 Minn. 63, 9 N. W. 76.

[11] G. S. 1894 § 4799; Wagner v. Wagner, 34 Minn. 441, 26 N. W. 450; Stiehm v. Stiehm, 69 Minn. 461, 72 N. W. 708; Segelbaum v. Segelbaum, 39 Minn. 258, 39 N. W. 492.

[12] G. S. 1894 § 2639. [13] G. S. 1894 §§ 2431, 2446, 2459.

[14] G. S. 1894 § 2115. [15] Laws 1897 ch. 199. [16] G. S. 1894 § 788.

[17] G. S. 1894 §§ 2372, 2382. [18] G. S. 1894 §§ 1135, 1139.

[19] G. S. 1894 §§ 1570, 1587. [20] G. S. 1894 § 191.

[21] G. S. 1894 § 393; Laws 1897 ch. 288. [22] G. S. 1894 § 2147.

[23] G. S. 1894 § 2261. [24] G. S. 1894 § 3371.

[25] G. S. 1894 § 3379. [26] G. S. 1894 § 3781.

[27] G. S. 1894 §§ 4124, 4125. [28] G. S. 1894 § 4268.

[29] G. S. 1894 § 4760. [30] G. S. 1894 §§ 5962, 5971.

[31] G. S. 1894 §§ 6224, 6227. [32] G. S. 1894 § 7767.

[33] G. S. 1894 §§ 2632, 2664, 2665; 1243, 1244, 4088, 4099; 77 27; Sherwood v. St. Paul etc. Ry. Co. 21 Minn. 122.

[34] G. S. 1894 § 645; Thomas v. County of Scott, 15 Minn. 324 Gil. 254; Kroshus v. County of Houston, 46 Minn. 162, 48 N. W. 770.

Digitized by Google

DISBURSEMENTS

The statute.

§ 1209. "In every action commenced in the district courts of this state, or the court of common pleas for the county of Ramsey, the prevailing party shall be allowed his disbursements necessarily paid or incurred: provided, that in all actions for the recovery of money only, of which a justice of the peace has jurisdiction, the plaintiff, if he recover no more than fifty dollars, shall recover no disbursements: and if he recover less than fifty dollars, he shall pay the defendant's costs and disbursements, as allowed by law when judgment is rendered in favor of the defendant on the merits; which said costs and disbursements shall be taxed and allowed by the clerk, upon notice, the same as in other cases, and shall be deducted by the clerk from the amount recovered by the plaintiff; and in case the amount of such costs and disbursements exceed the amount recovered by the plaintiff, the clerk shall enter judgment against the plaintiff, and in favor of the defendant, for the amount of such excess, and the defendant may have execution thereon."

[G. S. 1894 § 5500]

§ 1210. The object of the proviso in the preceding section was obviously to discourage the bringing of actions in the district court of which a justice of the peace has concurrent jurisdiction. The intention of the legislature has been frustrated by the construction placed upon the statute. It is held that where the damages claimed exceed the jurisdiction of a justice of the peace a successful plaintiff is entitled to his costs and disbursements although he recover fifty dollars or less.

Greenman v. Smith, 20 Minn. 418 Gil. 370; Potter v. Mellen, 36 Minn. 122, 30 N. W. 438; L. Kimball Printing Co. v. Southern Land Improvement Co. 57 Minn. 37, 58 N. W. 868. See Greggs v. Holleran, 8 Minn. 451 Gil. 401 (under old statute); Felber v. Southern Minn. Ry. Co. 28 Minn. 156, 9 N. W. 635.

Witness fees.

§ 1211. Where witnesses attend and are sworn, though not subpœnaed, their fees may be taxed.[1] The fees of witnesses in attendance, but not sworn, are taxable if their attendance was secured under a reasonable belief that their testimony would or might be necessary or material.[2] Much must be left to the integrity of counsel in requesting or compelling the attendance of witnesses.[3] If a party acts in good faith when requesting or compelling the attendance of his witnesses, the mere fact that their testimony is immaterial or inadmissible will not deprive him of the right to tax their fees. Bad faith in such a case will not be presumed on the taxation of costs before the clerk.[4] If a cause is set for trial on a particular day and the interval is short and the witnesses live at a considerable distance, a party may keep them in attendance. But if a considerable time is to elapse before the day of trial and the witnesses live but a short distance from the place of trial a party cannot charge for them on

Digitized by Google

days when they are not needed.[5] An attorney in a cause is not entitled to a fee for attending as a witness.[6] A party to the action is entitled to fees as a witness only when he appears solely as a witness for other parties.[7] The fees of a party's own witnesses should not be taxed against him.[8] The fees of a witness who is subpœnaed but does not attend cannot be taxed.[9] Special provision is made for the fees of experts.[10]

[1] Clague v. Hodgson, 16 Minn. 329 Gil. 291.
[2] Slama v. Chicago etc. Ry. Co. 57 Minn. 167, 58 N. W. 989; Schuler v. Minneapolis Street Ry. Co. 76 Minn. 48, 78 N. W. 881; Berryhill v. Carney, 76 Minn. 319, 79 N. W. 170.
[3] Mankato Lime & Stone Co. v. Craig, 81 Minn. 224, 83 N. W. 983. See Barber v. Robinson, 82 Minn. 112, 84 N. W. 732.
[4] Id.
[5] Andrews v. Cressy, 2 Minn. 67 Gil. 55.
[6] Barry v. McGrade, 14 Minn. 286 Gil. 214; G. S. 1894 § 5590.
[7] Id.
[8] Payson v. Everett, 12 Minn. 216 Gil. 137; Triggs v. Larson, 10 Minn. 220 Gil. 175.
[9] Ehle v. Bingham, 4 Hill (N. Y.) 595.
[10] G. S. 1894 § 5547; Le Mere v. McHale, 30 Minn. 410, 15 N. W. 682; State v. Tiepner, 36 Minn. 535, 32 N. W. 678; Farmer v. Stillwater Water Co. (Minn.) 90 N. W. 10.

Miscellaneous disbursements.

§ 1212. The expense of procuring necessary documentary evidence is taxable as a general rule.[1] The fees of notaries in taking depositions for use on the trial are taxable.[2] The expense of procuring a copy of the stenographer's notes for use on a motion for a new trial may be taxed if a new trial is granted with the costs of the motion.[3] Where there were three trials in a cause, each resulting in a verdict for the plaintiff, who had paid the jury fee in each trial, it was held proper to tax all the fees on the entry of judgment upon the last verdict.[4] The expenses of a sheriff on attachment are taxable upon order of the court.[5] Plaintiff obtained judgment by default and levied upon the personal property of the defendant. On motion of the defendant the judgment was set aside, default opened, and leave given to answer on condition that such judgment, execution and levy should stand as security for plaintiff's claim to abide the event of the action. Subsequently, on stipulation of parties judgment was authorized to be entered and execution to be issued anew against defendant. It was held proper on entering the last judgment to tax the expenses of the sheriff on the first execution and in caring for the property.[6] The fees of the sheriff for serving a subpœna are taxable although the witness could not be found.[7] The expense of serving a summons cannot be taxed if the service was not made by the sheriff or some other proper officer.[8] When the same persons are defendants in different actions, and incur a joint expense for documentary evidence necessary for their defence in several actions, and use the same in such actions, they may charge such expense as

Digitized by Google

a disbursement in either action, at their election, provided such charge is made in one action only.[9] No fees shall be taxed for services as having been rendered by any clerk, sheriff, or other officer, in the progress of a cause, unless such service was actually rendered, except when otherwise expressly provided.[10] In entering any judgment or decree, no prospective costs shall be taxed or included therein, except for docketing the same, unless the party demanding such judgment or decree shall require the costs of an execution or transcript of the judgment to be taxed and included therein, in which case the same shall be so taxed and included.[11] The legal fees paid for certified copies of the depositions of witnesses filed in any clerk's office, and of any documents or papers recorded or filed in any public office, necessarily used on the trial of a cause, or on the assessment of damages, shall be allowed in the taxation of costs.[12]

[1] Andrews v. Cressy, 2 Minn. 67 Gil. 55; Wentworth v. Griggs, 24 Minn. 450; Barry v. McGrade, 14 Minn. 286 Gil. 214.
[2] Wentworth v. Griggs, 24 Minn. 450.
[3] In re Pinney's Will, 27 Minn. 280, 6 N. W. 791, 7 N. W. 144; Linne v. Forrestal, 51 Minn. 249, 53 N. W. 547, 653.
[4] Schultz v. Bower, 66 Minn. 281, 68 N. W. 1080.
[5] Barman v. Miller, 23 Minn. 458.
[6] Id. [7] Id.
[8] G. S. 1894 § 5198.
[9] Barry v. McGrade, 14 Minn. 286 Gil. 214.
[10] G. S. 1894 § 5587. [11] G. S. 1894 § 5588. [12] G. S. 1894 § 5589.

TAXATION OF COSTS

The statute.

§ 1213. "Costs and disbursements shall be taxed and allowed in the first instance by the clerk, upon two days' notice by either party, and inserted in the entry of judgment. The disbursements shall be stated in detail and verified by affidavit, which shall be filed; a copy of the items of the costs and disbursements, with the affidavit verifying the same, shall be served, with the notice of taxation. The party objecting to any item shall specify in writing the grounds of objection, and the same, in case of appeal, shall be certified to the court by the clerk, and the appeal shall be heard and determined upon the objection so certified and none other."

[G. S. 1984 § 5505]

Time.

§ 1214. Ordinarily costs are taxed before the entry of judgment but this is not indispensable. The costs properly constitute a part of the judgment, and, unless they are waived or released by the prevailing party, he is entitled to have them included in the judgment as of right. A judgment is not perfected until the costs are inserted,[1] and hence the time of appeal does not run against the defeated party until they are properly taxed and included in the judgment.[2] But as respects the lien or validity of a judgment, the omission to include costs, or the insertion therein of costs taxed without

Digitized by Google

notice, is to be treated as an irregularity merely. A party may enter and docket his judgment so as to secure a lien without waiting to give notice of taxation of costs, and, upon a retaxation, the record may be amended, and, if the costs are reduced, the amount of such reduction may be indorsed on the execution if previously issued.[3]

[1] Fall v. Moore, 45 Minn. 517, 48 N. W. 404.

[2] Richardson v. Rogers, 37 Minn. 461, 35 N. W. 270; Mielke v. Nelson, 81 Minn. 228, 83 N. W. 836.

[3] Richardson v. Rogers, 37 Minn. 461, 35 N. W. 270; Leyde v. Martin, 16 Minn. 38 Gil. 24; Fall v. Moore, 45 Minn. 517, 48 N. W. 404.

Notice.

§ 1215. A judgment for costs entered without notice or upon insufficient notice is not void but merely irregular and subject to correction on motion.

Jakobsen v. Wigen, 52 Minn. 6, 53 N. W. 1016; Lindholm v. Itasca Lumber Co. 64 Minn. 46, 65 N. W. 931.

§ 1216. If a party to an action has not appeared costs may be taxed against him without notice,[1] but if he has appeared he is entitled to notice although he is in default for want of an answer.[2]

[1] Holler v. Apa, 18 N. Y. Supp. 588.

[2] Dix v. Palmer, 5 How. Pr. (N. Y.) 233; Elson v. Equitable Ins. Co. 2 Sandf. (N. Y.) 654. See Davis v. Red River Lumber Co. 61 Minn. 534, 63 N. W. 1111.

Affidavit as to disbursements.

§ 1217. It devolves upon the party claiming costs and disbursements to show, by his statement and affidavit, at least prima facie, that they are such as he is entitled to have taxed.[1] Hence if a party claims traveling fees for witnesses his affidavit should state the place of residence of each witness, and the number of miles they respectively traveled as such witnesses for the purpose of going from such place of residence to the place of trial and returning therefrom.[2] It should also state the number of days' attendance of each witness with the dates.[3] If witnesses are in attendance but not sworn an affidavit merely stating that they were "necessary and material" is not sufficient. There must be an affidavit stating facts which show the necessity of having them in attendance. This affidavit may be made after objection is raised.[4]

[1] Andrews v. Cressy, 2 Minn. 67 Gil. 55.

[2] Merriman v. Bowen, 35 Minn. 297, 28 N. W. 921; Dallemand v. Swenson, 54 Minn. 32, 55 N. W. 815 (affidavit held sufficient).

[3] Andrews v. Cressy, 2 Minn. 67 Gil. 55.

[4] D. M. Osborne & Co. v. Gray, 32 Minn. 53, 19 N. W. 81; Berryhill v. Carney, 76 Minn. 319, 79 N. W. 170; Haynes v. Mosher, 15 How. Pr. (N. Y.) 216; Robitzek v. Heck, 3 Civil Pr. (N. Y.) 56.

Specification of objections.

§ 1218. The statute provides that a party objecting to any items presented in the bill of costs and disbursements shall specify in writ-

Digitized by Google

ing the grounds of objection, and, in case of appeal, these objections are to be certified to the court by the clerk. The appeal is to be heard and determined by the court upon the objections so certified, "and none other." The object of this section is to prevent a party appealing from urging before the court any ground of objection which the clerk had not been called upon to determine. And on appeal to the supreme court a party is limited to the objections thus specifically taken before the clerk.

Davidson v. Lamprey, 17 Minn. 32 Gil. 16; Schuler v. Minneapolis Street Ry. Co. 76 Minn. 48, 78 N. W. 881; Barry v. McGrade, 14 Minn. 286 Gil. 214; Barber v. Robinson, 82 Minn. 112, 84 N. W. 732.

Appeal to district court.

§ 1219. "Costs and charges to be inserted in a judgment shall be taxed in the first instance by the clerk upon two days' notice. And an appeal therefrom may be taken to the court within ten days after such taxation by the clerk, but not afterwards. Such appeal shall be taken by notice in writing, signed by the appellant, directed to and served upon the adverse party and the clerk, and shall specify the items from which the appeal is taken. When such appeal is taken, either party may bring the same on for determination before the court on notice, or by an order to show cause. On such appeal the court will only review the items objected to, and upon the grounds specified before the clerk."

[Rule 44, District Court.] See the following cases decided before the adoption of this rule: Andrews v. Cressy, 2 Minn. 67 Gil. 55; Davidson v. Lamprey, 17 Minn. 32 Gil. 16.

§ 1220. The remedy by appeal to the trial court is exclusive. Objection to the taxation of costs by the clerk cannot be raised for the first time on appeal.

See § 1803.

§ 1221. When costs are allowable in the discretion of the court the court exercises its discretion in that regard when it affirms, on appeal, the taxation of such costs by the clerk.[1] And where the clerk improperly taxes costs which are only taxable upon application to the court, the irregularity is cured by the subsequent affirmance of the taxation of the court on appeal.[2]

[1] Turner v. Holleran, 8 Minn. 451 Gil. 401.

[2] Barnum v. Miller, 23 Minn. 458.

§ 1222. In passing upon the propriety of witness fees or other disbursements the court is not confined to the affidavits presented but may act upon its own knowledge of the proceedings.

Valerius v. Richard, 57 Minn. 443, 451, 59 N. W. 534.

Appeal to the supreme court.

§ 1223. Objection to the taxation of costs by the clerk cannot be raised for the first time on appeal.[1] An appeal does not lie from an order of the district court made on appeal from the taxation of

Digitized by Google

costs by the clerk.[2] The only way in which such an order can be reviewed in the supreme court is on appeal from the judgment,[3] and it may be so reviewed even though made after the entry of judgment.[4]

[1] See § 1803.

[2] Minnesota Valley Ry. Co. v. Flynn, 14 Minn. 552 Gil. 421; Felber v. Southern Minnesota Ry. Co. 28 Minn. 156, 9 N. W. 635; Closen v. Allen, 29 Minn. 86, 12 N. W. 146; Herrick v. Butler, 30 Minn. 156, 14 N. W. 794.

[3] Felber v. Southern Minnesota Ry. Co. 28 Minn. 156, 9 N. W. 635; Richardson v. Rogers, 37 Minn. 461, 35 N. W. 270; Herrick v. Butler, 30 Minn. 156, 14 N. W. 794; Andrews v. Cressy, 2 Minn. 67 Gil. 55.

[4] Fall v. Moore, 45 Minn. 517, 48 N. W. 404.

§ 1224. The supreme court will not review the action of the trial court on an appeal from the taxation of costs by the clerk unless the record fully discloses all the evidence upon which the action of the court was based.

Schultz v. Bower, 66 Minn. 281, 68 N. W. 1080; Gardner v. Leck, 52 Minn. 522, 54 N. W. 746. See Wentworth v. Griggs, 24 Minn. 450.

Digitized by Google

CHAPTER XV

JUDGMENTS

Definition of judgment.

§ 1225. A judgment is the final determination of the rights of the parties to an action. It is the sentence of the law pronounced by the court upon the matter contained in the record.[1] There is no such thing as an interlocutory judgment in our practice.[2] Our statutes frequently include the word "decree." This is an unfortunate survival of the time when we had a court of chancery.[3] In the interest of uniformity all final determinations of our courts should be termed judgments.

[1] Aetna Ins. Co. v. Swift, 12 Minn. 437 Gil. 326; Williams v. McGrade, 13 Minn. 46 Gil. 39.

[2] See § 2084.

[3] Thompson v. Bickford, 19 Minn. 17 Gil. 1.

Only one judgment in action.

§ 1226. Under our practice only one judgment and that a final one should be entered in an action and it should determine the rights of all the parties.

Adamson v. Sundby, 51 Minn. 460, 53 N. W. 466.

ENTRY OF JUDGMENT

By the clerk.

§ 1227. In all actions, whether of a legal or equitable nature and whether the trial was by jury, court or referee, the judgment is entered by the clerk.[1] In thus entering judgment the clerk acts in a ministerial rather than judicial capacity.[2] He is the arm of the court. His act is the act of the court and the judgment entered is the judgment of the court.[3] While it is the duty of the clerk to enter judgment he does not ordinarily act except upon the application of one of the parties.

[1] Piper v. Johnston, 12 Minn. 60 Gil. 27; Skillman v. Greenwood, 15 Minn. 102 Gil. 77.

[2] Ramaley v. Ramaley, 69 Minn. 491, 72 N. W. 694; Williams v. McGrade, 13 Minn. 46 Gil. 39. But see § 1273.

[3] Skillman v. Greenwood, 15 Minn. 102 Gil. 77; Reynolds v. La Crosse etc. Packet Co. 10 Minn. 178 Gil. 144; Hawke v. Banning, 3 Minn. 67 Gil. 30; Dillon v. Porter, 36 Minn. 341, 31 N. W. 56; Kipp v. Fullerton, 4 Minn. 473 Gil. 366.

Notice.

§ 1228. The prevailing party may cause judgment to be entered on a verdict, report or decision, without notice to the opposite party.[1] In entering default judgments notice is sometimes necessary,[2] and the same rules apply to the entry of judgment for the plaintiff on an

Digitized by Google

issue of law.[3] Notice is unnecessary in entering a judgment of dismissal.[4]

[1] Piper v. Johnston, 12 Minn. 60 Gil. 27; Whitaker v. McClung, 14 Minn. 170 Gil. 131; Leyde v. Martin, 16 Minn. 38 Gil. 24; Berthold v. Fox, 21 Minn. 51; Heinrich v. Englund, 34 Minn. 395, 26 N. W. 122.

[2] See § 1279.

[3] G. S. 1894 § 5387. See Schuler v. Wood, 81 Minn. 372, 84 N. W. 121.

[4] See Herrick v. Butler, 30 Minn. 156, 14 N. W. 794.

Signing.

§ 1229. It is provided by rule of court that "judgments and copies to annex to the judgment roll shall in all cases be signed by the clerk, and no other signature thereto shall be required." [1] The failure of the clerk to sign the judgment renders it irregular but not void.[2]

[1] Rule 45, District Court. See Cathcart v. Peck, 11 Minn. 45 Gil. 24; Hawke v. Banning, 3 Minn. 67 Gil. 30.

[2] Jorgensen v. Griffin, 14 Minn. 464 Gil. 346; Hotchkiss v. Cutting, 14 Minn. 537 Gil. 408.

Time.

§ 1230. In this state there is no statutory requirement as to the time within which judgment must be entered. In order to prevent the prevailing party from taking advantage of this fact to the injury of the opposite party it is provided by rule of court that "where a party is entitled to have judgment entered in his favor by the clerk, upon the verdict of a jury, report of referee, or decision or finding of the court, and neglects to enter the same for the space of ten days after the rendition of the verdict, or notice of the filing of the report, decision or finding (or in case the same has been stayed, for the space of ten days after the expiration of such stay), the opposite party may cause the same to be entered by the clerk upon five days' notice to the adverse party of the application therefor." [1] A judgment entered during a stay of proceedings is irregular,[2] but not void.[3] Generally a judgment is not entered until after the taxation of costs.[4] The entry may be made in vacation [5] or after the expiration of the term of office of the judge who rendered the decision.[6]

[1] Rule 46, District Court. See, Deuel v. Hawke, 2 Minn. 50 Gil. 37; Furlong v. Griffin, 3 Minn. 207 Gil. 138; Sherrerd v. Frazer, 6 Minn. 572 Gil. 406.

[2] Uhe v. Chicago etc. Ry. Co. 4 S. D. 505. See Danner v. Capehart, 41 Minn. 294, 42 N. W. 1062.

[3] See Harvey v. McAdams, 32 Mich. 473.

[4] See § 1214.

[5] G. S. 1894 § 5388; Grant v. Schmidt, 22 Minn. 1.

[6] Crim v. Kessing, 89 Cal. 478; Roberts v. White, 39 N. Y. Superior Ct. 272.

Digitized by Google

What constitutes judgment book.

§ 1231. The statutes provide that the clerk shall keep "a judgment book, in which shall be entered the judgments in each action" [1] and that "the judgment shall be entered in the judgment book, and specify clearly the relief granted, or other determination of the action." [2] The writing out of the judgment in full by the clerk in the judgment book constitutes the entry of judgment.[3] Regularly the judgment in the judgment roll is a copy of the judgment in the judgment book,[4] but if the clerk irregularly enters the original judgment in the judgment roll instead of in the judgment book the judgment is not void. "If the court has jurisdiction, a departure from the statute in the manner of entering the judgment is a mere irregularity, and does not render void the judgment or the proceedings under it. The validity of the judgment cannot depend on whether it is written in one part of the clerk's records or another; whether it is written in the judgment book or in the judgment roll. If, before entering a judgment in the judgment book, the judgment roll is made up with a judgment entered therein such that it would be a proper judgment if entered in the judgment book, and the judgment is docketed, or an execution issued, or a transcript of the judgment is taken out, before entering judgment in the judgment book, this amounts to treating the judgment entered in the judgment roll as the judgment in fact. And although it is irregular to enter the judgment in the judgment roll, instead of entering it in the judgment book, yet the judgment entered in the roll will support the docketing, execution, etc., and will not be vitiated or destroyed by subsequently entering a copy or duplicate of it in the judgment book." [5]

[1] G. S. 1894 § 861; Brown v. Hathaway, 10 Minn. 303 Gil. 238; Thompson v. Bickford, 19 Minn. 17 Gil. 1; Jorgensen v. Griffin, 14 Minn. 464 Gil. 346.

[2] G. S. 1894 § 5421; Rockwood v. Davenport, 37 Minn. 533, 35 N. W. 377; Williams v. McGrade, 13 Minn. 46 Gil. 39.

[3] Brown v. Hathaway, 10 Minn. 303 Gil. 238; Rockwood v. Davenport, 37 Minn. 533, 35 N. W. 377; Williams v. McGrade, 13 Minn. 46 Gil. 39; Smith v. Valentine, 19 Minn. 452 Gil. 393. See Jorgensen v. Griffin, 14 Minn. 464 Gil. 346.

[4] Rockwood v. Davenport, 37 Minn. 533, 35 N. W. 377.

[5] Clark v. Butts, 73 Minn. 361, 76 N. W. 199. See Scheibel v. Anderson, 77 Minn. 54, 79 N. W. 594.

Rendition of judgment.

§ 1232. At common law and in the practice of most of the states the rendition of judgment is distinct from its entry. The entry in the judgment book is regarded as a mere memorial or record of a pre-existing judgment.[1] In our practice there is no judgment prior to the entry in the judgment book and the rendition and entry are one and the same thing.[2] In an action tried by the court without a jury the findings, conclusions and order for judgment do not constitute the judgment.[3] When filed they constitute the "decision"

Digitized by Google

of the court, but not its judgment. They are the basis of the judgment, like a verdict, rather than the judgment itself.[4]

[1] 1 Black, Judgments, § 106; Freeman, Judgments (3rd ed.) § 38.
[2] See Rockwood v. Davenport, 37 Minn. 533, 35 N. W. 377; Williams v. McGrade, 13 Minn. 46 Gil. 39; Brown v. Hathaway, 10 Minn. 303 Gil. 238; Jorgensen v. Griffin, 14 Minn. 464 Gil. 346; Thompson v. Bickford, 19 Minn. 17 Gil. 1.
[3] Child v. Morgan, 51 Minn. 116, 52 N. W. 1127.
[4] See § 500.

Necessity of an order of court.

§ 1233. In all actions, whether of a legal or equitable nature, judgment may be entered by the clerk on the verdict, report or decision, without any special order of the court therefor.[1] In entering a default judgment the necessity of an order of court depends on the character of the action.[2] In entering a judgment upon an issue of law for the plaintiff the necessity of an order of court is the same as in the case of default judgments.[3] In entering judgments by confession no order of court is necessary.[4] Judgments of dismissal are entered by the clerk without special order of court.[5] Where a motion for judgment on the pleadings is granted the order granting the motion generally directs judgment.

[1] G. S. 1894 §§ 5386, 5394, 5414; Piper v. Johnston, 12 Minn. 60 Gil. 27.
[2] See § 1271.
[3] G. S. 1894 § 5387.
[4] See § 1292.
[5] G. S. 1894 § 5408.

Clerk limited by decision of court or referee.

§ 1234. Where a cause is tried by a court or referee the judgment entered by the clerk must be in accordance with the conclusions of law and order for judgment. He has no authority to include anything in the judgment which is not authorized by such conclusions and order, even though the findings of facts would have justified or required different conclusions of law.

Ramaley v. Ramaley, 69 Minn. 491, 72 N. W. 694. See § 1347.

Remedy for erroneous entry.

§ 1235. On an appeal from a judgment the appellant cannot raise the objection that the judgment entered by the clerk does not conform to the verdict or order for judgment unless he moved the court below for the necessary amendment. McLaughlin v. Nicholson, 70 Minn. 71, 72 N. W. 827, 73 N. W. 1; Harper v. Carroll, 66 Minn. 487, 60 N. W. 610; Bank of Commerce v. Smith, 57 Minn. 374, 59 N. W. 311; Fletcher v. German-American Ins. Co. 79 Minn. 337, 82 N. W. 649; Levine v. Lancashire, 66 Minn. 138, 68 N. W. 855; Village of Fairmont v. Meyer, 83 Minn. 456, 86 N. W. 457; State v. Currie, 72 Minn. 403, 75 N. W. 742. See §§ 1347–1350.

Digitized by Google

Failure to enter.

§ 1236. There is no judgment until entry in the judgment book and a verdict or finding upon which no judgment has been entered does not operate as an estoppel and is inadmissible in evidence.

Schurmeier v. Johnson, 10 Minn. 319 Gil. 250; Child v. Morgan, 51 Minn. 116, 52 N. W. 1127.

Construction.

§ 1237. In the event of any doubt as to the scope or meaning of the judgment as entered in the judgment book it is to be construed in connection with the judgment roll.[1] Resort may also be had to extrinsic evidence not inconsistent with the record.[2] If, after considering the judgment roll and permissible extrinsic evidence, there is any reasonable doubt as to the facts actually litigated the judgment does not operate as an estoppel by verdict.[3]

[1] Banning v. Sabin, 41 Minn. 477, 43 N. W. 329; City Nat. Bank v. Hager, 52 Minn. 18, 53 N. W. 867; Boom v. St. Paul etc. Co. 33 Minn. 253, 22 N. W. 538; Andrews v. School District No. 4, 35 Minn. 70, 27 N. W. 303; Daly v. Bradbury, 46 Minn. 396, 49 N. W. 190; Hanlon v. Hennessey, (Minn. 1902) 92 N. W. 1.

[2] Irish American Bank v. Ludlum, 56 Minn. 317, 57 N. W. 927; Drea v. Cariveau, 28 Minn. 280, 9 N. W. 802; Augir v. Ryan, 63 Minn. 373, 65 N. W. 640; Neilson v. Pennsylvania Coal & Oil Co. 78 Minn. 113, 80 N. W. 859.

[3] Id.

As evidence.

§ 1238. When the object sought is to prove merely the fact of a judgment and not to take advantage of it as a bar or estoppel by verdict a transcript of the judgment book is sufficient.[1] Of course the judgment book itself may be introduced.

[1] Williams v. McGrade, 13 Minn. 46 Gil. 39.

Judgment upon stipulations.

§ 1239. Judgments are frequently entered upon stipulations therefor.[1] Whether the clerk may enter such judgments without an order of court is an open question in this state. The practice is not uncommon and where it is followed the parties ought to be estopped from raising objection.[2] Under G. S. 1894 § 6184, an attorney has, in an action pending, authority to stipulate for judgment against his client; but, even though the opposite party is not guilty of fraud, collusion, or bad faith in entering into the stipulation with such attorney, the court, by reason of the large equitable powers which it has over its own proceedings, may, in a proper case, set aside the stipulation on the ground that the same was improvidently made, or ought not in equity or good conscience to stand.[3] Where all the parties to an action but one entered into a stipulation for judgment which ignored the rights of such party and the court ordered judgment accordingly, it was held on appeal that the judgment was erroneous as to the party not joining in the stipulation.[4]

Digitized by Google

[1] Chisholm v. Clitherall, 12 Minn. 375 Gil. 251; Herrick v. Butler, 30 Minn. 156, 14 N. W. 794; Oldenberg v. Devine, 40 Minn. 409, 42 N. W. 88; Cameron v. Chicago etc. Ry. Co. 51 Minn. 153, 53 N. W. 199; Nash v. Adams, 55 Minn. 46, 56 N. W. 241; Bates v. Bates, 66 Minn. 131, 68 N. W. 845; Wells v. Penfield, 70 Minn. 66, 72 N. W. 816; State v. Merchants Bank, 74 Minn. 175, 77 N. W. 31; Walsh v. Curtis, 73 Minn. 254, 76 N. W. 52.

[2] See Oldenberg v. Devine, 40 Minn. 409, 42 N. W. 88.

[3] Wells v. Penfield, 70 Minn. 66, 72 N. W. 816. See Bates v. Bates, 66 Minn. 131, 68 N. W. 845.

[4] State v. Merchants Bank, 74 Minn. 175, 77 N. W. 31.

Extent and nature of relief allowable to plaintiff.

§ 1240. "The relief granted to the plaintiff, if there is no answer, cannot exceed that which he has demanded in his complaint; but in any other case, the court may grant him any relief consistent with the case made by the complaint, and embraced within the issue." [G. S. 1894 § 5413] Substantially same as statutes in New York, California and Wisconsin.

§ 1241. The relief allowable on default has been considered elsewhere.[1] The primary object of this statute is to protect the defendant on default. It cannot be invoked for the protection of a stranger to the judgment.[2] A demurrer is not an answer within the meaning of this section.[3] In case there is an answer the court may grant any relief consistent with the case made by the complaint and embraced within the issue.[4] This is too narrow a statement of the rule as the court is bound to grant relief upon issues litigated by consent.[5] In actions for damages greater damages than prayed cannot be recovered although there is an answer, but this limitation may always be avoided by amendment.[6] When a court once takes jurisdiction of a cause it is its duty to determine all rights and obligations pertaining to the subject matter and grant full measure of relief.[7] The prevailing party must be given such relief, either legal or equitable, as he proves himself entitled to, without regard to the prayer for relief.[8] So far as the power of the court to grant relief is concerned the distinction between actions at law and suits in equity has been abolished.[9]

[1] See § 1278.

[2] Peck v. N. Y. etc. Ry. Co. 85 N. Y. 246.

[3] Kelly v. Downing, 42 N. Y. 71; Alexander v. Katle, 63 How. Prac. (N. Y.) 262. But see Viles v. Green, 91 Wis. 217.

[4] Farmer v. Crosby, 43 Minn. 459, 45 N. W. 866; Thompson v. Bickford, 19 Minn. 17 Gil. 1; Washburn v. Mendenhall, 21 Minn. 332; Morish v. Mountain, 22 Minn. 564; Howard v. Barton, 28 Minn. 116, 9 N. W. 584; Hardin v. Palmerlee, 28 Minn. 450, 10 N. W. 773; Minneapolis Harvester Works v. Smith, 30 Minn. 399, 16 N. W. 462; Hatch v. Coddington, 32 Minn. 92, 19 N. W. 393; Mykleby v. Chicago etc. Ry. Co. 39 Minn. 54, 38 N. W. 763; Alworth v. Seymour, 42 Minn. 526, 44 N.

Digitized by Google

W. 1030; Abbott v. Nash, 35 Minn. 451, 29 N. W. 69; Smith v. Gill, 37 Minn. 455, 35 N. W. 178; Triggs v. Jones, 46 Minn. 277, 48 N. W. 1113; Spooner v. Bay St. Louis Syndicate, 47 Minn. 464, 50 N. W. 601; Seibert v. Minneapolis etc. Ry. Co. 58 Minn. 39, 59 N. W. 822; Henry v. Meighen, 46 Minn. 548, 49 N. W. 323, 646; Wilson v. Fuller, 58 Minn. 149, 59 N. W. 988; Brown v. Doyle, 69 Minn. 543, 72 N. W. 814; Nichols & Shepard Co. v. Wiedemann, 72 Minn. 344, 75 N. W. 208; Wilson v. Fairchild, 45 Minn. 203, 47 N. W. 642; Griffin v. Jorgenson, 22 Minn. 92; Germania Bank v. Osborne, 81 Minn. 272, 83 N. W. 1084; Norton v. Met. Life Ins. Co. 74 Minn. 484, 77 N. W. 539.

[8] See § 503.

[9] Elfelt v. Smith, 1 Minn. 126 Gil. 101; Eaton v. Caldwell, 3 Minn. 134 Gil. 80; Amort v. Christofferson, 57 Minn. 234, 59 N. W. 304; Nichols & Shepard Co. v. Wiedemann, 72 Minn. 344, 75 N. W. 208.

[10] Sewell v. City of St. Paul, 20 Minn. 511 Gil. 459; Belote v. Morrison, 8 Minn. 87 Gil. 62; Nichols v. Randall, 5 Minn. 304 Gil. 240; Thompson v. Myrick, 24 Minn. 4; Coolbaugh v. Roemer, 32 Minn. 445, 21 N. W. 472; Thwing v. Hall & Ducey Lumber Co. 40 Minn. 184, 41 N. W. 815; Crump v. Ingersoll, 47 Minn. 179, 49 N. W. 739; Erickson v. Fisher, 51 Minn. 300, 53 N. W. 638; Winona etc. Ry. Co. v. St. Paul etc. Ry. Co. 26 Minn. 179, 2 N. W. 489; Sprague v. Sprague, 73 Minn. 474, 76 N. W. 268.

[11] See Dunnell, Minn. Pl. §§ 8, 372–378.

[12] See Dunnell, Minn. Pl. §§ 8, 374.

Judgment in action for recovery of personal property.

§ 1242. "In an action to recover the possession of personal property, judgment may be rendered for the plaintiff and for the defendant in the same action, or for either of them. Judgment for either party, if the property has not been delivered to him, and a return is claimed in the complaint or answer, may be for the possession, or the value thereof in case possession cannot be obtained, and damages for the detention, or taking and withholding the same. When the prevailing party is in possession of the property, the value thereof shall not be included in the judgment. If the property has been delivered to the plaintiff, and the action is dismissed before answer, or if the answer so claims, the defendant shall have judgment for a return of the property and damages, if any, for the detention, or taking and withholding such property, but such judgment shall not be a bar to another action for the same property or any part thereof."

[G. S. 1894 § 5420] For the cases under this statute see, Dunnell, Minn. Pl. §§ 846–855; Johnson v. Vaule, 61 Minn. 401, 63 N. W. 1039 (effect of dismissal by plaintiff as an estoppel).

Digitized by Google

Judgment as between several parties.

§ 1243. "Judgment may be given for or against one or more of several plaintiffs, and for or against one or more of several defendants, and it may, when the justice of the case requires it, determine the ultimate rights of the parties on each side, as between themselves."

[G. S. 1894 § 5410] Identical with California statute and substantially the same as that of New York.

§ 1244. "The equitable and the legal theories of the judgment, like the same theories of the parties, were in marked contrast and opposition to each other. In equity it was possible, and, indeed, common, for a decree to be rendered which discriminated among the plaintiffs or the defendants, and pronounced in favor of some and against the others without regard to any unity or identity of right or interest. The object of the adjudication was to determine the entire controversy according to the individual rights of all the litigants; and if they were before the court as parties to the suit, so that they would be concluded by the decision, it was not of vital consequence whether they were plaintiffs or defendants. In short, the court of equity had full power to sever in its decree, to adjudge in favor of some plaintiffs and against others, in favor of some defendants and against others, to confer relief upon the defendants or some of them against the plaintiffs or some of them, and finally to settle the equities among the co-plaintiffs or the co-defendants as against each other. The common law theory of the judgment was in every respect different from this. Based upon the intensely arbitrary notion of joint rights and obligations, it regarded the demand of co-plaintiffs on the one side, and the liability of co-defendants on the other, except in a certain well-defined class of cases, as a unit, as utterly incapable of being severed, as something which must be established as to all, or must fail as to all the parties. In no instance was affirmative relief granted to the defendant; recoveries by plaintiff against plaintiff, or by defendant against defendant, were unknown. Since the right of the plaintiffs or the liability of the defendants was conceived of as one and indivisible, the recovery must be against all the defendants equally and in favor of all the plaintiffs alike. As a general rule, therefore, independent of statute and of the few excepted cases, the judgment in a common law action could not be severed, and be pronounced in favor of some plaintiffs, and against the others, nor in favor of some defendants and against others."[1] The object of the above statute was to abolish these common law rules and to make the equity rules applicable to all actions,[2] but it did not abolish the rule that the judgment must follow the complaint and that in an action against several defendants upon a joint contract the plaintiff must recover against all or none.[3] This rule, however, was abrogated by a subsequent statute.[4]

[1] Pomeroy, Remedies, (3rd Ed.) § 41.

[2] Id.; Howe v. Spaulding, 50 Minn. 157, 52 N. W. 527; Fetz v. Clark, 7 Minn. 217 Gil. 159.

[3] Fetz v. Clark, 7 Minn. 217 Gil. 159; Whitney v. Reese, 11 Minn.

Digitized by Google

138 Gil. 87; Carlton v. Chouteau, 1 Minn. 103 Gil. 81; Davison v. Harmon, 65 Minn. 402, 67 N. W. 1015.

[4] See § 1252.

§ 1245. The statute provides that the court may "determine the ultimate rights of the parties on each side," [1] but this determination must be confined to the issues presented by the complaint. The relief which the defendants may have, as against each other, must be framed upon the facts involved in the litigation of the plaintiff's claim, and as a part of the adjustment of that claim, and not upon claims with which the plaintiff has nothing to do, and which are properly the subject of an independent litigation.[2] If new issues are to be formed it must be by means of a cross-complaint and even then the new issues must have relation to the subject of the original action.[3] It is every day practice to render judgment against part of several defendants.[4]

[1] Goldschmidt v. County of Nobles, 37 Minn. 49, 33 N. W 544; Ermentrout v. American Fire Ins. Co. 60 Minn. 418, 62 N. W. 543. See for an exception to the general rule, Grant v. Schmidt, 22 Minn. 1.

[2] Howe v. Spalding, 50 Minn. 157, 52 N. W. 527; Richardson v. McLaughlin, 55 Minn. 489, 57 N. W. 210; Jewett v. Iowa Land Co. 64 Minn. 531, 67 N. W. 639; Lansing v. Hadsall, 26 Hun (N. Y.) 621; Kay v. Whittaker, 44 N. Y. 565; Powers v. Savin, 64 Hun (N. Y.) 567; Revoir v. Barton, 71 Hun (N. Y.) 457; Hall v. Hall, 55 How. Pr. (N. Y.) 19.

[3] American Exchange Bank v. Davidson, 69 Minn. 319, 72 N. W. 129. See Dunnell, Minn. Pl. § 385.

[4] Harper v. Carroll, 66 Minn. 487, 69 N. W. 610, 1069; Hanson v. Davison, 73 Minn 454, 76 N. W. 254.

Judgment in actions for tort against several.

§ 1246. In an action against several for a tort alleged to have been committed by them jointly a recovery may be had against one or more of them proved to be guilty although the action fails as to the others.[1] All persons whose property is affected by a nuisance, though they own the property in severalty and not jointly, may join in an action to abate the nuisance. But in such cases the relief granted must be such as is common to all of the plaintiffs. Several judgments in favor of each for his separate damages cannot be rendered.[2]

[1] Huot v. Wise, 27 Minn. 68, 6 N. W. 425. See Dunnell, Minn. Pl. § 133.

[2] Grant v. Schmidt, 22 Minn. 1.

Extent and nature of relief allowable to defendant.

§ 1247. "If a counterclaim, established at the trial, exceeds the plaintiff's demand so established, judgment for the defendant shall be given for the excess, or, if it appears that the defendant is entitled to any other affirmative relief, judgment shall be given accordingly." [G. S. 1894 § 5419] Substantially the same as statutes in New York and California.

Digitized by Google

§ 1248. The object of this statute was to abrogate the common law rule that judgment for affirmative relief cannot be rendered in favor of the defendant.[1] When in an answer matter is pleaded as a counterclaim, the defendant must have such relief, though not specifically demanded in the answer, as the facts proved within its allegations show him entitled to.[2] It is immaterial whether the defendant labels his new matter as a defence or a counterclaim. If he demands affirmative relief he will be awarded such relief as the facts proved within the allegations of his answer entitle him to although not specifically prayed.[3] But a court is not authorized to grant affirmative relief to a defendant who has not sought it in his answer, either by pleading a counterclaim as such or asking for such relief in his prayer. This statute does not do away with the fundamental requirement that the judgment must follow the pleadings and proof. The plaintiff has an absolute right to be apprised by the answer that affirmative relief is sought against him.[4] Of course he may waive this right and authorize the court to render a judgment for affirmative relief against him by voluntarily litigating a counterclaim.[5] This statute does not authorize an affirmative judgment against the plaintiff where all the necessary parties are not before the court.[6] The defendant cannot recover greater damages than prayed in his answer.[7]

[1] See § 1244 and Smith v. Dukes, 5 Minn. 373 Gil. 301; Townsend v. Minneapolis etc. Co. 46 Minn. 121, 48 N. W. 682.

[2] Wilson v. Fairchild, 45 Minn. 203, 47 N. W. 642.

[3] Germania Bank v. Osborne, 81 Minn. 272, 83 N. W. 1084.

[4] Wright v. Delafield, 25 N. Y. 266; Baird v. Mayor of New York, 96 N. Y. 566; Equitable Life Assurance Society v. Cuyler, 75 N. Y. 515; Kniffen v. McConnell, 30 N. Y. 285; Garvey v. Jarvis, 54 Barb. (N. Y.) 179; Walker v. Walker, 93 Iowa 643; McDougald v. Argonaut Land etc. Co. 117 Cal. 87. See Dunnell, Minn. Pl. §§ 577–588.

[5] Phelps v. Compton, 72 Minn. 109, 75 N. W. 19.

[6] Smith v. Howard, 20 How. Pr. (N. Y.) 151; Cummings v. Morris, 25 N Y. 625.

[7] Nichols & Shepard Co. v. Wiedemann, 72 Minn. 344, 75 N. W. 208.

Judgments as against one or more of several defendants.

§ 1249. "In an action against several defendants, the court may, in its discretion, render judgment against one or more of them, leaving the action to proceed against the others, whenever a several judgment is proper."

[G. S. 1894 § 5411]

§ 1250. This statute was formerly held inapplicable to an action on a joint obligation,[1] but under a late statute it has become applicable to every action.[2] In an action against the maker, and the guarantors of payment, of a promissory note, the plaintiff may enter a several judgment on a verdict against the maker without waiting until the trial of the issues with the other defendants.[3] The matter

Digitized by Google

rests in the discretion of the court and judgment therefore cannot regularly be entered without an order.[4]

[1] Davison v. Harmon, 65 Minn. 402, 67 N. W. 1015.
[2] See § 1252.
[3] Bank of Commerce v. Smith, 57 Minn. 374, 59 N. W. 311; First Nat. Bank v. Burkhardt, 71 Minn. 185, 73 N. W. 858.
[4] Wolford v. Bowen, 57 Minn. 267, 59 N. W. 195.

Judgment after death of party.

§ 1251. A judgment ought not to be rendered for or against a party after his death. But a court which has acquired jurisdiction of the subject matter and the parties possesses the power to proceed to the final determination of the action; and while the court ought to cease to exercise its jurisdiction over a party at his death, the neglect to do so is an error to be corrected by some proceeding in the action in which the error occurs, and the judgment, though erroneous, is not on that account to be attacked in a collateral action. In other words, the judgment is voidable when properly assailed, but not void.[1] It is provided by statute that an action does not abate by the death of a party and provision is made for the substitution of his personal representative.[2] It is held that the term "representative" as used in the statute is not confined to executors and administrators but includes all persons who occupy the position held by the deceased party, succeeding to his rights and obligations.[3] "If a party dies after verdict or decision upon an issue of fact, and before judgment, the court may nevertheless render judgment thereon; such judgment is not a lien on the real property of the deceased party, but is payable in the course of administration on his estate."[4]

[1] Hayes v. Shaw, 20 Minn. 405 Gil. 355; Stocking v. Hanson, 22 Minn. 542; Berkey v. Judd, 27 Minn. 475, 8 N. W. 475.
[2] G. S. 1894 § 202; Jordan v. Secombe, 33 Minn. 220, 22 N. W. 283; Stocking v. Hanson, 22 Minn. 542; Brown v. Brown, 35 Minn. 191, 28 N. W. 238; Lanier v. Irvine, 24 Minn. 116; Landis v. Olds, 9 Minn. 90 Gil. 79. See Dunnell, Minn. Pl. §§ 202–213.
[3] Willoughby v. St. Paul German Ins. Co. 80 Minn. 432, 83 N. W. 377.
[4] G. S. 1894 § 5422; Berkey v. Judd, 27 Minn. 477, 8 N. W. 383; Id. 31 Minn. 271, 17 N. W. 618; Fowler v. Mickley, 39 Minn. 28, 38 N. W. 634; Fern v. Leuthold, 39 Minn. 212, 39 N. W. 397; Berkey v. St. Paul Nat. Bank, 54 Minn. 448, 56 N. W. 53; Oswald v. Pillsbury, 61 Minn. 520, 63 N. W. 1072.

In actions on a joint obligation.

§ 1252. "(1) Parties to a joint obligation shall be jointly and severally liable thereon for the full amount thereof.[1]

(2) A joint obligation within the meaning of this act shall be construed to include all promissory notes, bills of exchange, copartnership debts and all contracts upon which parties are liable jointly.

(3) A joint or separate or several action may be brought against

Digitized by Google

any one or more or all of the parties liable upon such joint obligation,[2] and a joint or several judgment may be entered against any one or more or all of the parties liable upon such joint obligation;[3] provided, however, the court may, upon application by any interested party, or upon its own motion, require the plaintiff to bring in as parties defendant all of the parties jointly liable on any such obligation.

(4) A judgment entered against any one or more of the parties to such joint obligation shall not be a bar to further proceedings in a separate action against the parties liable upon such joint obligation not included in such judgment.[4]

(5) In an action upon a joint obligation, where more than one party are made parties defendant, and some of the defendants shall not answer the plaintiff's complaint therein, and other of the defendants shall interpose a defence, judgment by default may be entered against the defendant or defendants not answering, and the said judgment against the defendant or defendants in default shall be enforced in the same manner as if no defence had been interposed by the other parties to such action; and such judgment by default shall not be a bar to further proceedings or judgment against the parties interposing a defence in such action.[5]

(6) A judgment entered against any one of the parties liable upon a joint obligation shall not operate as a discharge or release of the parties to such joint obligation who are not included in such action or judgment.[6]

(7) This act shall not be construed so as to affect or change the liability of the parties to joint obligations as to each other."

[Laws 1897 ch. 303] Repeals and supersedes G. S. 1894 §§ 5207, 5436.

[2] Abrogates the common law rule. See Dunnell, Minn. Pl. § 94; Johnson v. Lough, 22 Minn. 203; Whittaker v. Collins, 34 Minn. 299, 25 N. W. 632; Little v. Lee, 53 Minn. 511, 55 N. W. 737; Davison v. Harmon, 65 Minn. 402, 67 N. W. 1015; Pfefferkorn v. Haywood, 65 Minn. 429, 68 N. W. 68; Harper v. Carroll, 66 Minn. 487, 69 N. W. 610, 1069; Ingwaldson v. Olson, 79 Minn. 252, 82 N. W. 579. See §§ 1253, 1254.

[3] Id.

[4] Overrules Johnson v. Lough, 22 Minn. 203.

[5] Overrules Davison v. Harmon, 65 Minn. 402, 67 N. W. 1015; Pfefferkorn v. Haywood, 65 Minn. 429, 68 N. W. 68.

[6] Id.

[7] Id.

§ 1253. "Whenever two or more persons are sued as joint defendants, and on the trial the plaintiff fails to prove a joint cause of action against all, but proves a cause of action against one or more of the defendants, judgment may be rendered against him or them against whom the cause of action is proved."

[G. S. 1894 § 5412] This statute is practically superseded by Laws 1897 ch. 303. See § 1252.

Digitized by Google

§ 1254. This statute was enacted for the purpose of abrogating the common law rule that in an action on a joint obligation against several defendants the plaintiff must recover against all or none. It overrules a line of early cases.[1] As the law now stands a plaintiff may allege a joint contract and recover upon proof of a joint and several contract or a joint contract as to a part of the defendants.[2] This is an exception to the general rule that the judgment must follow the complaint and is based on practical considerations.

[1] Fetz v. Clark, 7 Minn. 217 Gil. 159; Whitney v. Reese, 11 Minn. 138 Gil. 87; Carlton v. Chouteau, 1 Minn. 103 Gil. 81; Johnson v. Lough, 22 Minn. 203; Ermentrout v. American Fire Ins. Co. 60 Minn. 418, 62 N. W. 543; Beatty v. Ambs, 11 Minn. 331 Gil. 234.

[2] Miles v. Wann, 27 Minn. 56, 6 N. W. 417; Keigher v. Dowlan, 47 Minn. 574, 50 N. W. 823; Sexton v. Steele, 60 Minn. 336, 62 N. W. 392; Ermentrout v. American Fire Ins. Co. 60 Minn. 418, 62 N. W. 543; Bunce v. Pratt, 56 Minn. 8, 57 N. W. 160; Reed v. Pixley, 22 Minn. 540; Bardwell-Robinson Co. v. Brown, 57 Minn. 140, 58 N. W. 872.

THE JUDGMENT ROLL

The statute.

§ 1255. "Immediately after entering the judgment, the clerk shall attach together and file the following papers, which constitute the judgment roll.

(1) In case the complaint is not answered by any defendant, the summons and complaint, or copies thereof, proof of service and that no answer has been received, the report, if any, and a copy of the judgment.

(2) In all other cases, the summons, pleadings, or copies thereof, and a copy of the judgment, with any verdict, decision or report, the offer of the defendant, exceptions, and all orders in any way involving the merits, and necessarily affecting the judgment. If a statement of the case is made, the same may be attached to the judgment roll, on the request of either party."

[G. S. 1894 § 5423] See as to judgment roll when real property is attached and taxes are paid, G. S. 1894 § 5444; in condemnation proceedings by the state, G. S. 1894 § 4090; when a dispute is submitted without action, G. S. 1894 § 6084; when judgment is rendered against a corporation vacating its letters patent, G. S. 1894 § 5973.

A duty of the clerk.

§ 1256. These three acts follow in regular sequence:

(1) The entry of the judgment in the judgment book;

(2) Making up and filing the judgment roll;

(3) Docketing the judgment.[1] In our practice the making and filing the judgment roll is a mere clerical duty imposed on the clerk of the court to be performed immediately after entering the judgment, for which neither the party nor his attorney is responsible.[2]

Digitized by Google

[1] Rockwood v. Davenport, 37 Minn. 533, 35 N. W. 377.
[2] Williams v. McGrade, 13 Minn. 46 Gil. 39.

Time.

§ 1257. Regularly the making and filing of the judgment roll immediately follows the entry of judgment in the judgment book and the judgment in the roll is a copy of the judgment in the judgment book.[1] But this order of entry is not jurisdictional. The entry of the original judgment in the roll prior to its entry in the judgment book does not render the subsequent proceedings void.[2]

[1] Rockwood v. Davenport, 37 Minn. 533, 35 N. W. 377; Williams v. McGrade, 13 Minn. 46 Gil. 39.
[2] Clark v. Butts, 73 Minn. 361, 76 N. W. 199; Scheibel v. Anderson, 77 Minn. 54, 79 N. W. 594.

Contents.

§ 1258. Only those documents specifically mentioned in the statute may properly be included in the judgment roll.[1] It will be observed that our statute makes all orders in any way involving the merits and necessarily affecting the judgment a part of the judgment roll. But nothing is said about the motion papers upon which the orders are based and consequently they have no place in the judgment roll.[2] The following papers should not be included in the roll: original pleadings that have been superseded by amended pleadings;[3] a demurrer that has been withdrawn after being overruled;[4] a pleading which has been stricken out;[5] the bill of costs and accompanying affidavits;[6] a bond for costs.[7]

[1] Cook v. Dickerson, 1 Duer (N. Y.) 679.
[2] See Cornell v. Davis, 16 Wis. 686.
[3] Dexter v. Dustin, 70 Hun (N. Y.) 515; Brown v. Saratoga etc. Ry. Co. 18 N. Y. 495.
[4] Brown v. Saratoga etc. Ry. Co. 18 N. Y. 495.
[5] Briggs v. Bergen, 23 N. Y. 162.
[6] Cook v. Dickerson, 1 Duer (N. Y.) 679.
[7] Shaubhut v. Hilton, 7 Minn. 506 Gil. 412.

Verity.

§ 1259. The verity conceded to the judgment roll applies to nothing which it is not the duty of the clerk to record.

Douglas v. Wickwire, 19 Conn. 489; Hahn v. Kelly, 34 Cal. 391.

Necessity of.

§ 1260. The filing of a judgment roll is not essential to the validity of the judgment. Execution may issue as soon as the judgment is entered in the judgment book and before the filing of the roll. Neither is a judgment roll essential to a valid docketing of the judgment.

See Williams v. McGrade, 13 Minn. 46 Gil. 39.

Presumptions.

§ 1261. Want of jurisdiction not affirmatively appearing, a judgment of a court of general jurisdiction is presumed valid. It is not

Digitized by Google

enough to overcome this presumption merely to show that the judgment roll is irregularly and defectively made up, or that papers, which should properly constitute a part of it, are missing from it.[1] But it will not be presumed that there was other proof of service of summons than that shown in the judgment roll; nor, in an action against a non-resident who is shown to have been personally beyond the jurisdiction of the court, will it be presumed, the question being directly presented, that the court acquired jurisdiction by substituted service, unless that is affirmatively shown.[2] The docket of a judgment being shown it will be presumed that a judgment roll has been regularly filed.[3] It will be presumed that an affidavit for publication of summons attached to the judgment roll was filed at the proper time.[4]

[1] Herrick v. Butler, 30 Minn. 156, 14 N. W. 794.
[2] See § 345.
[3] Williams v. McGrade, 13 Minn. 46 Gil. 39.
[4] Bogart v. Kiene, 85 Minn. 261, 88 N. W. 748.

As evidence.

§ 1262. The judgment roll or an authenticated copy of it is evidence of all that is properly contained in it, including the judgment, and is prima facie evidence that the judgment was properly rendered and entered, so as to have effect.[1] The judgment roll is not exclusive evidence of the judgment itself,[2] but when a judgment is sought to be introduced as a bar or an estoppel by verdict the entire judgment roll must be offered.[3]

[1] In re Ellis' Estate, 55 Minn. 401, 56 N. W. 1056.
[2] Williams v. McGrade, 13 Minn. 46 Gil. 39.
[3] Converse v. Sickles, 146 N. Y. 200. See Long v. Webb, 24 Minn. 380; Augir v. Ryan, 63 Minn. 373, 65 N. W. 640; Neilson v. Pennsylvania Coal & Oil Co. 78 Minn. 113, 80 N. W. 859; Lytle v. Chicago etc. Ry. Co. 75 Minn. 330, 77 N. W. 975.

DOCKETING OF JUDGMENT

The statute.

§ 1263. "On filing a judgment roll, upon a judgment requiring the payment of money, the judgment shall be docketed by the clerk of the court in which it was rendered, and in any other county, upon filing in the office of the clerk of the district court of such county a transcript of the original docket; and thereupon the judgment from the time of docketing the same, becomes a lien on all the real property of the debtor in the county, owned by him at the time of the docketing of the judgment, or afterward acquired; * * * all judgments so rendered and docketed shall survive, and the lien thereof continue, for a period of ten years and no longer."

[G. S. 1894 § 5425 as amended Laws 1901 ch. 274]

A duty of the clerk.

§ 1264. The statute provides that the clerk shall keep "a docket, in which he shall enter alphabetically the name of each judgment

Digitized by Google

debtor, the amount of the judgment, and the precise time of his entry." [1] The duty is a ministerial rather than judicial one.[2]

[1] G. S. 1894 § 861.

[2] In re Worthington, 7 Biss. (U. S.) 455; Williams v. McGrade, 13 Minn. 46 Gil. 39.

Time—necessity of prior judgment.

§ 1265. Regularly the docketing of a judgment follows immediately upon the filing of the judgment roll. These three acts follow in regular sequence: (1) the entry of judgment in the judgment book; (2) making up and filing the judgment roll; (3) docketing the judgment.[1] Until there is a judgment there can be no valid docketing.[2] The docketing must follow the entry of judgment. Formerly it was held that there could be no valid docketing until after the entry of judgment in the judgment book.[3] It is now held that a prior entry of the judgment in the judgment roll alone will sustain a docketing.[4] On the other hand there may be a valid docketing without a judgment roll if there is a prior entry of the judgment in the judgment book.[5] A judgment may be docketed before the taxation of costs.[6]

[1] Rockwood v. Davenport, 37 Minn. 533, 35 N. W. 377; Todd v. Johnson, 50 Minn. 310, 52 N. W. 864.

[2] Hunter v. Cleveland Co-operative Stove Co. 31 Minn. 505, 18 N. W. 645; Rockwood v. Davenport, 37 Minn. 533, 35 N. W. 377; Clark v. Butts, 73 Minn. 361, 76 N. W. 199.

[3] Rockwood v. Davenport, 37 Minn. 533, 35 N. W. 377.

[4] Clark v. Butts, 73 Minn. 361, 76 N. W. 199; Scheibel v. Anderson, 77 Minn. 54, 79 N. W. 594.

[5] Williams v. McGrade, 13 Minn. 46 Gil. 39.

[6] Richardson v. Rogers, 37 Minn. 461, 35 N. W. 270.

Necessity and object of.

§ 1266. The primary object of the statute is to create a lien on the real property of the judgment debtor and to impart notice to third persons of the existence of the lien.[1] The docketing of a judgment and the lien thereby acquired performs the office and takes the place of an actual levy on the land.[2] The docketing of a judgment is not essential to its validity or operation as an estoppel.[3] Whether it is a prerequisite of execution is an open question in this state. The better view would seem to be that execution may issue immediately upon the entry of judgment in the judgment book without docketing,[4] especially to the county where the judgment is rendered.[5] An execution issued to a county other than the one in which the judgment was rendered is valid though taken from the clerk's office before the judgment is docketed in the county to which it runs, but not delivered to the sheriff for service until after the judgment is so docketed.[6]

[1] Clark v. Dakin, 2 Barb. Ch. (N. Y.) 36; Sheridan v. Andrews, 49 N. Y. 478; Todd v. Johnson, 50 Minn. 310, 52 N. W. 864.

[2] Thompson v. Dale, 58 Minn. 365, 59 N. W. 1086.

[3] Sheridan v. Andrews, 49 N. Y. 478.

[4] See 1 Freeman, Executions, § 24; Kentzler v. Chicago etc. Ry. Co. 47 Wis. 641; Drake v. Harrison, 69 Wis. 99; Hastings v.

Digitized by Google

Cunningham, 39 Wis. 137; Dunham v. Reilly, 110 N. Y. 373; Gowan v. Fountain, 50 Minn. 264, 52 N. W. 862.

[5] Drake v. Harrison, 69 Wis. 99.

[6] Gowan v. Fountain, 50 Minn. 264, 52 N. W. 862.

Docket entries unimpeachable collaterally.

§ 1267. The entries in the judgment docket import absolute verity. If they are erroneous the error must be corrected on an application for that purpose to the court of which they are records. They cannot be impeached collaterally by the parties or their privies.

Ferguson v. Kumler, 25 Minn. 183. See Hunter v. Cleveland Co-operative Stove Co. 31 Minn. 505, 18 N. W. 645.

As evidence of judgment.

§ 1268. A transcript of the docket of a judgment is prima facie evidence of the docketing,[1] but not of the judgment.[2] Docket entries which are merely minutes of proceedings are not admissible as evidence of a judgment.[3]

[1] Williams v. McGrade, 13 Minn. 46 Gil. 39; Thompson v. Bickford, 19 Minn. 17 Gil. 1.

[2] Brown v. Hathaway, 10 Minn. 303 Gil. 238.

[3] Todd v. Johnson, 50 Minn. 310, 52 N. W. 864.

Mistakes in name of debtor.

§ 1269. The docketing of a judgment in favor of Sumner W. Farnham is proved by a transcript of the docket, in which the name is given Samuel W. Farnham, the description corresponding in every other respect with the judgment rendered.[1] A judgment duly rendered against one whose name is misspelled in the proceedings, is, when docketed, a lien on his real estate, unless as against those who can claim that by reason of the misspelling the docket is no notice to them. A fraudulent grantee cannot object to it.[2] A record of a judgment against one whose Christian name is indicated only by initials is effectual to put upon inquiry a subsequent purchaser of lands the title of which appears of record in a person of the same family name as such judgment debtor, and whose Christian name has the same initial letters.[3] The omission of "Jr." from the debtor's name does not affect the validity of a judgment lien.[4]

[1] Thompson v. Bickford, 19 Minn. 17 Gil. 1.

[2] Fuller v. Nelson, 35 Minn. 213, 28 N. W. 511.

[3] Pinney v. Russell & Co. 52 Minn. 443, 54 N. W. 484; Nystrom v. Quinby, 68 Minn. 4. See further as to the use of initials in judicial proceedings: Knox v. Starks, 4 Minn. 20 Gil. 7; Gardner v. McClure, 6 Minn. 250 Gil. 167; Kenyon v. Semon, 43 Minn. 180.

[4] Bidwell v. Coleman, 11 Minn. 78 Gil. 45.

Effect of appeal.

§ 1270. When a judgment which is docketed in the district court is affirmed by the supreme court, it remains, without redocketing, a lien upon real estate, by virtue of the original docketing, for the

Digitized by Google

amount of the original judgment with accumulative interest. But to make it a lien for the damages and costs in the supreme court, it must be redocketed.

Daniels v. Winslow, 4 Minn. 318 Gil. 235; Messerschmidt v. Baker, 22 Minn. 81. See G. S. 1894 § 5426.

JUDGMENT ON DEFAULT

The statute.

§ 1271. "Judgment may be had, if the defendant fails to answer the complaint, as follows:

(1) When, in an action arising on contract for the payment of money only, the summons has been personally served, and the plaintiff shall file with the clerk proof of the personal service of the summons, and that no answer has been received within the time allowed by law, the clerk shall thereupon enter judgment for the amount mentioned in the summons against the defendant or against one or more of several defendants, in the cases provided for in this chapter. In other actions for the recovery of money only, on filing the like proof the plaintiff may apply to the court for a reference, to have his damages assessed, or the amount he is entitled to recover ascertained in any other manner, and for judgment. When the defendant, by his answer in such action, shall not deny the plaintiff's claim, but shall set up a counterclaim amounting to less than the plaintiff's claim, judgment may be entered by the clerk or court in favor of plaintiff for the excess of his claim over the said counterclaim, with costs and disbursements, upon the plaintiff's filing with said clerk a statement signed by plaintiff, his attorney or agent, admitting such counterclaim, together with an affidavit of his costs and disbursements; which statement and affidavit shall be annexed to and be made a part of the judgment roll; all of which may be done without notice to the defendant.

(2) In other actions the plaintiff may, upon like service and proof, apply to the court, after the expiration of the time for answering, for the relief demanded in the complaint. If the taking of an account or the proof of any fact is necessary to enable the court to give judgment, or to carry the judgment into effect, the court may take the account or hear the proof, or may, in its discretion, order a reference for that purpose.

(3) When the service of the summons was by publication, or by leaving a copy thereof at the house of the usual abode of the defendant, in actions arising on contract for the payment of money only, the plaintiff, upon filing with the clerk proof of such service, and that no answer has been received within the time allowed by law, together with the security hereinafter mentioned, shall be entitled to judgment in the same manner as if the summons had been served upon the defendant personally. In other actions, upon filing the like proof, the plaintiff may apply for judgment and the court shall thereupon require proof to be made of the demand set forth in the complaint, and may render judgment for the plaintiff for such amount,

Digitized by Google

or such relief, as he is entitled to recover. In all cases where the summons has not been served personally, the plaintiff, before judgment is entered, must file, or cause to be filed, satisfactory security to abide the order of the court touching the restitution of any money or property collected or received under or by virtue of the judgment, in case the defendant or his representatives shall thereafter apply and be admitted to defend the action, and shall succeed in the defence: provided, that when service of the summons is made by leaving a copy thereof at the house of the usual abode of the defendant, and the officer or person making such service shall return that he left such copy with some person of suitable age and discretion then resident therein, it shall be deemed personal service; and in such cases judgment may be entered without filing the security herein provided for: provided, further, that in all actions involving the title to or brought to quiet the title to real estate or to foreclose mortgages of real estate, judgment may be entered without filing the security above provided."

[G. S. 1894 § 5354 as amended by Laws 1895 ch. 62]

Filing proof a prerequisite.

§ 1272. The affidavit of no answer should be filed with the clerk before entry of judgment. But a judgment without such preliminary filing would probably not be absolutely void.

Cunningham v. Water-Power Sandstone Co. 74 Minn. 282, 77 N. W. 137.

The act of the clerk in entering judgment the act of the court.

§ 1273. The rendition of a judgment in any case is a judicial act which, according to the letter of the law, can only be performed by the court; and in the early days of the common law it was true in fact and in theory that all judgments were rendered by the courts. This feature of the common law has long since been greatly modified, and while the theory still is that all judgments are rendered by the court, yet the fact is that they are entered by the prothonotary or clerk out of court, and in some cases without the actual direction of the court or any judge.[1] The judgment entered by the clerk is the judgment of the court in all cases whether entered upon an order, verdict or default. The clerk acts for the court. When a plaintiff, in order to take judgment for want of an answer, offers to the clerk proof of the service of summons and that no answer has been received, the clerk must necessarily decide upon the sufficiency of such proof and to that extent he acts on behalf of the court in a judicial capacity. His decision is a judicial determination of the facts essential to the entry of a judgment by default and as conclusive upon the parties as if it had been made by the judge himself.[2] If the clerk, in entering up a default judgment, commits error or irregularity, the judgment is not void and cannot be collaterally attacked.[3]

[1] Skillman v. Greenwood, 15 Minn. 102 Gil. 77.

[2] Kipp v. Fullerton, 4 Minn. 473 Gil. 366.

[3] Kipp v. Fullerton, 4 Minn. 473 Gil. 366; Dillon v. Porter, 36 Minn. 341, 31 N. W. 56. See §§ 1274, 1286.

Digitized by Google

Remedy for irregular or erroneous judgment by default.

§ 1274. If the clerk commits an error or irregularity in entering a default judgment the remedy is a motion to set aside,[1] a motion to correct,[2] or possibly an appeal from the judgment. In the earliest cases it was held that such objections could not be raised for the first time on appeal.[3] Later these earlier cases were overruled.[4] But in all cases it is practically advisable to apply to the trial court in the first instance.

[1] Dillon v. Porter, 36 Minn. 341, 31 N. W. 56; Heinrich v. Englund, 34 Minn. 385, 26 N. W. 122; Hersey v. Walsh, 38 Minn. 521, 38 N. W. 613.

[2] Babcock v. Sanborn, 3 Minn. 141 Gil. 86; Hawke v. Banning, 3 Minn. 67 Gil. 30; Milwain v. Sanford, 3 Minn. 147 Gil. 92.

[3] Id.

[4] Reynolds v. La Crosse etc. Packet Co. 10 Minn. 178 Gil. 144. See § 1723.

§ 1275. If the court commits an error or irregularity in ordering judgment on default and the clerk enters judgment in strict accordance with the order the objection may be raised for the first time on appeal.[1] Of course a motion to amend or modify the judgment is proper in such cases and should ordinarily be resorted to in the first instance.

[1] White v. Iltis, 24 Minn. 43; Northern Trust Co. v. Albert Lea College, 68 Minn. 112, 71 N. W. 9.

Necessity of proving cause of action.

§ 1276. If the action is on contract for the payment of money only it is unnecessary to prove the cause whether the service of summons was personal or not. In all other actions it is necessary to prove the cause if the service of summons was by publication or by leaving at the house of usual abode. In actions for damages other than actions on contract for the payment of money only it is necesary to prove the damages even though service of summons is personal, but the cause of action is admitted by the default.[1] In all other actions, except an action for divorce, the cause of action is admitted by the default in case of personal service of summons and the court grants the relief sought without proof unless it is necessary to have an account taken or some fact proved to enable the court to give judgment or to carry the judgment into effect.[2] Thus, in an action in the nature of ejectment [3] or to determine adverse claims, the plaintiff is entitled to judgment without proof, upon a default after personal service of the summons. So, in an action to avoid a mortgage and a statutory foreclosure of the same for usury, the summons having been personally served, it was held that the relief demanded in the complaint might be granted without proof upon a default. The practice in such cases is similar to the chancery practice of taking the bill pro confesso.[4]

[1] See Doud, Sons & Co. v. Duluth Milling Co. 55 Minn. 53, 56 N. W. 463.

Digitized by Google

[2] Exley v. Berryhill, 37 Minn. 182, 33 N. W. 567; Young v. Young, 18 Minn. 90 Gil. 72.
[3] Doyle v. Hallam, 21 Minn. 515.
[4] Exley v. Berryhill, 37 Minn. 182, 33 N. W. 567.

§ 1277. A judgment for a divorce cannot be granted upon default without proof and the proof must be made out, in part at least, by the testimony of others than the parties.

G. S. 1894 § 5769; True v. True, 6 Minn. 458 Gil. 315; Young v. Young, 17 Minn. 181 Gil. 153; Clark v. Clark (Minn.) 90 N. W. 390.

Relief which may be awarded on default.

§ 1278. On default the relief which may be awarded the plaintiff is strictly limited in nature and degree to the relief specifically demanded in the complaint and it matters not that the allegations and proof would justify different or greater relief.

Minnesota Linseed Oil Co. v. Maginnis, 32 Minn. 193, 20 N. W. 85; Prince v. Farrell, 32 Minn. 293, 20 N. W. 234; Exley v. Berryhill, 37 Minn. 182, 33 N. W. 567; Spooner v. Bay St. Louis Syndicate, 47 Minn. 464, 50 N. W. 601; Doud, Sons & Co. v. Duluth Milling Co. 55 Minn. 53, 56 N. W. 463; Northern Trust Co. v. Albert Lea College, 68 Minn. 112, 71 N. W. 9; Heinrich v. Englund, 34 Minn. 395, 26 N. W. 122.

Notice.

§ 1279. In an action arising on contract for the payment of money only, when the plaintiff is entitled to judgment as a matter of course on default of an answer, the appearance of defendant does not entitle him to notice of the entry of judgment, any more than in case of entry of judgment upon a verdict, finding or report. But where, upon default,[1] judgment cannot be entered except on application to the court a defendant who has appeared is entitled to notice of such application.[2]

[1] Heinrich v. Englund, 34 Minn. 395, 26 N. W. 122.
[2] Davis v. Red River Lumber Co. 61 Minn. 534, 63 N. W. 1111; Banning v. Sabin, 41 Minn. 477, 43 N. W. 329.

Security.

§ 1280. When the summons is served by publication in actions arising on contract for the recovery of money only, the plaintiff is entitled to judgment as of course upon filing with the clerk proof of such service and that no answer has been received within the time allowed by law, together with the statutory security in certain cases in the same manner as if the summons had been personally served upon the defendant. So far as the formal entry of judgment is concerned, the proceeding against a non-resident who has been served by publication solely, is, with the exception as to security, the same as it is against a defendant who has been personally served.[1] Where judgment is entered without personal service of the summons it is not essential that the judgment roll should show that security was filed.[2]

Digitized by Google

[1] Cousins v. Alworth, 44 Minn. 505, 47 N. W. 169.
[2] Shaubhut v. Hilton, 7 Minn. 506 Gil. 412; Brown v. Brown, 28 Minn. 501, 11 N. W. 64.

Variance between summons and complaint—effect of failure to apply to court.

§ 1281. In an action wherein the complaint stated a cause of action arising on contract for the payment of money only and demanded judgment for a specified sum, the summons notified the defendant that in case of default the plaintiff would "have the amount he is entitled to recover ascertained by the court, or under its direction, and take judgment for the amount so ascertained." The summons and complaint were served together on defendant. Upon default of answer judgment was entered by the clerk without application to the court. The supreme court held the variance no ground for a reversal, saying: "Inasmuch as both summons and complaint were served together, we think the variance between the two was immaterial. The defendant could not have been misled by the form of the notice, as the complaint informed him of the nature of the cause of action and the amount for which judgment was asked. He could not have taken advantage of the variance, under the circumstances, even on motion. The form of notice in the summons will confer no right upon a plaintiff to enter judgment without application to the court, when application is necessary by the form of the complaint; and, by analogy of reasoning, we think that when both summons and complaint are served, a plaintiff is entitled to judgment, without application to the court, notwithstanding the form of notice in the summons, when such application is unnecessary under the form of the complaint. But even if the plaintiffs in this case should regularly have applied to the court for judgment, their failure to do so was an irregularity which did not prejudice defendant, for the reason that, under the complaint, plaintiffs would have been entitled to the order for judgment as a matter of course." [1]

[1] Heinrich v. Englund, 34 Minn. 395, 26 N. W. 122. See also, Libby v. Mikelborg, 28 Minn. 38, 8 N. W. 903; Hersey v. Walsh, 38 Minn. 521, 38 N. W. 613.

Misnomer of plaintiff.

§ 1282. A judgment by default against the defendants in an action is valid notwithstanding a mistake in the summons in the Christian name of one of the plaintiffs.

Bradley v. Sandilands, 66 Minn. 40, 68 N. W. 321.

Effect of an attachment.

§ 1283. If an attachment has been issued it is not necessary to refer to the fact in the order for judgment or in the judgment. In this state the practice is to enter a general money judgment and issue a general execution without referring to the attachment.

Hencke v. Twomey, 58 Minn. 550, 60 N. W. 667.

Irregularity in entering judgment.

§ 1284. If the proper judgment is entered it is immaterial that it was entered by the clerk without an order where regularly an appli-

Digitized by Google

cation should have been made to the court.[1] In an action against four defendants jointly indebted upon a contract, a judgment upon default entered by the clerk against the three only who were served with summons is not void but only irregular or erroneous.[2] Where a cause of action in tort is joined with others on contract it is error for the clerk upon default to enter judgment including the amount claimed for the tort.[3]

[1] Hersey v. Walsh, 38 Minn. 521, 38 N. W. 613; Libby v. Mikelborg, 28 Minn. 38, 8 N. W. 903; Heinrich v. Englund, 34 Minn. 395, 26 N. W. 122; Slater v. Olson, 83 Minn. 35, 85 N. W. 825; Hencke v. Twomey, 58 Minn. 550, 60 N. W. 667.

[2] Dillon v. Porter, 36 Minn. 341, 31 N. W. 56.

[3] Reynolds v. La Crosse etc Packet Co. 10 Minn. 178 Gil. 144.

Review of assessment of damages.

§ 1285. Whether excessive damages were awarded upon an inquest and assessment of damages will not be considered by the supreme court upon affidavits, but only upon a case presenting the evidence upon which the verdict was founded.

Moran v. Mackey, 32 Minn. 266, 20 N. W. 159.

Collateral attack.

§ 1286. A judgment entered upon default is as free from collateral attack as a judgment rendered after a trial on the merits. The determination by the clerk or the court of the sufficiency of the proof of service of summons and no answer is conclusive on the parties until set aside or reversed by a direct proceeding in the same action.

Kipp v. Fullerton, 4 Minn. 473 Gil. 366; Hotchkiss v. Cutting, 14 Minn. 537 Gil. 408.

Presumptions in favor of default judgment.

§ 1287. Where judgment is entered by default it will be presumed that whatever proofs were necessary were taken.[1] In the absence of anything in the record to the contrary it will be presumed that the court had jurisdiction over the person of the defendant.[2] But if the record shows that jurisdiction over the defendant was acquired, if acquired at all, by publication of summons the record must affirmatively show compliance with the statutory requirements as to service of summons by publication.[3]

[1] Hotchkiss v. Cutting, 14 Minn. 537 Gil. 408; Skillman v. Greenwood, 15 Minn. 102 Gil. 77.

[2] Skillman v. Greenwood, 15 Minn. 102 Gil. 77.

[3] See § 345.

Judgment on issue of law—statute.

§ 1288. "On a judgment for the plaintiff, upon an issue of law, the plaintiff may proceed in the manner prescribed by the statute upon the failure of the defendant to answer where the summons was personally served. If judgment is for the defendant, upon an issue of law, and the taking of an account or the proof of any fact is necessary to enable the court to complete the judgment, a reference may be ordered as by statute provided."

[G. S. 1894 § 5387]

Digitized by Google

§ 1289. When a demurrer is sustained without leave to amend the defendant is entitled to a judgment of dismissal with his costs.[1] In an action of tort the plaintiff is not entitled to proceed under this section to assess his damages, without notice to a defendant who has appeared.[2]

[1] Deuel v. Hawke, 2 Minn. 50 Gil. 37. See Aetna Ins. Co. v. Swift, 12 Minn. 437 Gil. 326; Schuler v. Wood, 81 Minn. 372, 84 N. W. 121.

[2] Davis v. Red River Lumber Co. 61 Minn. 534, 63 N. W. 1111.

CONFESSION OF JUDGMENT.

The statutes.

§ 1290. "A judgment by confession may be entered without action, either for money due, or to become due, or to secure any person against contingent liability on behalf of the defendant, or both, in the manner prescribed by this chapter."

[G. S. 1894 § 6077]

§ 1291. "A statement in writing should be made, signed by the defendant, and verified by his oath, to the following effect:

(1) It shall authorize the entry of judgment for a specified sum.

(2) If it is for money due, or to become due, it shall state concisely the facts out of which it arose, and show that the sum confessed therefor is justly due, or to become due.

(3) If it is for the purpose of securing the plaintiff against a contingent liability, it shall state concisely the facts constituting the liability, and show that the sum confessed therefor, does not exceed the same."

[G. S. 1894 § 6078]

§ 1292. "The statement may be filed with the clerk of the district court, who shall indorse upon it, and enter in a judgment book, a judgment of the district court for the amount computed. The statement and verification, with the judgment indorsed thereon, become the judgment roll."

[G. S. 1894 § 6079]

§ 1293. "Judgment may also be rendered in the district court in vacation, or in term, upon a plea of confession signed by an attorney of such court, although there is no action then pending between the parties, if the following provisions are complied with, and not otherwise:

(1) The authority for confessing such judgment shall be in some proper instrument, distinct from that containing the bond, contract, or other evidence of the demand for which judgment is confessed.

(2) Such authority shall be filed with the clerk of the court in which the judgment is entered, at the time of filing and docketing such judgment."

[G. S. 1894 § 6079] This statute, which was derived from Wisconsin, is rarely resorted to in practice. See Marshall v. Hart, 4 Minn. 450 Gil. 352.

Digitized by Google

§ 1294. "When the authority mentioned in the last section is filed with the clerk of the district court, judgment may be entered thereon, in the same manner as is provided in section one of this chapter."
[G. S. 1894 § 6081]

§ 1295. "Any judgment entered, under either of the provisions of this chapter, in vacation, shall be as final and effectual as judgment rendered upon a verdict of a jury; and unless special provision is made for a stay of execution upon such judgment, execution may issue immediately."
[G. S. 1894 § 6084]

In what cases allowable.

§ 1296. The statute does not contemplate a confession of judgment for damages occasioned by a tort,[1] nor for a debt after an action for its enforcement has been commenced.[2] Although it is necessary that the debt should be a legal one yet it is not necessary that it should be enforceable. Thus, confession of judgment may be made for a debt which is barred by the statute of limitations,[3] or within the statute of frauds.[4]

[1] Burkham v. Van Saun, 14 Abb. Pr. N. S. (N. Y.) 163; Miller v. French, 27 Ill. App. 552.
[2] Boutel v. Owens, 2 Sandf. (N. Y.) 655; Elliot v. Woodhall, 12 N. J. L. 126; Crouse v. Derbyshire, 10 Mich. 479.
[3] Woods v. Irwin, 141 Pa. St. 278; Cross v. Moffat, 11 Colo. 210.
[4] Keen v. Klecker, 42 Pa. St. 529.

Strict construction.

§ 1297. The statutes allowing judgment by confession without action are to be strictly construed and their requirements followed with precision.
Chapin v. Thompson, 20 Cal. 686; Edgar v. Greer, 7 Iowa 136.

Who may confess judgment.

§ 1298. A partner cannot confess judgment against his firm or the other members of his firm, but if he attempts to do so the judgment will bind him. Under our statute all the joint debtors to be bound must sign the confession.[1] In this state a married woman may undoubtedly confess judgment for her separate debts.[2] An infant or other person under disability cannot confess judgment.[3] An officer of a corporation is not generally authorized to confess judgment.[4]

[1] Stoutenburgh v. Vandenburgh, 7 How. (N. Y.) 229; Hopper v. Lucas, 86 Ind. 43.
[2] See First Nat. Bank v. Garlinghouse, 53 Barb. (N. Y.) 615.
[3] Bennett v. Davis, 6 Cowen (N. Y.) 393; L'Amoureaux v. Crosby, 2 Paige (N. Y.) 422; Person v. Warren, 14 Barb. (N. Y.) 488.
[4] Ford v. Hill, 92 Wis. 188.

Signature.

§ 1299. The statute requires that the party making the confession must sign the statement but it has been held sufficient if he signs the verification.

Digitized by Google

Kern v. Chalfant, 7 Minn. 487 Gil. 393. See also, Purdy v. Upton, 10 How. Pr. (N. Y.) 494.

Verification.

§ 1300. The verification should be positive and not on information and belief.[1] It may be made before the attorney for the plaintiff if he is a notary.[2] A defective verification may be amended.[3]

[1] Ingram v. Robbins, 33 N. Y. 409; Cook v. Whipple, 55 N. Y. 150.

[2] Post v. Coleman, 9 How. Pr. (N. Y.) 64.

[3] Cook v. Whipple, 55 N. Y. 150.

Sufficiency of the statement.

§ 1301. The purpose of the statute in requiring the statement of facts out of which the indebtedness arose is to protect creditors, and to prevent fraud by facilitating its detection, by enabling creditors to investigate the transaction out of which the debt might be alleged to have arisen. It is apparent that, in view of this purpose, a distinction must be taken between the transaction—the facts out of which the debt arose—and the mere evidence of it which the parties to the confession have made. If only that evidence be stated, creditors will be no better directed in their inquiries than by the judgment confessed. It is therefore uniformly agreed that stating such evidence as the note, bond, or other writing will not answer the purpose of the statute, and that the facts which furnish the consideration for the note, bond, or other writing must be stated far enough to put creditors on inquiry as to the existence of such facts, and to direct them so that they can make such inquiry.[1] Formerly some courts were inclined to hold with exceeding strictness against statements for confessions of judgments, when attacked by creditors; but the general doctrine of the later cases is to the effect that the requirement that the facts be stated out of which the indebtedness arose is intended to enable other creditors to test the bona fides of the transaction by which a particular debt is preferred; that it is not the object of the statute to compel the debtor to state sufficient of the transaction to enable other creditors to form an opinion, from the facts stated, as to the integrity of the debtor in confessing judgment, but that all that is required is to state facts sufficient to enable them to investigate the transaction, and form their opinion of the honesty of the judgment from the facts thus ascertained.[2]

[1] Wells v. Gieseke, 27 Minn. 479, 8 N. W. 380; Kern v. Chalfant, 7 Minn. 487 Gil. 393; Cleveland Co-Operative Stove Co. v. Douglas, 27 Minn. 177, 6 N. W. 628; Hackney v. Wollaston, 73 Minn. 114, 75 N. W. 1037.

[2] Atwater v. Manchester Savings Bank, 45 Minn. 341, 48 N. W. 187.

Effect of insufficient statement.

§ 1302. A judgment by confession, entered upon a statement of facts insufficient to satisfy the requirements of the statute, is valid as between the parties. The judgment debtor cannot avoid it on

Digitized by Google

that ground alone; nor can one do so who claims rights of property under him, but whose interests are not prejudiced thereby.

Coolbaugh v. Roemer, 30 Minn. 424, 15 N. W. 869. See also, Wells v. Gieseke, 27 Minn. 478, 8 N. W. 380; Hackney v. Wollaston, 73 Minn. 114, 75 N. W. 114.

Who may attack judgment.

§ 1303. Such a judgment may be attacked either for insufficiency in the statement or for fraud, by judgment or attaching creditors who are prejudiced.[1] It may also be attacked by a purchaser for value who received his deed before, but did not record it until after, the judgment was confessed.[2] Whether a subsequent purchaser for value without actual notice may do so is an open question in this state.[3] In New York it is settled that he may.[4] The judgment debtor cannot avoid such a judgment for insufficiency of the statement,[5] but the court may, in its discretion, open it and allow him to make a defence on the merits.[6] An assignee for the benefit of creditors may attack a judgment confessed by his assignor.[7]

[1] Wells v. Gieseke, 27 Minn. 478, 8 N. W. 380; Auerbach v. Gieseke, 40 Minn. 258, 41 N. W. 946; Atwater v. Manchester Savings Bank, 45 Minn. 341, 48 N. W. 187; Hackney v. Wollaston, 73 Minn. 114, 75 N. W. 1037.

[2] Hackney v. Wollaston, 73 Minn. 114, 75 N. W. 1037.

[3] Id. See Kern v. Chalfant, 7 Minn. 487 Gil. 393; Coolbaugh v. Roemer, 30 Minn. 424, 15 N. W. 869; Marshall v. Hart, 4 Minn. 450 Gil. 352.

[4] Kendall v. Hodgins, 1 Bosw. (N. Y.) 659.

[5] Coolbaugh v. Roemer, 30 Minn. 424, 15 N. W. 869.

[6] McCabe v. Sumner, 40 Wis. 386.

[7] Cleveland Co-Operative Stove Co. v. Douglas, 27 Minn. 177, 6 N. W. 628. See Pehrson v. Hewitt, 79 Cal. 594.

Mode of attack.

§ 1304. In New York it is held that a judgment by confession may be set aside either by motion[1] or action.[2] A similar practice prevails in this state.[3]

[1] Chappel v. Chappel, 12 N. Y. 215; Dunham v. Waterman, 17 N. Y. 9; Norris v. Denton, 30 Barb. (N. Y.) 117.

[2] Dunham v. Waterman, 6 Abb. Pr. (N. Y.) 357; Miller v. Earle, 24 N. Y. 110.

[3] See Cleveland Co-Operative Stove Co. v. Douglas, 27 Minn. 177, 6 N. W. 628 (motion); Hackney v. Wollaston, 73 Minn. 114, 75 N. W. 1037 (action).

Amendment nunc pro tunc.

§ 1305. As between the parties the court has power to amend the proceedings as justice may require. An amendment nunc pro tunc of an insufficient statement for judgment by confession will not be allowed to the prejudice of subsequent judgment creditors whose executions have been levied, and who have begun proceedings to avoid the prior judgment. An order allowing such amendment,

Digitized by Google

without notice to such subsequent judgment creditors, is of no effect as to them.

Wells v. Gieseke, 27 Minn. 478, 8 N. W. 380; Auerbach v. Gieseke, 40 Minn. 258, 41 N. W. 946.

Vacating judgment in part.

§ 1306. Where the statement is for two or more liabilities the judgment may be vacated as to those insufficiently stated and allowed to stand as to the others if not vitiated by fraud.

Kern v. Chalfant, 7 Minn. 487 Gil. 393; Wells v. Gieseke, 27 Minn. 478, 8 N. W. 380.

OFFER OF JUDGMENT

The statute.

§ 1307. "The defendant may, at any time before the trial or judgment, serve upon the plaintiff an offer to allow judgment to be taken against him for the sum or property, [or] [1] to the effect therein specified, with costs. If the plaintiff accepts the offer, and gives notice thereof, within ten days, he may file the offer, with an affidavit of notice of acceptance, and the clerk shall thereupon enter judgment accordingly; if the notice of acceptance is not given, the offer is to be deemed withdrawn, and cannot be given in evidence; and if the plaintiff fails to obtain a more favorable judgment, he cannot recover costs, but must pay costs to the defendant."

[G. S. 1894 § 5405]

[1] An omission. See statutes in other code states.

Municipal courts.

§ 1308. This statute is not applicable to actions in municipal courts established in accordance with the terms of Laws 1895 ch. 229.

J. Thompson & Sons Mfg. Co. v. Ferch, 78 Minn. 520, 81 N. W. 520.

Statutory.

§ 1309. The right to offer judgment does not exist at common law. Being wholly statutory it cannot be exercised when not expressly authorized.

J. Thompson & Sons Mfg. Co. v. Ferch, 78 Minn. 520, 81 N. W. 520.

To what actions applicable.

§ 1310. The right to offer judgment under our statute is not limited to actions ex contractu but extends to actions ex delicto [1] and actions of an equitable nature.[2]

[1] Bridenbecker v. Mason, 16 How. Pr. (N. Y.) 203.

[2] Singleton v. Home Ins. Co. 121 N. Y. 644.

Where there are several defendants.

§ 1311. The right to offer judgment extends to actions in which there are several defendants.[1] All the parties against whom judgment is offered must ordinarily join in the offer.[2] One joint debtor

Digitized by Google

cannot bind his co-defendant by an offer. Thus one partner cannot offer judgment against his co-defendant when both have been served with process.[3] Where only one of several joint debtors has been served with process, he may make an offer which will bind the joint property of the defendants not served and the individual property of the party making the offer.[4] If such an offer is made by collusion between the plaintiff and the defendant served the judgment entered thereon may be set aside.[5]

[1] Bridenbecker v. Mason, 16 How. Pr. (N. Y.) 203; Griffiths v. De Forest, 16 Abb. Pr. (N. Y.) 292; Kantrowitz v. Kulla, 13 Civil Pro. (N. Y.) 74.

[2] Griffiths v. De Forest, 16 Abb. Pr. (N. Y.) 292.

[3] Garrison v. Garrison, 67 How. Pr. (N. Y.) 271; Bridenbecker v. Mason, 16 How. Pr. (N. Y.) 203.

[4] Bridenbecker v. Mason, 16 How. Pr. (N. Y.) 203.

[5] Everson v. Gehrman, 1 Abb. Pr. (N. Y.) 167; Binney v. Le Gal, 1 Abb. Pr. 283.

Time of making offer.

§ 1312. An offer of judgment under our statute, to be of any effect upon the recovery of costs occasioned by the trial, must be made and served ten days before the commencement of the trial.[1] An offer of judgment and answer served the same day may be deemed served together or at different times according to the intention of the parties.[2]

[1] Mansfield v. Fleck, 23 Minn. 61.

[2] Kautz v. Vanderburgh, 77 Hun (N. Y.) 591.

Time within which to accept offer.

§ 1313. The plaintiff is entitled to the full period of ten days in which to accept or reject the offer, and, in case of acceptance, to give notice thereof. In ascertaining this period, the day of service of the offer must be excluded and the trial must be regarded as a single point of time identical with its commencement.

Mansfield v. Fleck, 23 Minn. 61.

Effect of offer as a stay.

§ 1314. The right of the plaintiff to take ten days in which to make an election is inconsistent with a co-existing right in the defendant to take any steps in the action adverse to the plaintiff contrary to the offer. The offer amounts to a written stipulation on the part of the defendant, waiving all right to proceed in the action for the term of ten days or until plaintiff makes his election.

Walker v. Johnson, 8 How. Pr. (N. Y.) 241.

Withdrawal of offer.

§ 1315. An offer of judgment cannot be withdrawn within ten days after it is made.

Hacket v. Edwards, Merrill & Co. 22 Misc. (N. Y.) 659.

Amendment of complaint.

§ 1316. If the plaintiff is allowed to amend his complaint after an offer of judgment the defendant should be allowed to amend his

Digitized by Google

offer.[1] An amendment of a complaint enlarging the plaintiff's demand, although it calls for a new answer, will not deprive the defendant of the benefit of his offer.[2]

[1] Brooks v. Mortimer, 10 App. Div. (N. Y.) 518.

[2] Kilts v. Seeber, 10 How Pr. (N. Y.) 270; Tompkins v. Ives, 30 How. Pr. (N. Y.) 13.

Requirements of offer.

§ 1317. The offer must be unconditional so that judgment may be entered thereon by the clerk forthwith and without application to the court or the submission of proof.[1] It must be clear, positive and explicit. The plaintiff is not required to take the responsibility of accepting or rejecting an offer of doubtful construction which may lead to future litigation.[2] An offer which may be made certain by a simple computation is sufficient.[3] The offer must be full and responsive to the complaint. Where, in an action to recover personal property, the defendant returned the property to the plaintiff before trial and offered to allow judgment to be taken against him for eight dollars damages and costs, the offer was held insufficient because it did not offer to allow judgment to be entered determining the title.[4]

[1] Pinckney v. Childs, 7 Bosw. (N. Y.) 660; Shepherd v. Moodhe, 150 N. Y. 183; De Long v. Wilson, 80 Iowa 216; Harbo v. Board of County Com'rs, 63 Minn. 238, 65 N. W. 457.

[2] Upton v. Foster, 148 Mass. 592; Bettis v. Goodwill, 32 How. Pr. (N. Y.) 137; Post v. N. Y. etc. Ry. Co. 12 How. Pr. (N. Y.) 552.

[3] Burnett v. Westfall, 15 How. Pr. (N. Y.) 420.

[4] Oleson v. Newell, 12 Minn. 186 Gil. 114.

For full amount claimed.

§ 1318. While the object of the statute is not to afford a substitute for confession of judgment it is held that the defendant may offer judgment for the full amount claimed.

Ross v. Bridge, 24 How. Pr. (N. Y.) 163.

Must include costs.

§ 1319. It is essential that the offer should include costs.[1] An offer of judgment for a specified sum and "accrued costs" is sufficient as regards costs.[2] The term "costs" as used in this connection includes disbursements.[3]

[1] Ranney v. Russell, 3 Duer (N. Y.) 689; Warden v. Sweeney, 86 Wis. 161.

[2] Petrosky v. Flanagan, 38 Minn. 26, 35 N. W. 665.

[3] Woolsey v. O'Brien, 23 Minn. 71.

Effect of acceptance.

§ 1320. An offer of judgment and an acceptance constitute a contract which the court cannot set aside on motion nor can the court order an amendment which would operate to change the contract without the consent of both parties.[1] Where a party accepts an of-

Digitized by Google

fer of judgment he is entitled to costs already accrued,[2] but he is not entitled to costs accruing subsequently.[3] An acceptance of an offer of judgment precludes a party from bringing another action for the same cause. In other words a judgment entered upon an offer operates as an estoppel in the same way and to the same extent as a judgment based on a verdict or finding.[4]

[1] Stilwell v. Stilwell, 81 Hun (N. Y.) 392; Shepherd v. Moodhe, 150 N. Y. 188.

[2] Douglass v. Macdurmid, 2 How. Pr. (N. Y.) 289; Woolsey v. O'Brien, 23 Minn. 71.

[3] Van Allen v. Glass, 60 Hun (N. Y.) 546.

[4] Davies v. New York, 93 N. Y. 250; Shepherd v. Moodhe, 150 N. Y. 183.

Effect of refusal.

§ 1321. If a party refuses an offer of judgment and finally recovers a more favorable judgment than that offered the case stands exactly as if no offer had been made and he is entitled to full costs;[1] if he fails to recover a more favorable judgment it is generally held, under statutes similar to our own, that he may recover costs up to the time of the offer,[2] but is not entitled to costs accruing after the offer and must pay them to the opposite party.[3] In this state the rule seems to be otherwise as respects costs prior to the offer. "A defendant may offer to permit judgment to be taken against him for a specified sum and costs—that is, all the allowances to which the plaintiff is entitled up to the time his offer is accepted or deemed withdrawn; and, to enable plaintiff, in case of such an offer, to secure those allowances, he must either accept the offer, or secure, upon the trial, a larger sum than that offered. If he chooses to take the risk of recovering less, he must take the risk of losing his right to such allowances, and of paying them to defendant."[4] This decision is unsound. The object of the statute is simply to save further expense of litigation.

[1] Upton v. Foster, 148 Mass. 592; Tompkins v. Ives, 36 N. Y. 75.

[2] Douthitt v. Finch, 84 Cal. 214; Manning v. Irish, 47 Iowa 650; Chicago etc. Ry. Co. v. Groh, 85 Wis. 641; Russ v. Brown, 113 N. C. 227; Burnett v. Westfall, 15 How. Pr. (N. Y.) 430.

[3] Chicago etc. Ry. Co. v. Groh, 85 Wis. 641; Bathgate v. Haskins, 63 N. Y. 261; Collins v. Lowry, 78 Wis. 329.

[4] Woolsey v. O'Brien, 23 Minn. 71.

What is a more favorable judgment.

§ 1322. In determining whether a judgment recovered after an offer is rejected is more favorable than the offer all the facts of the case must be considered and practical rather than technical considerations should control.[1] A judgment against all the defendants who are joint debtors is more favorable than a judgment for the same amount against less than all.[2] The import and effect of the offer must be determined by the condition of the pleadings at the time it was made.[3] If a counterclaim be pleaded after the offer and it is allowed its extinguishment is to be deemed beneficial to the

Digitized by Google

plaintiff to that extent.[4] Interest accruing on the claim between the offer and the entry of judgment should not be considered.[5] If the plaintiff recovers a more favorable judgment in the trial court but on appeal such judgment is modified so as to make it less favorable than the offer the defendant is entitled to costs.[6]

[1] See Kennedy v. McKone, 10 N. Y. App. Div. 88; Howard v. Farley, 29 How. Pr. (N. Y.) 4; Bettis v. Goodwill, 32 How. Pr. (N. Y.) 137; Dayton v. Parke, 67 Hun (N. Y.) 137; Baldwin v. Brown, 37 How. Pr. (N. Y.) 385.

[2] Griffiths v. De Forest, 16 Abb. Pr. (N. Y.) 292.

[3] Shepherd v. Moodhe, 150 N. Y. 188.

[4] Tompkins v. Ives, 36 N. Y. 75.

[5] Schulte v. Lestershire Boot etc. Co. 88 Hun (N. Y.) 226. See Bathgate v. Haskins, 63 N. Y. 261.

[6] Sturgis v. Spofford, 58 N. Y. 103. See Bathgate v. Haskins, 63 N. Y. 261; Lumbard v. Syracuse etc. Ry. Co. 62 N. Y. 290.

Entry of judgment.

§ 1323. When defendant is entitled to costs because the recovery is not more favorable to the plaintiff than an offer made such costs should be offset against the recovery and a single judgment entered for the difference in favor of the plaintiff.[1] The statute provides that the clerk shall enter judgment upon an offer without an order of court [2] and an offer which requires a preliminary application to the court is unavailing.[3]

[1] Coatsworth v. Ray, 28 Civ. Pro. (N. Y.) 6; Dingee v. Shears, 29 Hun (N. Y.) 210.

[2] Hill v. Northrop, 9 How. Pr. 525.

[3] Griffiths v. De Forest, 16 Abb. Pr. 292. But see, Bathgate v. Haskins, 63 N. Y. 261.

Acceptance must be unconditional.

§ 1324. The plaintiff must accept the offer unconditionally if at all. He cannot reserve the right to litigate a part of the claim in the future.

Sellers v. Union Lumbering Co. 36 Wis. 398.

Object of statute—liberal construction.

§ 1325. This statute affords a remedy which is a substitute for the common law cognovit.[1] The object of the statute is to encourage compromises and enable a defendant to avoid further expenses of litigation.[2] Inasmuch as the statute is of a remedial nature it should be liberally construed in furtherance of its object.[3]

[1] Kantrowitz v. Kulla, 13 Civ. Pro. (N. Y.) 74; Emery v. Emery, 9 How. Pr. (N. Y.) 130.

[2] Bettis v. Goodwill, 32 How. Pr. (N. Y.) 137; Woolsey v. O'Brien, 23 Minn. 71.

[3] Woolsey v. O'Brien, 23 Minn. 71.

On appeal from justice court.

§ 1326. Whether an offer of judgment under our statute may be made on appeal from a justice court is an open question.

Flaherty v. Rafferty, 51 Minn. 341, 53 N. W. 644.

Digitized by Google

Second offer.

§ 1327. The defendant may make a second offer if the first is not accepted.

Hibbard v. Randolph, 72 Hun (N. Y.) 626.

JUDGMENT LIEN

Nature of lien.

§ 1328. A judgment lien is not an estate or interest in the land. It only confers a right to levy on the same to the exclusion of other adverse interests, subsequent to the judgment. In short, a judgment creditor has no jus in re, but a mere power to make his general lien effectual by following up the steps of the law and consummating his judgment by an execution and levy on the land.[1] The docketing of a judgment, and the lien thereby acquired, performs the office and takes the place of an actual levy on land.[2] A lien by judgment does not exist except in consequence of the right of an execution for its enforcement.[3] It is purely a creature of statute.[4] The nature of the lien is not changed by the levy of an execution.[5]

[1] Ashton v. Slater, 19 Minn. 347 Gil. 300; Lebanon Savings Bank v. Hollenbeck, 29 Minn. 322, 13 N. W. 145; Steele v. Taylor, 1 Minn. 275 Gil. 210; Brackett v. Gilmore, 15 Minn. 245 Gil. 190; Burnell v. Tullis, 12 Minn. 572 Gil. 486; State v. District, 85 Minn. 283, 88 N. W. 755.

[2] Thompson v. Dale, 58 Minn. 365, 59 N. W. 1086.

[3] Id.

[4] Ashton v. Slater, 19 Minn. 347 Gil. 300.

[5] State v. District Court, 85 Minn. 755, 88 N. W. 755.

Duration of lien.

§ 1329. The ten year limitation is absolute and cannot be extended by means of a levy or action.[1] In calculating the ten years the first day should be excluded and the last day included.[2] The death of a judgment debtor does not operate to extend the life of a lien.[3]

[1] Newell v. Dart, 28 Minn. 248, 9 N. W. 732; Dole v. Wilson, 39 Minn. 330, 40 N. W. 161; Spencer v. Haug, 45 Minn. 231, 50 N. W. 305; Ashton v. Slater, 19 Minn. 347 Gil. 300.

[2] Spencer v. Haug, 45 Minn. 231, 50 N. W. 305; Davidson v. Gaston, 16 Minn. 230 Gil. 202.

[3] Erickson v. Johnson, 22 Minn. 380.

Upon what estates and interests.

§ 1330. Under the existing law the lien does not attach to the homestead of the judgment debtor.[1] Formerly the rule was otherwise.[2] When the owner of land executes a bond for the conveyance of the same he continues to be the legal owner as long as any part of the purchase money remains unpaid, and his interest, which is the fee subject to the equitable right of the obligee, is bound by the lien of a judgment duly docketed against him in the county

Digitized by Google

where the land is situated.[2] After the docketing, the obligee cannot acquire new rights in the land free from the lien.[4] The interest of a vendee under a subsisting contract for the sale of land, under which he has entered and paid part of the purchase price is subject to a judgment lien against him.[5] Where a deed of land, absolute in terms, and a simultaneous bond for reconveyance, duly recorded, constitute a mortgage, the mortgagee, that is, the grantee in the deed, has no interest subject to levy or to the lien of a judgment against him.[6] A trustee who, without the knowledge of his cestui que trust, purchases real estate, taking the title in his own name, and pays part of the consideration with trust funds in his hands and gives his own note and mortgage for the remainder, has an interest subject to a judgment lien against him.[7] "If a party dies after verdict or decision upon an issue of fact, and before judgment, the court may nevertheless render judgment thereon; such judgment is not a lien on the real estate of the deceased party, but is payable in the course of administration on his estate."[8] A duly docketed judgment is a lien on the real estate of the judgment creditor in the hands of a fraudulent grantee, though the conveyance was prior to the rendition of the judgment. A judgment creditor seeking relief against prior fraudulent conveyances has the choice of three remedies. He may sell the debtor's land upon execution issued on his judgment, and leave the purchaser to contest the validity of the defendant's title in an action of ejectment or otherwise; or, secondly, he may bring an action in equity to remove the fraudulent obstruction to the enforcement of his lien by execution, and await the result of the action before selling the property; or, thirdly, he may, on the return of the execution unsatisfied, bring an action in the nature of a creditors' bill, to have the conveyance adjudged fraudulent and void as to his judgment, and the lands sold by a receiver or other officer of the court, and the proceeds applied to the satisfaction of his judgment.[9]

[1] G. S. 1894 § 5528; Kaser v. Haas, 27 Minn. 406, 7 N. W. 824; Kipp v. Bullard, 30 Minn. 84, 14 N. W. 364.

[2] Folsom v. Carli, 5 Minn. 333 Gil. 264; Tillotson v. Millard, 7 Minn. 513 Gil. 419.

[3] Minneapolis etc. Ry. Co. v. Wilson, 25 Minn. 382; Welles v. Baldwin, 28 Minn. 408, 10 N. W. 427; Coolbaugh v. Roemer, 30 Minn. 424, 15 N. W. 869; Berryhill v. Potter, 42 Minn. 279, 44 N. W. 251; Baker v. Thompson, 36 Minn. 314, 31 N. W. 51.

[4] Coolbaugh v. Roemer, 30 Minn. 424, 15 N. W. 869.

[5] Reynolds v. Fleming, 43 Minn. 513, 45 N. W. 1079.

[6] Butman v. James, 34 Minn. 547, 27 N. W. 66.

[7] Martin v. Baldwin, 30 Minn. 537, 16 N. W. 449.

[8] G. S. 1894 § 5422; Berkey v. Judd, 27 Minn. 477, 8 N. W. 383; Id. 31 Minn. 271, 17 N. W. 618; Fowler v. Mickley, 39 Minn. 28, 38 N. W. 634; Fern v. Leuthold, 39 Minn. 212, 39 N. W. 397; Berkey v. St. Paul Nat. Bank, 54 Minn. 448, 56 N. W. 53; Oswald v. Pillsbury, 61 Minn. 520, 63 N. W. 1072.

[9] Jackson v. Holbrook, 36 Minn. 494, 32 N. W. 852; Wadsworth

Digitized by Google

v. Schisselbauer, 32 Minn. 84, 19 N. W. 390; Lane v. Innes, 43 Minn. 137, 45 N. W. 4. See Dunnell, Minn. Pl. §§ 1229–1247.

Conflicting liens.

§ 1331. Successive judgment liens take effect in the order of the docketing and a junior judgment creditor cannot secure a preference merely by virtue of superior diligence in taking steps to enforce his lien.[1] Where one conveys land, and at the same time takes back a mortgage for a part of the purchase money, the lien of the mortgage takes precedence of the lien of a prior judgment against the mortgagor.[2]

[1] Jackson v. Holbrook, 36 Minn. 494, 32 N. W. 852.

[2] Banning v. Edes, 6 Minn. 402 Gil. 270. See Peaslee v. Hart, 71 Minn. 319, 73 N. W. 976.

Limitation of lien.

§ 1332. In all cases the lien of the judgment is limited to the actual interest of the judgment debtor in the land.

Banning v. Edes, 6 Minn. 402 Gil. 270. See Martin v. Baldwin, 30 Minn. 537, 16 N. W. 449; Steele v. Taylor, 1 Minn. 275 Gil. 210.

Debtor cannot defeat.

§ 1333. When a judgment lien has attached it cannot be defeated by the act of the judgment debtor without the consent of the judgment creditor.

Campion v. Whitney, 30 Minn. 177, 14 N. W. 806.

Priority of lien as affected by recording act.

§ 1334. Aside from the recording act judgment debtors are not regarded as bona fide purchasers.[1] The recording act[2] gives a judgment lien priority over unrecorded conveyances of which the judgment creditor had no notice at the time of the docketing;[3] otherwise when he had notice, either actual or constructive.[4] But a judgment takes precedence of unrecorded conveyances only as to such titles as appear of record.[5] The recording act does not give judgment liens precedence over resulting trusts.[6] The statutory interest of one spouse in the real property of the other is not within the recording act,[7] but it is subject to a judgment lien.[8]

[1] Greenleaf v. Edes, 2 Minn. 264 Gil. 226; School District v. Peterson, 74 Minn. 122, 76 N. W. 1126; Martin v. Baldwin, 30 Minn. 537, 16 N. W. 449.

[2] G. S. 1894 § 4180.

[3] Ferguson v. Kumler, 11 Minn. 104 Gil. 62; Dutton v. McReynolds, 31 Minn. 66, 16 N. W. 468; Wilkins v. Bevier, 43 Minn. 213, 45 N. W. 157; Wilcox v. Leominster Nat. Bank, 43 Minn. 541, 45 N. W. 1136; Welles v. Baldwin, 28 Minn. 408, 10 N. W. 427; Bank of Ada v. Gullikson, 64 Minn. 91, 66 N. W. 131; Clark v. Greene, 73 Minn. 467, 76 N. W. 263; School District v. Peterson, 74 Minn. 122, 76 N. W. 1126. The law was

Digitized by Google

formerly otherwise: Greenleaf v. Edes, 2 Minn. 264 Gil. 226; Dunwell v. Bidwell, 8 Minn. 34 Gil. 18; Johnson v. Robinson, 20 Minn. 189 Gil. 169; School District v. Peterson, 74 Minn. 122, 76 N. W. 1126; Steele v. Taylor, 1 Minn. 275 Gil. 210.

[4] Lamberton v. Merchants' Nat. Bank, 24 Minn. 281; Dyer v. Thorstad, 35 Minn. 532, 29 N. W. 345; Baker v. Thompson, 36 Minn. 314, 31 N. W. 51; Wilkins v. Bevier, 43 Minn. 213, 45 N. W. 157; Groff v. State Bank, 50 Minn. 234, 52 N. W. 651; Lebanon Savings Bank v. Hollenbeck, 29 Minn. 322, 13 N. W. 145; N. W. Land Co. v. Dewey, 58 Minn. 359, 59 N. W. 1085.

[5] Lebanon Savings Bank v. Hollenbeck, 29 Minn. 322, 13 N. W. 145; Lyman v. Gaar, Scott & Co. 75 Minn. 207, 77 N. W. 828; Dickinson v. Kinney, 5 Minn. 409 Gil. 332; Coles v. Berryhill, 37 Minn. 56, 33 N. W. 213; Golcher v. Brisbin, 20 Minn. 453 Gil. 407; School District v. Peterson, 74 Minn. 122, 76 N. W. 1126; Berryhill v. Smith, 59 Minn. 285, 61 N. W. 144; Hall v. Sauntry, 72 Minn. 420, 75 N. W. 720.

[6] School District v. Peterson, 74 Minn. 122, 76 N. W. 1126.

[7] Golcher v. Brisbin, 20 Minn. 453 Gil. 407; Snell v. Snell, 54 Minn. 285, 55 N. W. 1131.

[8] Laws 1901 ch. 33.

Death of debtor.

§ 1335. A judgment lien cannot be acquired on the land of the judgment debtor after his death.[1] The death of a judgment debtor does not operate to extend the life of a lien.[2]

[1] Byrnes v. Sexton, 62 Minn. 135, 64 N. W. 155; New Hampshire Savings Bank v. Barrows, 77 Minn. 138, 79 N. W. 660.

[2] Erickson v. Johnson, 22 Minn. 380.

Security on appeal—discharge of lien.

§ 1336. "That whenever judgment has been entered in any suit or action, and a motion has been made and is pending for a new trial, or an appeal has been taken to the supreme court, the judgment shall cease to be a lien on the real estate of the defendant, upon payment into court, as security of such judgment, the amount thereof, and such further sum as the court may by order direct and determine to be sufficient to secure all interest and costs that will probably accrue pending such appeal."

[G. S. 1894 § 5426]

Judgments of the federal courts.

§ 1337. "Judgments for the payment of money that have been heretofore or shall be hereafter duly docketed, either in the district or circuit court of the United States in and for the state of Minnesota, from the time of docketing the same become a lien on all the real property of the debtor in the county wherein said judgment was rendered, and in any other county in the state, upon filing, in the office of the clerk of the district court of such county, a duly certified transcript of such docket. Whenever any such transcript

Digitized by Google

shall be delivered to the clerk of the district court in and for any county in the state of Minnesota, the same shall be docketed in like manner, and have like effect, as if such judgment had been rendered in one of the district courts in and for the state of Minnesota."

[G. S. 1894 §§ 5427, 5428]

SATISFACTION OF JUDGMENTS

General statement.

§ 1338. The statute provides that "satisfaction of a judgment shall be entered in the judgment book, and noted upon the docket, upon an execution returned satisfied, or upon an acknowledgment of satisfaction filed with the clerk, made in the manner of an acknowledgment of a conveyance of real property, by the judgment creditor, or, within two years after the judgment by the attorney unless a revocation of his authority is previously entered upon the register. * * * Unless such revocation of authority has been so previously entered upon the register, the attorney of record may, at any time within two years after the judgment, satisfy and discharge the same and the lien thereof, by a brief entry to that effect made on the register, subscribed by such attorney, and witnessed and dated by the clerk of the court or his deputy." [1] Whenever a judgment is satisfied in fact otherwise than upon execution it is the duty of the party or attorney to give an acknowledgment of satisfaction, and, upon motion, the court may compel it, or may order the entry of satisfaction to be made without it. If the facts are in dispute the court may deny the motion and relegate the parties to an action.[2] A party may be compelled to accept a lawful tender and satisfy the judgment.[3] Judgments may be satisfied by being set off either on motion or by action.[4] An unfiled order of the court declaring a judgment to be satisfied is of no more effect than an order for judgment and is inadmissible as evidence of a satisfaction.[5] On an application to have a judgment satisfied of record it is immaterial that the consideration for the satisfaction did not move from the judgment debtor.[6] Satisfaction may be set aside for cause.[7] A judgment cannot be collaterally attacked by proof of its satisfaction subsequent to the acquirement of the grantee's rights under it.[8]

[1] G. S. 1894 § 5435.

[2] Woodford v. Reynolds, 36 Minn. 155, 30 N. W. 757; Ives v. Phelps, 16 Minn. 451 Gil. 407; Lough v. Pitman, 26 Minn. 345, 4 N. W. 229. See as to evidence of satisfaction: Brisbin v. Farmer, 16 Minn. 215 Gil. 187; Shelley v. Lash, 14 Minn. 498 Gil. 373; Presley v. Lowry, 26 Minn. 158, 2 N. W. 61; Walker v. Crosby, 38 Minn. 34, 35 N. W. 475.

[3] Rother v. Monahan, 60 Minn. 186, 62 N. W. 263; Roberts v. Meighen, 74 Minn. 273, 77 N. W. 139.

[4] Lindholm v. Itasca Lumber Co. 64 Minn. 46, 65 N. W. 931; Lundberg v. Davidson, 68 Minn. 328, 71 N. W. 395, 72 N. W. 71; Temple v. Scott, 3 Minn. 419 Gil. 306; Irvine v. Myers,

Digitized by Google

6 Minn. 562 Gil. 398; Hunt v. Conrad, 47 Minn. 557, 50 N. W. 614; Midland Company v. Broat, 50 Minn. 562, 52 N. W. 972; Morton v. Urquhart, 79 Minn. 390, 82 N. W. 653; Wyvell v. Barwise, 43 Minn. 171, 45 N. W. 11.

[5] Hall v. Sauntry, 80 Minn. 348, 83 N. W. 156.

[6] Ives v. Phelps, 16 Minn. 451 Gil. 407.

[7] First Nat. Bank v. Rogers, 22 Minn. 224.

[8] Hall v. Sauntry, 80 Minn. 348, 83 N. W. 156.

ASSIGNMENT OF JUDGMENTS

The statute.

§ 1339. "Whenever a judgment is assigned, the assignment thereof shall be in writing under the hand and seal of the assignor, and shall by him be acknowledged before a justice of the peace, or any other officer authorized to take the acknowledgment of deeds. The instrument of assignment of any such judgment shall be filed in the court rendering the judgment, with the files in the action, and an entry thereof shall be made upon the docket; and until so filed, any such assignment shall be void as against creditors levying upon or attaching the same, and as against subsequent purchasers in good faith for value. After a judgment has been assigned, and the assignment filed, as in this act provided, none but the assignee, his agent or attorney, shall have authority to receive or collect the amount due on such judgment, or to take out execution to enforce the collection of such judgment: provided, that no assignment shall be construed or allowed to deprive attorneys of their lien or interest in any judgment, for their fees, costs and disbursements."

[G. S. 1894 §§ 5430–5432]

§ 1340. The requirement of filing is applicable to an assignment of a part of a judgment.[1] As between the parties an assignment is valid though not filed and entered.[2] An assignee of a judgment on which the attorneys who recovered it for the judgment creditor issued execution, having recognized and acquiesced in their acts in the matter, is bound by the sheriff's payment to such attorneys the money collected on the execution. When attorneys recovering a judgment have a lien on it, and the judgment has been collected by the sheriff, the latter may, if the attorneys give him notice of the lien, and require him so to do, retain the amount of the lien out of the money so collected, when the money is demanded by an assignee of the judgment.[3] If the debtor, before notice of an assignment, pays the judgment in good faith an execution issued will be set aside and the judgment satisfied of record.[4] Where in the same action, there are judgments against and in favor of each party, the assignee of one of the judgments is charged with notice of the judgment against his assignor.[5] An action may be maintained against the assignee of a judgment to set it aside for want of jurisdiction.[6] An assignment is valid although it contains an error as to the date of the rendition and docketing of the judgment if the identity of the judgment plainly appears.[7] An assignee of a judgment takes

Digitized by Google

subject to all equities existing at the time between the judgment debtor and the assignor.[8] If an assignment is made to two persons and one of them bids off the property at a sale on execution under it he will hold it in trust.[9] The instrument need not be under seal.[10]

[1] Wheaton v. Spooner, 52 Minn. 417, 54 N. W. 372.
[2] Swanson v. Realization etc. Corporation, 70 Minn. 380, 73 N. W. 165.
[3] Gill v. Truelson, 39 Minn. 373, 40 N. W. 254.
[4] Dodd v. Brott, 1 Minn. 270 Gil. 205.
[5] Irvine v. Myers, 6 Minn. 562 Gil. 398 (decided prior to statute).
[6] Magin v. Lamb, 43 Minn. 80, 44 N. W. 675.
[7] Willis v. Jelineck, 27 Minn. 18, 6 N. W. 373.
[8] Brisbin v. Newhall, 5 Minn. 273 Gil. 217. See Dunnell, Minn. Pl. §§ 214–232.
[9] Holmes v. Campbell, 10 Minn. 401 Gil. 320.
[10] Laws 1899 ch. 86.

AMENDMENT OF JUDGMENTS AND JUDICIAL RECORDS

[For statute regulating amendments see §§ 1395, 1396]

To be made with caution.

§ 1341. Obvious considerations of public policy require that the records of a court should be as permanent and inviolable as an enlightened administration of justice will permit. Anciently, judicial records were regarded as sacrosanct.[1] The modern tendency is to relax more and more the common law rules upon this subject. Yet even now it is held that the power of amending records should be sparingly and cautiously exercised.[2] No general rule can be laid down. The discretion of the court should be exercised with reference to the facts of the particular case, the time of the application, the nature of the amendment sought and the probability of third parties being affected. Mere clerical mistakes ought to be freely corrected. But in no case should the court allow an amendment unless it is persuaded beyond a reasonable doubt of the truth of the facts on which the amendment is sought. "While we would go as far as any court in reprobating a rule which would place the proceedings of a court almost entirely at the mercy of the subordinate officers thereof, we would be scrupulously careful in adopting any rule which would tend to destroy the sanctity or lessen the verity of records. And while we admit the power to amend a record after the term has passed in which the record was made up, we would deprecate the exercise of the power in any case where there was the least room for doubt about the facts upon which the amendment was sought to be made."[3]

[1] Bilansky v. State, 3 Minn. 427 Gil. 313.
[2] Id.
[3] Id. Quoted with approval in In re Wight, 134 U. S. 136.

Digitized by Google

A matter of discretion.

§ 1342. The matter of amending the record in an action lies almost wholly in the discretion of the trial court and its action will not be reversed on appeal except for a clear abuse of discretion.[1] Each case should be determined with reference to its own facts and in furtherance of justice.[2]

[1] Berthold v. Fox, 21 Minn. 51; Burr v. Seymour, 43 Minn. 401, 45 N. W. 715.

[2] Bilansky v. State, 3 Minn. 427 Gil. 313; Berthold v. Fox, 21 Minn. 51; Burr v. Seymour, 43 Minn. 401, 45 N. W. 715; Mitchell v. Overman, 103 U. S. 62.

Clerical mistakes of clerk.

§ 1343. The district court, as a superior court with general jurisdiction, has full power, by the common law and by statute, to amend its records by correcting the clerical errors and misprisions of its clerk.

Berthold v. Fox, 21 Minn. 51; Lundberg v. Single Men's Endowment Assoc. 41 Minn. 508, 43 N. W. 394; Coit v. Waples, 1 Minn. 134 Gil. 110; State v. Crosley Park Land Co. 63 Minn. 205, 65 N. W. 268; State v. Macdonald, 24 Minn. 48; Thompson v. Bickford, 19 Minn. 17 Gil. 1.

Clerical mistakes of judge.

§ 1344. The district court may at any time after final judgment—at least where no rights of third parties are affected—correct its own clerical mistakes or misprisions so as to make its judgments conform to what it intended they should.[1] It may make such corrections upon its own motion.[2]

[1] McClure v. Bruck, 43 Minn. 305, 45 N. W. 438; Chase v. Whitten, 62 Minn. 498, 65 N. W. 84; Knappen v. Freeman, 47 Minn. 491, 50 N. W. 533; Hodgins v. Heanley, 15 Minn. 185 Gil. 142; U. S. Invest. Co. v. Ulrickson, 84 Minn. 14, 86 N. W. 613, 1004.

[2] Chase v. Whitten, 62 Minn. 498, 65 N. W. 84.

Amendment of verdict.

§ 1345. It is the general rule that a verdict when it is once recorded cannot be amended, corrected, contradicted or impeached either by the court or jury.[1] But "where it is undisputably clear from the judge's notes, or the record of the proceedings and evidence on the trial as settled or agreed on, that the jury have omitted to find facts which were consented to, or which were not disputed or actually litigated at the trial, and which should have been directed to have been included therein, but overlooked through inadvertence, we are of the opinion it is in the power of the trial court to supply the defect by an amendment of the verdict. The substance of the verdict as actually rendered cannot be changed or impeached, but defects and omissions in matters of form, or resulting from inadvertence or mistake, and not affecting the real merits of the controversy, may be supplied. The practice appears to be well settled

Digitized by Google

to allow verdicts, general or special, to be amended in this way in proper cases, where there appears to be no doubt or dispute as to what actually transpired at the trial; but, if the question is left in doubt, there must be a new trial at least of the particular issue." [2] The right of a trial court to amend and correct verdicts is limited to such amendments and corrections as tend to make them conform to the intention of the jury. A court cannot in any case, by an order amending a verdict, substitute its conclusions upon questions of fact for those found by the jury.[3] Though a verdict cannot be changed by the court in point of substance, it may be so amended in point of form or language as to give the real intention full expression, in proper legal terms.[4] A verdict may be amended by adding nominal damages.[5] The supreme court may correct a manifest error of the jury in making a calculation without ordering a new trial.[6]

[1] Dana v. Farrington, 4 Minn. 433 Gil. 335; Steele v. Etheridge, 15 Minn. 501 Gil. 413; Seeman v. Feeney, 19 Minn. 79 Gil. 54; Stevens v. Montgomery, 27 Minn. 108, 6 N. W. 456; Eaton v. Caldwell, 3 Minn. 134 Gil. 80.

[2] Crich v. Williamsburg City Fire Ins. Co. 45 Minn. 441, 48 N. W. 198.

[3] Miller v. Hogan, 81 Minn. 312, 84 N. W. 40.

[4] Coit v. Waples, 1 Minn. 134 Gil. 110.

[5] Id.

[6] Brown v. Lawler, 21 Minn. 327.

False return of sheriff.

§ 1346. A court has power to set aside or amend a false return of the sheriff and thereby make its record conform to the fact.

Suchaneck v. Smith, 53 Minn. 96, 54 N. W. 932; D. M. Osborne & Co. v. Wilson, 37 Minn. 8, 32 N. W. 782.

Judgment not authorized by order.

§ 1347. When the clerk enters a judgment not authorized by the order therefor the court will correct it on motion. The objection cannot be raised for the first time on appeal.

Hall v. Merrill, 47 Minn. 260, 49 N. W. 980; Nell v. Dayton, 47 Minn. 257, 49 N. W. 981; Lundberg v. Single Men's Endowment Assoc. 41 Minn. 508, 43 N. W. 394; Harper v. Carroll, 66 Minn. 487, 69 N. W. 610, 1069; Levine v. Lancashire Ins. Co. 66 Minn. 138, 68 N. W. 855; Parker v. Bradford, 68 Minn. 437, 71 N. W. 619; McLaughlin v. Nicholson, 70 Minn. 71, 72 N. W. 827, 73 N. W. 1; Bishop Iron Co. v. Hyde, 72 Minn. 16, 74 N. W. 1016. See Oldenberg v. Devine, 40 Minn. 409, 42 N. W. 88 (judgment entered irregularly on stipulation) and § 1235.

§ 1348. The reasons for the rule requiring objections to errors or irregularities of the clerk in entering judgment to be first raised in the trial court have been thus stated by our supreme court: "If the clerk entered judgment when proceedings were stayed, or if, in

Digitized by Google

entering judgment, he inserted a provision not justified by the direction for judgment, it would be mere clerical irregularity, the remedy for which, in the first instance, should be by application to the court below. We try any alleged error by the record certified to us. The court below, upon an allegation of irregularity of its clerk, may take evidence of facts not of record, and, in order to effect justice, disregarding mere technicalities, it may order matter of record to be supplied nunc pro tunc. As for instance, in this case, if the direction for judgment did not mention the name of the receiver, the court below might cure the irregularity by filing a direction naming the receiver nunc pro tunc. It is for considerations of this character that, before this court will consider alleged clerical irregularities, the decision of the court below must first be got upon them."[1] A still more fundamental reason is to be found in the appellate nature of the jurisdiction of the supreme court. It is a mere fiction that the action of the clerk in entering judgment is the action of the court and it is a fiction that ought not to be entertained for the purposes of review on appeal. It is axiomatic that the supreme court should not pass upon questions not passed upon by the lower court,[2] and appellate procedure is a domain in which fictions are wholly unjustifiable.

[1] Lundberg v. Single Men's Endowment Assoc. 41 Minn. 508, 43 N. W. 394.

[2] See §§ 1634, 1802.

Judgment not authorized by verdict.

§ 1349. When the clerk enters a judgment not authorized by the verdict the court will correct it on motion. The objection cannot be raised for the first time on appeal.

Eaton v. Caldwell, 3 Minn. 134 Gil. 80; County of Hennepin v. Jones, 18 Minn. 199 Gil. 182; Scott v. Minneapolis etc. Ry. Co. 42 Minn. 179, 43 N. W. 966; Hall v. Merrill, 47 Minn. 260, 49 N. W. 980.

Judgment not authorized by report of referee.

§ 1350. When the clerk enters a judgment not authorized by the report of a referee the court will correct it on motion. The objection cannot be urged for the first time on appeal.

Piper v. Johnston, 12 Minn. 60 Gil. 27; Hall v. Merrill, 47 Minn. 260, 49 N. W. 980.

Amendment of execution.

§ 1351. The power of the court to amend process is not confined to mesne process. An execution may be amended even after a sale under it.

Thompson v. Bickford, 19 Minn. 17 Gil. 1.

Amendment of names of parties.

§ 1352. Where an action was brought in the name of a guardian it was held that the court had authority, either before or after judgment, to amend the record by inserting the name of the ward as

Digitized by Google

plaintiff.[1] It is in the discretion of the trial court to amend the record in respect to the name of the plaintiff and if there is no suggestion that the defendant was misled the supreme court will affirm its action as a matter of course.[2] The court may also amend the name of a defendant. If a party who was in fact intended to be sued is personally served with process in which he is incorrectly designated he must appear and object to the misnomer and if he fails to do so any judgment rendered in the action will bind him until set aside or amended.[3]

[1] Perine v. Grand Lodge, 48 Minn. 82, 50 N. W. 1022; Beckett v. N. W. Masonic Aid Assoc. 67 Minn. 298, 69 N. W. 923.

[2] McEvoy v. Bock, 37 Minn. 402, 34 N. W. 740; Western Land Assoc. v. Thompson, 79 Minn. 423, 82 N. W. 677. See also, Bradley v. Sandilands, 66 Minn. 40, 68 N. W. 321.

[3] Casper v. Klippen, 61 Minn. 353, 63 N. W. 737; Ueland v. Johnson, 77 Minn. 543, 80 N. W. 700.

Amendment of proof of service of summons.

§ 1353. The jurisdiction of the court is acquired by the fact of the service of summons and not by the proof of such fact filed of record. Consequently the proof of such service may be amended or supplied on motion.[1] In an action commenced against a non-resident defendant by publication of summons, where judgment for want of an answer is properly entered, except that the affidavit of publication is insufficient, if the summons was in fact duly served, and no facts appear to show that it would be unjust to the defendant, or would affect intervening rights of third persons, the court ought to allow a proper affidavit of publication to be filed nunc pro tunc.[2] Of course the omission of acts essential to the acquisition of jurisdiction cannot be remedied by amendment. It is fundamental that a court cannot acquire jurisdiction by an amendment of the record nunc pro tunc.

[1] Hinkley v. St. Anthony Falls Water Power Co. 9 Minn. 55 Gil. 44; Fowler v. Cooper, 81 Minn. 19, 83 N. W. 464; Board of County Com'rs v. Morrison, 22 Minn. 178.

[2] Burr v. Seymour, 43 Minn. 401, 45 N. W. 715. See State v. Crosley Park Land Co., 63 Minn. 205, 65 N. W. 268; Bennett v. Blatz, 44 Minn. 56, 46 N. W. 319; Stai v. Selden, (Minn. 1902) 92 N. W. 6.

Supplying omissions in the record.

§ 1354. The court has full authority to supply omissions in the record on motion and its discretion in this regard is freely exercised to prevent the reversal of judgments on merely technical grounds. "If a jury is sworn according to law, or any other of the ordinary proceedings takes place in the progress of the trial of a cause, and the clerk omits to record the fact, we can see no reason why the record should not be made to conform to the truth, even after the term, when there exists no doubt about what the truth is." [1] Thus it was held allowable for the court in a capital case to amend the record so that it would show that when the jury retired they were put in charge of an officer who was duly sworn to keep them as prescribed by law; that

Digitized by Google

after each adjournment of the trial, and before the charge of the court, the jury were permitted to separate with the consent of the defendant; that the jury were polled at the request of the defendant on the coming in of the verdict, and each assented to it and that it was then entered and read over to the jury and by them again assented to.[2] Findings of fact and conclusions of law may be filed by the court after judgment nunc pro tunc.[3] Proof of service of summons either personally or by publication may be supplied by amendment.[4] After a judgment by default the court may allow a defect in the affidavit of no answer to be corrected.[5]

[1] Bilansky v. State, 3 Minn. 427 Gil. 313.
[2] Id.
[3] See § 529.
[4] See § 1353.
[5] Dunwell v. Warden, 6 Minn. 287 Gil. 194.

Rights of third parties.

§ 1355. An amendment of a record should in all cases be made with a saving of the rights of third persons, not parties or privies to the judgment. In any event the law protects their rights; but it is proper that such saving clause should be inserted in the order for amendment. The amendment of a judgment by confession stands on distinct grounds. An amendment nunc pro tunc of an insufficient statement for judgment by confession will not be allowed to the prejudice of subsequent judgment creditors whose executions have been levied and who have begun proceedings to avoid the prior judgment. An order allowing such amendment, without notice to such subsequent judgment creditors, is of no effect as to them.[2]

[1] Berthold v. Fox, 21 Minn. 51. See also: Burr v. Seymour, 43 Minn. 401, 45 N. W. 715.
[2] Wells v. Gieseke, 27 Minn. 478, 8 N. W. 380; Auerbach v. Gieseke, 40 Minn. 258, 41 N. W. 946.

Notice of motion.

§ 1356. A motion to amend the record in an action should be made on a written notice of eight days served on the adverse party.[1] It is sometimes held unnecessary to serve notice when the motion is made in term.[2] In this state, when judgments are not entered of any particular term and amendments may be made after as well as in term, it would probably be held necessary in all cases except where the amendment is merely formal and the court acts on its own motion to serve notice on the adverse party. The notice should be served on the adverse party personally rather than on his attorney if the authority of the latter has terminated.[3]

[1] See Berthold v. Fox, 21 Minn. 51.
[2] O'Conner v. Mullen, 11 Ill. 57; Balch v. Shaw, 7 Cush. (Mass.) 282.
[3] Berthold v. Fox, 21 Minn. 51. See Sheldon v. Risedorph, 23 Minn. 518; Phelps v. Heaton, 79 Minn. 476, 82 N. W. 990.

Digitized by Google

Who may oppose motion.

§ 1357. A person not a party to the action has no right to be heard in opposition to such a motion or to appeal from the order allowing the amendment.

Berthold v. Fox, 21 Minn. 51.

May be made after term.

§ 1358. In this state a record may be amended as well after as in term. The rule limiting the amendment of records to the term in which they were made up which was fixed by the old practice was adopted on the ground alone that the court and parties interested would be more capable of safely arriving at the truth while the transaction was fresh in their minds, than at a more remote period, and the wisdom of such limitation is manifest wherever the facts of the particular case fall within the reason upon which it stands; but when the facts stand undisputed, and the objection is based upon the technical point alone that the term has passed at which the record was made up, it would be doing violence to the spirit which pervades the administration of justice in the present age to sustain it.[1] An amendment cannot be made after an appeal and return to the supreme court so as to affect the rights of the parties on appeal.[2]

[1] Bilansky v. State, 3 Minn. 427 Gil. 313; In re Wight, 134 U. S. 136. See also, Berthold v. Fox, 21 Minn. 51; McClure v. Bruck, 43 Minn. 305, 45 N. W. 438; Nell v. Dayton, 47 Minn. 257, 49 N. W. 981; Chase v. Whitten, 62 Minn. 498, 65 N. W. 84; Gerish v. Johnson, 5 Minn. 23 Gil. 10. See § 1365.

[2] Floberg v. Joslin, 75 Minn. 75, 77 N. W. 557.

Extrinsic evidence admissible.

§ 1359. It is held in many jurisdictions that the record cannot be amended, at least after term, by reference to evidence dehors the record—that there must be something in the record to amend by.[1] In this state the rule is otherwise. The court may consider any competent evidence or act on its own memory.[2] The minutes of the judge are competent but not conclusive evidence.[3] The notes of the stenographic reporter are also competent evidence.[4] When there is nothing more to rely on than mere memory the court should act with great caution.[5]

[1] 1 Black, Judgments, § 165; 17 Ency. Pl. & Prac. 928.

[2] Lundberg v. Single Men's Endowment Assoc. 41 Minn. 508, 43 N. W. 394.

[3] Gillett v. Booth, 95 Ill. 183. See Crich v. Williamsburg City Fire Ins. Co. 45 Minn. 441, 48 N. W. 198.

[4] Sullivan v. Eddy, 154 Ill. 199.

[5] Frink v. Frink, 43 N. H. 508.

Replacing lost records.

§ 1360. A court has the power to replace its own records when lost or destroyed. This power extends to supplying any pleadings or other papers in civil cases before as well as after judgment.

Red River etc. Ry. Co. v. Sture, 32 Minn. 95, 20 N. W. 229.

Digitized by Google

Lost papers.

§ 1361. It is provided by statute that "if an original pleading or paper is lost, or withheld by any person, the court may authorize a copy thereof to be filed and used instead of the original."

[G. S. 1894 § 5424]

How amendment should be made.

§ 1362. Amendments should not be made by erasures or interlineations. They should be made by appending the order of amendment to the roll, as well as by entering it in the proper book, and by referring in the margin of the entry of the judgment to an amendment as made by an order of such a date. The portions changed or omitted should be designated by brackets, underscoring, or otherwise. The judgment may properly be entered anew as amended.

Sluyter v. Smith, 2 Bosw. (N. Y.) 673.

Order.

§ 1363. The clerk has no authority to make a nunc pro tunc entry without a written order of the court.

Rockwood v. Davenport, 37 Minn. 533, 35 N. W. 377.

Appeal.

§ 1364. An order granting or denying an application for an amendment of the record is appealable.

Nell v. Dayton, 47 Minn. 257, 49 N. W. 981.

Modification of judgment.

§ 1365. There is a sharp distinction between amending a judgment so that it may conform to the original intention of the court and amending it to correct judicial error. If a judgment entered without application to the court is erroneous, it is an irregularity which may be corrected on motion, and the court may either modify or vacate it. But if such a judgment is entered upon application to the court, and pursuant to its order, the case is different. The court is presumed to have decided the plaintiff's right to recover to the full extent justified by its order. There may be error in the decision of the court; but if the judgment follows the order, there is no irregularity in its entry. At common law the court might, at any time during the same term, correct any error in its judgment, even after it was in fact entered, but had no right to do so after the close of the term. Under common law practice all causes came on to be disposed of at some term, and all judgments were entered as of the term at which the cause was heard, and the court was supposed to retain control over causes during the entire term at which they came on to be heard, and not to have finally disposed of them until the term closed. This theory is not retained in our practice. The summons is not returnable at any term. The cause need not be brought on at a term unless there is an issue to be tried. The judgment, whether in fact entered during a term or in vacation, is not entered as of any term. In chancery, after the decree was enrolled, errors apparent on the face of the decree could be reheard on bill of review; those not apparent only by appeal. Before enrollment a rehearing might be obtained by petition. The bill of review and re-

Digitized by Google

hearing are not retained in our practice and both legal and equitable actions are governed by the same rules as to amendment on motion.[1] It was formerly held in this state that after entry of judgment pursuant to order a court had no authority to correct its judicial errors on motion, the only remedy being a new trial or an appeal.[2] It is now held that the court may modify its judgments on motion at any time within the period for taking an appeal.[3]

[1] Grant v. Schmidt, 22 Minn. 1.

[2] Grant v. Schmidt, 22 Minn. 1; Semrow v. Semrow, 23 Minn. 214; White v. Iltis, 24 Minn. 43; Weld v. Weld, 28 Minn. 33, 8 N. W. 900.

[3] Gallagher v. Irish-American Bank, 79 Minn. 226, 81 N. W. 1057. See U. S. Invest. Co. v. Ulrickson, 84 Minn. 14, 86 N. W. 613, 1004.

VACATION OF JUDGMENTS

Distinction between opening default and vacating judgment.

§ 1366. There is an obvious distinction between opening and vacating a judgment. A motion to vacate a judgment and nothing more is usually made on the ground of some irregularity or jurisdictional defect appearing on the face of the record.[1] It is a direct attack on the validity of the judgment.[2] The opening of a judgment is merely a mode of allowing a defendant who is in default to interpose a defence, and it does not necessarily involve the vacation of the judgment. It is not an attack on the judgment but proceeds on the assumption that there is a valid judgment.[3] A motion to vacate a judgment is a matter of right; but a motion to open a judgment is directed to the discretion of the court. On a motion to vacate it is immaterial whether the moving party has a meritorious defence or has moved with diligence. On a motion to open the moving party must show merits and due diligence. When a judgment is opened it is commonly vacated by the same order, but the court may allow it to stand as security.

[1] O'Hara v. Baum, 82 Pa. St. 416. Not always so in this state. See §§ 1371, 1373, 1374.

[2] Reinhart v. Lugo, 86 Cal. 395; Magin v. Lamb, 43 Minn. 80, 44 N. W. 675; Jensen v. Crevier, 33 Minn. 372, 23 N. W. 541; Stocking v. Hanson, 22 Minn. 542.

[3] Durham v. Moore, 48 Kans. 135. See Ueland v. Johnson, 77 Minn. 543, 80 N. W. 700.

Inherent power.

§ 1367. All superior courts of common law jurisdiction have inherent power to vacate their judgments when improvidently entered.[1] Our statute regulates and greatly extends this power. At common law the power could be fully exercised only at the term in which the judgment was rendered,[2] and was limited to a few well defined grounds.[3]

[1] Crosby v. Farmer, 39 Minn. 305, 40 N. W. 71.

Digitized by Google

[2] **Albers v. Whitney,** 1 Story (U. S.) 310; **Grant v. Schmidt,** *22* Minn. 1.

[3] See 15 Ency. Pl. & Prac. 234.

Void judgments.

§ 1368. A person against whom a void judgment has been entered has an absolute right, at any time and without showing diligence [1] or a meritorious defence,[2] to have it vacated on motion.[3] An appearance to set aside a void judgment does not validate it.[4] A stranger to the action may sometimes have a void judgment vacated, but his application, unlike that of a party, is addressed to the discretion of the court.[5] The remedy by motion is so simple and expeditious that it is almost always resorted to, but an action may be maintained in this state to set aside a void judgment.[6]

[1] See § 1380.

[2] See § 1379.

[3] Covert v. Clark, 23 Minn. 539; Lee v. O'Shaughnessy, 20 Minn. 173 Gil. 157; Mackubin v. Smith, 5 Minn. 367 Gil. 296; Heffner v. Gunz, 29 Minn. 108, 12 N. W. 342; Chauncey v. Wass, 35 Minn. 1, 35, 25 N. W. 457, 30 N. W. 826; Feikert v. Wilson, 38 Minn. 341, 37 N. W. 585; Magin v. Lamb, 43 Minn. 80, 44 N. W. 675; Savings Bank v. Authier, 52 Minn. 98, 53 N. W. 812; Godfrey v. Valentine, 39 Minn. 336, 40 N. W. 163; Roberts v. Chicago etc. Ry. Co. 48 Minn. 521, 51 N. W. 478; Holcomb v. Stretch, 74 Minn. 234, 76 N. W. 1132; City of Duluth v. Dibblee, 62 Minn. 18, 63 N. W. 1117; Phelps v. Heaton, 79 Minn. 476, 82 N. W. 990; Strong v. Conter, 48 Minn. 66, 50 N. W. 936; Wistar v. Foster, 46 Minn. 484, 49 N. W. 247.

[4] See § 351

[5] Mueller v. Reimer, 46 Minn. 314, 48 Minn. 1120. See Magin v. Lamb, 43 Minn. 80, 44 N. W. 675; Holcomb v. Stretch, 74 Minn. 234, 76 N. W. 1132; Lee v. O'Shaughnessy, 20 Minn. 173 Gil. 157.

[6] Magin v. Lamb, 43 Minn. 80, 44 N. W. 675. See also, Allen v. McIntyre, 56 Minn. 351, 57 N. W. 1060; State v. District Court, 85 Minn. 283, 88 N. W. 755.

Want of jurisdiction.

§ 1369. The following jurisdictional defects have been held grounds for vacating judgments: defective or untrue affidavits for publication of summons; [1] defective publication of summons; [2] improper personal service of summons; [3] service of summons on wrong person; [4] service by publication on resident of state; [5] failure to substitute proper parties after death of defendant; [6] rendition of judgment in state court after removal to federal court; [7] improper service at house of usual abode; [8] unauthorized appearance; [9] no service of summons; [10] departure from the requirements of the statute in regard to the service of a summons in any substantial matter affecting the rights of the defendant; [11] improper service of summons on officer of a foreign corporation.[12]

[1] Mackubin v. Smith, 5 Minn. 367 Gil. 296; Chauncey v. Wass, 35

Digitized by Google

Minn. 1, 35, 25 N. W. 457, 30 N. W. 826; Feikert v. Wilson, 38 Minn. 341, 37 N. W. 585.

[2] Godfrey v. Valentine, 39 Minn. 336, 40 N. W. 163; Stai v. Selden, (Minn. 1902) 92 N. W. 6.

[3] Savings Bank v. Authier, 52 Minn. 98, 53 N. W. 812.

[4] Magin v. Lamb, 43 Minn. 80, 44 N. W. 675; Savings Bank v. Authier, 52 Minn. 98, 53 N. W. 812.

[5] Covert v. Clark, 23 Minn. 539; Bardwell v. Collins, 44 Minn. 97, 46 N. W. 315. But see, Shepherd v. Ware, 46 Minn. 174, 48 N. W. 773; McClymond v. Noble, 84 Minn. 329, 87 N. W. 838.

[6] Lee v. O'Shaughnessy, 20 Minn. 173 Gil. 157.

[7] Roberts v. Chicago etc. Ry. Co. 48 Minn. 521, 51 N. W. 478.

[8] Crosby v. Farmer, 39 Minn. 305, 40 N. W. 71.

[9] Stocking v. Hanson, 35 Minn. 207, 28 N. W. 507. See Deering Harvester Co. v. Donovan, 82 Minn. 162, 82 N. W. 162.

[10] Knutson v. Davies, 51 Minn. 363, 53 N. W. 646; Allen v. McIntyre, 56 Minn. 351, 57 N. W. 1060; Phelps v. Heaton, 79 Minn. 476, 82 N. W. 990; Flanigan v. Duncan, 47 Minn. 250, 49 N. W. 981.

[11] Lee v. Clark, 53 Minn. 315, 55 N. W. 127.

[12] State v. District Court, 26 Minn. 233, 2 N. W. 698.

§ 1370. The return of an officer of the service of summons is not conclusive. It may be impeached by the defendant on a motion to set aside the judgment.[1] But it cannot be impeached by means of equivocal and evasive affidavits. To set aside a judgment on the ground that such a return is false the proof of its falsity must be positive and convincing. Upon grounds of public policy, the return of the officer should be deemed strong evidence of the facts as to which the law requires him to certify and should be upheld unless its falsity appears beyond a reasonable doubt.[2] The determination of the trial court upon conflicting affidavits will rarely be reversed on appeal.[3]

[1] Crosby v. Farmer, 39 Minn. 305, 40 N. W. 71; Burton v. Schenck, 40 Minn. 52, 41 N. W. 244; Knutson v. Davies, 51 Minn. 363, 53 N. W. 646; Allen v. McIntyre, 56 Minn. 351, 57 N. W. 1060. See Town of Hinckley v. Kettle River Ry. Co. 70 Minn. 105, 72 N. W. 835.

[2] Jensen v. Crevier, 33 Minn. 372, 23 N. W. 541; Allen v. McIntyre, 56 Minn. 351, 57 N. W. 1060; Gray v. Hays, 41 Minn. 12, 42 N. W. 594; Osman v. Wisted, 78 Minn. 295, 80 N. W. 1127.

[3] Allen v. McIntyre, 56 Minn. 351, 57 N. W. 1060.

Unauthorized action.

§ 1371. A judgment in an action begun by an attorney without authority is void and may be set aside.[1] But in such cases the plaintiff cannot have the judgment set aside unless he returns or offers to return the fruits of the action.[2]

[1] Stocking v. Hanson, 35 Minn. 207, 28 N. W. 507.

[2] Deering Harvester Co. v. Donovan, 82 Minn. 162, 82 N. W. 162.

Digitized by Google

Erroneous judgment.

§ 1372. If a judgment entered in strict accordance with the order of the court for judgment departs from or exceeds the relief demanded in the complaint, the proper remedy is not a motion to wholly vacate and set it aside, but an appeal from the judgment [1] or a motion to correct.[2]

[1] Palmer v. Bank of Zumbrota, 65 Minn. 90, 67 N. W. 893.

[2] See §§ 1274, 1347 et seq.

Vacation because of facts arising after judgment.

§ 1373. Where facts have arisen after final judgment of such a nature that it ought not to be executed relief by the vacation or modification of the judgment may be granted on motion if the facts are undisputed.

Weaver v. Mississippi etc. Boom Co. 30 Minn. 477, 16 N. W. 269; Colstrum v. Minneapolis etc. Ry. Co. 33 Minn. 516, 24 N. W. 255. See Semrow v. Semrow, 23 Minn. 214.

Fraud.

§ 1374. A judgment may be set aside summarily on motion for fraudulent practices in obtaining it.[1] In this state, however, it is the usual practice to seek relief in such cases by means of an action as authorized by statute.[2]

[1] Olmstead v. Olmstead, 41 Minn. 297, 43 N. W. 67; Wieland v. Shillock, 23 Minn. 227; Id. 24 Minn. 345; Johnston v. Paul, 23 Minn. 46.

[2] See Dunnell, Minn. Pl. §§ 1488–1499.

Surprise.

§ 1375. A judgment may be vacated on the ground of surprise.[1] Thus, in an action against a resident, in which the summons was improperly served upon him by publication, it was held that the judgment might be vacated on the ground of surprise.[2]

[1] Wieland v. Shillock, 23 Minn. 227. See Seibert v. Minneapolis etc. Ry. Co. 58 Minn. 72, 59 N. W. 828.

[2] Covert v. Clark, 23 Minn. 539 (it is doubtful whether surprise was the proper ground).

Failure to file or serve complaint.

§ 1376. When a summons is regular on its face and is duly served the court acquires jurisdiction. The fact that the complaint is not filed, or a copy thereof is not served with the summons, does not render the judgment void and liable to be set aside on motion.

W. W. Kimball Co. v. Brown, 73 Minn. 167, 75 N. W. 1043. See § 300.

Judgment against infant.

§ 1377. If a judgment is erroneously entered against an infant without the appointment of a guardian ad litem he may set it aside on motion within a reasonable time after becoming of age and learning of its existence.

Eisenmenger v. Murphy, 42 Minn. 84, 43 N. W. 784.

Digitized by Google

Adjudication of bankruptcy.

§ 1378. An adjudication of bankruptcy under the United States bankrupt law does not, of its own force, divest other courts of jurisdiction in suits against the bankrupt and render their judgments void and liable to be vacated on motion.

Brackett v. Dayton, 34 Minn. 219, 25 N. W. 348.

Merits need not be shown.

§ 1379. Upon an application to vacate a judgment for irregularity of the court or plaintiff or for want of jurisdiction the applicant need not show merits, for he is demanding a right and not craving a favor. Every defendant may insist that legal proceedings against him shall be conducted regularly and according to law and the practice of the courts, whether he has a good defence on the merits or not.

Mackubin v. Smith, 5 Minn. 367 Gil. 296; Lee v. O'Shaughnessy, 20 Minn. 173 Gil. 157; Heffner v. Gunz, 29 Minn. 108, 12 N. W. 342; Savings Bank v. Authier, 52 Minn. 98, 53 N. W. 812.

Laches.

§ 1380. When the judgment is absolutely void and not merely voidable the moving party need not show diligence.[1] A void judgment never becomes good by lapse of time.[2] When the judgment to be set aside is merely voidable the applicant must show due diligence.[3]

[1] Feikert v. Wilson, 38 Minn. 341, 37 N. W. 585; Heffner v. Gunz, 29 Minn. 108, 12 N. W. 342; Lee v. O'Shaughnessy, 20 Minn. 173 Gil. 157; Phelps v. Heaton, 79 Minn. 476, 82 N. W. 476. But see, Stocking v. Hanson, 35 Minn. 207, 28 N. W. 507.

[2] McNamara v. Casserly, 61 Minn. 335, 63 N. W. 880.

[3] Jorgensen v. Griffin, 14 Minn. 464 Gil. 346; Feikert v. Wilson, 38 Minn. 341, 37 N. W. 585; Covert v. Clark, 23 Minn. 539; Dillon v. Porter, 36 Minn. 341, 31 N. W. 56; Stocking v. Hanson, 22 Minn. 542; Seibert v. Minneapolis etc Ry. Co. 58 Minn. 72, 59 N. W. 828; Eisenmenger v. Murphy, 42 Minn. 84, 42 N. W. 784.

Notice.

§ 1381. Notice of a motion to vacate a judgment in favor of a non-resident plaintiff may be served on his attorney of record, although more than two years have elapsed since the entry thereof.

Phelps v. Heaton, 79 Minn. 476, 82 N. W. 990.

Application by non-resident—attachment.

§ 1382. Where jurisdiction over a non-resident was acquired by publication of summons and the attachment of property alleged to be his, it was held that he could not have the judgment entered on default set aside and the attachment defeated on affidavit denying any interest in the property attached.

Whitney v. Sherin, 74 Minn. 4, 76 N. W. 787.

Application by stranger.

§ 1383. A judgment, void for want of jurisdiction appearing on its face, may be set aside on motion of one not a party to the action who

Digitized by Google

has an interest in the property upon which the judgment is a cloud, but he is not entitled to such relief as a matter of right.

Mueller v. Reimer, 46 Minn. 314, 48 N. W. 1120. See Stewart v. Duncan, 40 Minn. 410, 42 N. W. 89; Hunter v. Cleveland Co-operative Stove Co. 31 Minn. 505, 18 N. W. 645.

Application by assignee.

§ 1384. In an action where the original parties, the defendant having no notice of the assignment of the cause of action, compromised the suit and stipulated for a judgment to be entered, and judgment was accordingly entered, it was held that the assignee could not have the judgment set aside.

Chisholm v. Clitherall, 12 Minn. 375 Gil. 251.

Motion to vacate defeated by amendment.

§ 1385. When a motion to vacate a judgment is made for a defect which is remediable by amendment the court may deny the motion and order an amendment.

Burr v. Seymour, 43 Minn. 401, 45 N. W. 715.

Appeal.

§ 1386. An appeal lies from an order vacating or refusing to vacate a judgment.[1] A determination of the trial court based on conflicting affidavits will rarely be disturbed on appeal.[2] The record on appeal must be certified to contain all the moving papers.[3]

[1] Barker v. Keith, 11 Minn. 65 Gil. 37; Young v. Young, 17 Minn. 181 Gil. 153; Piper v. Johnston, 12 Minn. 60 Gil. 27; Stocking v. Hanson, 22 Minn. 542.

[2] Olmstead v. Olmstead, 41 Minn. 297, 43 N. W. 67; Flanigan v. Duncan, 47 Minn. 250, 49 N. W. 981; Knutson v. Davies, 51 Minn. 363, 53 N. W. 646.

[3] Gerish v. Johnson, 5 Minn. 23 Gil. 10.

OPENING DEFAULT UPON PUBLICATION OF SUMMONS

The statute.

§ 1387. "If the summons is not personally served on the defendant, in the cases provided in the last two sections [publication of summons], he or his representatives, on application and sufficient cause shown, at any time before judgment, shall be allowed to defend the action; and, except in an action for divorce, the defendant or his representatives may in like manner be allowed to defend after judgment, and within one year after the rendition of such judgment on such terms as may be just; and if the defence is successful, and the judgment, or any part thereof, has been collected or otherwise enforced, such restitution may thereupon be compelled as the court directs."

[G. S. 1894 § 5206]

A matter of right not discretion.

§ 1388. In actions where default judgment is rendered on a service of the summons by publication, the defendant is entitled, as a matter

Digitized by Google

of right, under this section, to an order vacating the judgment and allowing him to come in and defend the action, upon an application seasonably made to the court, accompanied by an answer setting up a good defence. Such an application is not addressed to the discretion of the court and in this particular is to be distinguished from an application under G. S. 1894 § 5267. If the proposed answer contains a good defence to the action and the defendant is not guilty of laches in making his application sufficient cause is shown for opening the judgment and the relief must be granted as a matter of right.

Lord v. Hawkins, 39 Minn. 73, 38 N. W. 689; Nye v. Swan, 42 Minn. 243, 44 N. W. 9; Boeing v. McKinley, 44 Minn. 392, 46 N. W. 766; Bausman v. Tilley, 46 Minn. 66, 48 N. W. 459; Fifield v. Norton, 79 Minn. 264, 82 N. W. 581; Bogart v. Kiene, 85 Minn. 261, 88 N. W. 748.

Relief allowed liberally.

§ 1389. Where a judgment has been taken by default against a non-resident, upon whom there was no personal service of the summons, courts ought to be liberal in granting leave to answer.[1] The legislature intended to give one not personally served more opportunity to obtain relief and make a defence than one personally served.[2]

[1] Frankoviz v. Smith, 35 Minn. 278, 28 N. W. 508; Lord v. Hawkins, 39 Minn. 73, 38 N. W. 689.

[2] Lord v. Hawkins, 39 Minn. 73, 38 N. W. 689.

A good defence sufficient cause.

§ 1390. The statute provides that sufficient cause must be shown. It is held that a good defence is a sufficient cause within the meaning of the statute.

Lord v. Hawkins, 39 Minn. 73, 38 N. W. 689; Nye v. Swan, 42 Minn. 243, 44 N. W. 9; Bausman v. Tilley, 46 Minn. 66, 48 N. W. 459.

§ 1391. It is indispensable that the applicant should show a good defence in his moving papers,[1] but he need do no more than propose an answer setting up a good defence.[2] It is not necessary for the applicant to exhibit the evidence of his defence. Neither an affidavit of merits nor a verified answer is necessary if a good defence appears by the moving affidavits. The proper practice is to propose a verified answer showing a good defence.[3] Of course the defence need not be affirmative. A verified general denial is sufficient.[4] An affidavit of merits may take the place of a proposed answer.[5]

[1] Holcomb v. Stretch, 74 Minn. 234, 76 N. W. 1132.

[2] Fifield v. Norton, 79 Minn. 264, 82 N. W. 581.

[3] See McMurran v. Bourne, 81 Minn. 515, 84 N. W. 338.

[4] See Fitzpatrick v. Campbell, 58 Minn. 20, 59 N. W. 629. But see People's Ice Co. v. Schlenker, 50 Minn. 1, 52 N. W. 219.

[5] People's Ice Co. v. Schlenker, 50 Minn. 1, 52 N. W. 219.

Diligence in making application.

§ 1392. The applicant need not show in his moving papers that he has been diligent. He need not show that he did not have actual

Digitized by Google

notice of the action in time to interpose his defence before judgment.[1] But he is bound to meet any charge of laches made by the plaintiff on proper affidavits.[2] There is, of course, no hard and fast rule by which to determine the diligence required of the defendant in making his application after actual notice of the action. Each case must be determined upon its own facts.[3] But inasmuch as the legislature has given the defendant the right to apply any time within one year from the rendition of judgment a court ought not to deny relief within that time except where the want of diligence indicates bad faith. But if a party receives the summons through the mail he is bound to act with great promptness.[4]

[1] Frankoviz v. Smith, 35 Minn. 278, 28 N. W. 508.

[2] Mueller v. McCulloch, 59 Minn. 409, 61 N. W. 455; Bogart v. Kiene, 85 Minn. 261, 88 N. W. 748.

[3] Nye v. Swan, 42 Minn. 243, 44 N. W. 9; Bausman v. Tilley, 46 Minn. 66, 48 N. W. 459; Cutler v. Button, 51 Minn. 550, 53 N. W. 872; Mueller v. McCulloch, 59 Minn. 409, 61 N. W. 455; Carlson v. Phinney, 56 Minn. 476, 58 N. W. 38.

[4] Bogart v. Kiene, 85 Minn. 261, 88 N. W. 748.

When year begins to run.

§ 1393. The year within which the defendant must move under this section begins to run with the entry of judgment. If the proceedings are begun before the expiration of the year it is immaterial that the court does not pass upon it until after the expiration of the year.

Washburn v. Sharpe, 15 Minn. 63 Gil. 43.

The question on appeal.

§ 1394. The action of the trial court upon an application under this section will not be reversed on appeal except for a palpable abuse of discretion.

Washburn v. Sharpe, 15 Minn. 63 Gil. 43; Frankoviz v. Smith, 35 Minn. 278, 28 N. W. 508; Lord v. Hawkins, 39 Minn. 73, 38 N. W. 689; Bausman v. Tilley, 46 Minn. 66, 48 N. W. 459; Cutler v. Button, 51 Minn. 550, 53 N. W. 872; Whitcomb v. Shafer, 11 Minn. 232 Gil. 153.

OPENING DEFAULT AS A MATTER OF DISCRETION

The statutes.

§ 1395. "The court may, before or after judgment, in furtherance of justice, and on such terms as may be proper, amend any pleading, process or proceeding, by adding or striking out the name of any party, or by correcting a mistake in the name of a party, a mistake in any other respect, or by inserting other allegations material to the case, or, when the amendment does not change substantially the claim or defence, by conforming the pleading or proceeding to the fact proved."

[G. S. 1894 § 5266]

§ 1396. "The court may likewise, in its discretion, allow an answer or reply to be made, or other act to be done, after the time limited by

Digitized by Google

this chapter, or by an order enlarge such time; and may also in its discretion, at any time within one year after notice thereof, relieve a party from a judgment, order, or other proceeding taken against him, through his mistake, inadvertence, surprise, or excusable neglect; and the court may, as well in vacation and out of term as in term, and without regard to whether such judgment or order was made and entered, or proceedings had, in or out of term, upon good cause shown, set aside or modify its judgments, orders, or proceedings, although the same were made or entered by the court, or under or by virtue of its authority, order, or direction, and may supply any omission in any proceeding. And, whenever any proceeding taken by a party fails to conform to the statute, the court may permit an amendment to such proceeding, so as to make it conformable thereto; but this section does not apply to a final judgment in an action for divorce: Provided, however, that no relief to be granted hereunder shall operate to affect any title to or estate in real estate affected by such judgment, as against a bona fide purchaser or incumbrancer, in any case where such judgment, or a certified copy thereof, shall have been of record in the office of the register of deeds of the county wherein such real estate is situated for a period of not less than three years prior to the date of the application for such relief; but nothing herein contained shall operate to prevent the granting of such relief as may be just and equitable against a party to such action, his heirs or devisees."

[G. S. 1894 § 5267]

Exclusive remedy.

§ 1397. When a party has a right to be relieved from a judgment under this statute he cannot maintain an action to enjoin its enforcement.

Wieland v. Shillock, 23 Minn. 227.

Statute not a grant of power.

§ 1398. This statute is not a grant of power. All courts of superior jurisdiction have inherent power to open their judgments and grant relief from default.[1] The statute is a limitation rather than a grant of power.[2] It simply regulates the inherent power of the court over its own judgments and proceedings in execution thereof.[3]

[1] Allen v. Ackley, 4 How. Prac. (N. Y.) 5; Gerish v. Johnson, 5 Minn. 23 Gil. 10.

[2] Gerish v. Johnson, 5 Minn. 23 Gil. 10.

[3] Russell v. Blakeman, 40 Minn. 463, 42 N. W. 391. See Holmes v. Campbell, 13 Minn. 66 Gil. 58.

To what actions applicable.

§ 1399. The statute is applicable to all forms of actions or proceedings. Thus it has been held applicable to foreclosure proceedings;[1] to tax proceedings;[2] to condemnation proceedings;[3] to habeas corpus proceedings;[4] to garnishment proceedings;[5] to actions in which the summons is served by publication;[6] to actions against unknown heirs;[7] to partition proceedings;[8] to an action in the nature of ejectment.[9]

Digitized by Google

[1] Russell v. Blakeman, 40 Minn. 463, 42 N. W. 391.
[2] See City of Duluth v. Dibblee, 62 Minn. 18, 63 N. W. 1117.
[3] In re Minneapolis Ry. Co. 38 Minn. 157, 36 N. W. 105.
[4] State v. Bechdel, 38 Minn. 278, 37 N. W. 338.
[5] Goodrich v. Hopkins, 10 Minn. 162 Gil. 130.
[6] Lord v. Hopkins, 39 Minn. 73, 38 N. W. 689; Welch v. Marks, 39 Minn. 481, 40 N. W. 611; Russell v. Blakeman, 40 Minn. 463, 42 N. W. 391; Boeing v. McKinley, 44 Minn. 392, 46 N. W. 766; Nauer v. Benham, 45 Minn. 252, 47 N. W. 796.
[7] Boeing v. McKinley, 44 Minn. 392, 46 N. W. 766.
[8] Welch v. Marks, 39 Minn. 481, 40 N. W. 611.
[9] Hallam v. Doyle, 35 Minn. 337, 29 N. W. 337.

Relief granted with liberality.

§ 1400. Courts are naturally and very properly inclined to relieve a party from a default if he furnishes any reasonable excuse for his neglect and makes any fair showing of merits.[1] The statute is remedial in its nature and should be liberally construed.[2] A default inadvertently permitted by a party having a substantial defence presents a case in which great latitude should be exercised in setting it aside.[3] Any doubt as to the propriety of opening a default should be resolved in favor of the application.[4] Different considerations apply when the application is made by a "prowling assignee" or speculative purchaser.[5]

[1] People's Ice Co. v. Schlenker, 50 Minn. 1, 52 N. W. 219; Hull v. Chapel, 77 Minn. 159, 79 N. W. 669; Milwaukee Harvester Co. v. Schroeder, 72 Minn. 393, 75 N. W. 606; McMurran v. Bourne, 81 Minn. 515, 84 N. W. 338; Martin v. Curley, 70 Minn. 489, 73 N. W. 405.
[2] Harbaugh v. Honey Lake Valley Land etc. Co. 109 Cal. 70; People v. Campbell, 18 Abb. Prac. (N. Y.) 1; Potter v. Holmes, 74 Minn. 508, 77 N. W. 416; G. S. Congdon Hardware Co. v. Consolidated Apex Mining Co. 11 S. D. 376, 77 N. W. 1022.
[3] Harbaugh v. Honey Lake Valley Land etc. Co. 109 Cal. 70.
[4] Watson v. San Francisco etc. Ry. Co. 41 Cal. 17.
[5] McClymond v. Noble, 84 Minn. 329, 87 N. W. 838.

A matter of discretion.

§ 1401. Except when the summons is served by publication[1] the matter of opening a default lies in the discretion of the trial court.[2] It is in the very nature of discretionary power that no rules can be laid down for its government.[3] It must be exercised judicially, with close regard to the facts of the particular case and in furtherance of justice.[4] It is ordinarily in furtherance of justice that an action should be tried on the merits.[5] The discretion contemplated by the statute is not the arbitrary and uncontrolled pleasure or caprice of the judge, but a sound legal discretion; a discretion in the exercise of which it is the duty of the judge to grant the desired relief in a meritorious case.[6] The discretion should not be exercised in a way to encourage loose practice or a lax administration of the law.[7]

[1] See § 1388.

Digitized by Google

[2] See cases under § 1428.
[3] See § 1890; Russell v. Blakeman, 40 Minn. 463, 42 N. W. 391.
[4] Id.; Merritt v. Putnam, 7 Minn. 493 Gil. 399; Watson v. San Francisco etc. Ry. Co. 41 Cal. 17.
[5] Potter v. Holmes, 74 Minn. 508, 77 N. W. 416; Watson v. San Francisco etc. Ry. Co. 41 Cal. 17; Whitcomb v. Shafer, 11 Minn. 232 Gil. 153.
[6] Wieland v. Shillock, 24 Minn. 345; Potter v. Holmes, 74 Minn. 508, 77 N. W. 416; Merritt v. Putnam, 7 Minn. 493 Gil. 399; Forin v. City of Duluth, 66 Minn. 54, 68 N. W. 515.
[7] Merritt v. Putnam, 7 Minn. 493 Gil. 399; John T. Noye Mfg. Co. v. Wheaton Roller Mill Co. 60 Minn. 117, 61 N. W. 910.

Excusable neglect.

§ 1402. The discretion of a court in relieving from defaults is not confined to cases involving no fault or negligence in the moving party. To the end that justice may be done, relief may, within proper limits, be granted from the consequences of positive negligence.[1] A party may be relieved from a default occasioned by the negligence of his attorney,[2] but where a plaintiff, who is regular in every respect, obtains a judgment by the default of the attorney for the defendant, it will not be disturbed, unless upon the most cogent reasons.[3] Where the defendant was apprised of the suit, appeared in it, answered the complaint and offered no excuse for not appearing at the trial except that his attorneys did not inform him that the action had been noticed for trial, it was held proper not to open the default.[4] Where the defendant knew that the case was to be tried at a particular time but left home and traveled from place to place so that he could not be notified of the trial it was held that the default ought not to be opened.[5] In an action against a city the summons and complaint were served on the mayor who neglected to turn them over to the corporation counsel. It was held proper to open the default.[6] Where a sheriff signed what he supposed was an answer to the complaint but which was, in fact, an answer to an order to show cause, it was held proper to open the default.[7] Two sureties were told by their principal that they need not pay any attention to an action against them and that he would have his attorney put in an answer for them, but none was put in. An order opening the default was sustained on appeal.[8] A corporation may be relieved from a default occasioned by the neglect of an officer.[9] Where the attorney for defendant was suddenly called away from home by telegram announcing the death of his father it was held proper to extend the time to answer.[10] When a party is personally served with summons he must show a good excuse for his neglect to answer.[11] Mere preoccupation with business is not a sufficient excuse.[12] Neglect to answer cannot be excused upon equivocal and evasive affidavits.[13] An order overruling a demurrer to an answer was sustained on appeal. The plaintiff moved for leave to file a reply. The motion was denied on the ground that the proper practice under the circumstances was to file a supplemental complaint. No stay of proceedings was ordered. On

Digitized by Google

the same day on which the order was made the defendant entered up judgment. It was held proper to open the judgment.[14] It is proper to consider the ignorance of the defendant in determining whether his negligence was excusable.[15] Negligence in failing to answer may properly be excused if it was the natural consequence of the conduct and assurances of the adverse party or his attorney.[16] That a party did not expect that the cause would be reached for trial is not ordinarily a good ground for opening a default.[17] The court may refuse to open a default because of the negligence of the attorney of the defendant although the defendant himself is free from fault.[18] A party upon whom summons is served at his house of usual abode in which his family resides ought not to be relieved from default after a long lapse of time when "ordinary diligence on his part and attention to his business and family would have led to a knowledge of the pendency of the action."[19] A party who suffers a default in reliance on a decision of the supreme court which is subsequently overruled is not chargeable with negligence on an application to open the default for the purpose of taking advantage of the subsequent decision.[20]

[1] City of Winona v. Minnesota Ry. Construction Co. 29 Minn. 68, 11 N. W. 228.

[2] Sandberg v. Berg, 35 Minn. 212, 28 N. W. 255; Dupries v. Milwaukee & St. Paul Ry. Co. 20 Minn. 156 Gil. 139; Lathrop v. O'Brien, 47 Minn. 428, 50 N. W. 530; Jorgensen v. Boehmer, 9 Minn. 181 Gil. 166; Hildebrandt v. Robbecke, 20 Minn. 100 Gil. 83; Bridgman v. Dambly, 41 Minn. 526, 43 N. W. 482; Stewart v. Cannon, 66 Minn. 164, 68 N. W. 604.

[3] Merritt v. Putnam, 7 Minn. 493 Gil. 399. See Stewart v. Cannon, 66 Minn. 64, 68 N. W. 604.

[4] Id.

[5] Bates v. Bates, 66 Minn. 131, 68 N. W. 845.

[6] Glaeser v. City of St. Paul, 67 Minn. 368, 69 N. W. 1101.

[7] Whitney v. Sherin, 74 Minn. 4, 76 N. W. 787.

[8] Hull v. Chapel, 77 Minn. 159, 79 N. W. 669.

[9] Bray v. Church of St. Brandon, 39 Minn. 390, 40 N. W. 518.

[10] Bridgman v. Dambly, 41 Minn. 526, 43 N. W. 482.

[11] Pine Mountain Iron & Coal Co. v. Tabour, 55 Minn. 287, 56 N. W. 895; John T. Noye Mfg. Co. v. Wheaton Roller Mill Co. 60 Minn. 117, 61 N. W. 910.

[12] John T. Noye Mfg. Co. v. Wheaton Roller Mill Co. 60 Minn. 117, 61 N. W. 910; Bates v. Bates, 66 Minn. 131, 68 N. W. 845.

[13] Osman v. Wisted, 78 Minn. 295, 80 N. W. 1127; Missouri, Kansas & Texas Trust Co. v. Norris, 61 Minn. 1256, 63 N. W. 634.

[14] Schuler v. Wood, 81 Minn. 372, 84 N. W. 121.

[15] Martin v. Curley, 70 Minn. 489, 73 N. W. 405; Wood v. Schoenauer, 85 Minn. 138, 88 N. W. 411; Milwaukee Harvester Co. v. Schroeder, 72 Minn. 393, 75 N. W. 606; Steiner v. Scholl, 163 Pa. St. 465.

[16] Hull v. Chapel, 77 Minn. 159, 79 N. W. 669; McMurran v. Bourne, 81 Minn. 515, 84 N. W. 338.

Digitized by Google

[17] Foote v. Branch, 42 Minn. 62, 43 N. W. 782.
[18] Stewart v. Cannon, 66 Minn. 64, 68 N. W. 604.
[19] Missouri, Kansas & Texas Trust Co. v. Norris, 61 Minn. 256, 63 N. W. 634.
[20] Johnston v. Piper, 4 Minn. 192 Gil. 133.

Surprise.

§ 1403. Where all arrangements had been made for putting in an answer by one of three attorneys who failed to do so because suddenly and unexpectedly called away from home, but who sent the necessary facts for drafting an answer to the other attorneys who also happened to be away from home, it was held proper to open the default on the ground of surprise.[1] Before the time for answering had expired the defendants had served notice on the plaintiff of a motion to have the sheriff substituted in their place and it was stipulated by the attorneys of both parties that the motion should be submitted to the judge of another district. Before the determination on the motion judgment was entered without notice, to the surprise of the defendants. Held proper to open the judgment.[2] A default may be opened on the ground of surprise where a party is misled and deceived by his attorney.[3] That a party did not expect that a cause would come on for trial so early in the term is not ordinarily a ground for opening a default.[4]

[1] Dupries v. Milwaukee etc. Ry. Co., 20 Minn. 156 Gil 139.
[2] Woods v. Woods, 16 Minn. 81 Gil. 69.
[3] Hildebrandt v. Robbecke, 20 Minn. 100 Gil. 83.
[4] Foote v. Branch, 42 Minn. 62, 43 N. W. 782.

Inadvertence.

§ 1404. A default inadvertently permitted by a party having a substantial defence presents a case in which great latitude should be exercised in setting it aside.

Harbaugh v. Honey Lake Valley Land etc. Co. 109 Cal. 70.

Mistake.

§ 1405. Relief may be had from default occasioned by the mistaken advice of an attorney on a question of law.[1] A default may be opened on the ground that the attorney for defendant made a mistake as to the expiration of the time for answering.[2] The attorneys for the defendants were non-residents, but were notified by plaintiffs' attorney of the service of an amended complaint, the reason assigned for not serving it upon the attorneys being that the court had ordered personal service on the defendants. Within twenty days thereafter the same attorneys appeared for defendants and served their answers, which plaintiffs' attorney immediately returned, because the defendants' attorneys were non-residents. It was held proper to open the default.[3] Where a judgment was entered in accordance with a stipulation shown to have been entered into under a mistake of fact it was held that the judgment was properly opened.[4] Where, in an action against a city, the mayor turned the summons over to the city attorney, giving him the date of service, and the attorney by mistake noted

Digitized by Google

on the summons the wrong date on which the period for answering would expire and in consequence inadvertently allowed a default to be taken, it was held proper to open the judgment.[5]

[1] Baxter v. Chute, 50 Minn. 164, 52 N. W. 379; Brown v. Brown, 37 Minn. 128, 33 N. W. 546; Jorgensen v. Boehmer, 9 Minn. 181 Gil. 166. See Northern Trust Co. v. Crystal Lake Cemetery Co. 67 Minn. 131, 69 N. W. 708; Martin v. Curley, 70 Minn. 489, 73 N. W. 405.

[2] Lathrop v. O'Brien, 47 Minn. 428, 50 N. W. 530.

[3] Brown v. Brown, 37 Minn. 128, 33 N. W. 546.

[4] Gerdtzen v. Cockrell, 52 Minn. 501, 55 N. W. 58.

[5] Forin v. City of Duluth, 66 Minn. 54, 68 N. W. 515.

Fraud.

§ 1406. A judgment may be opened on the ground of fraudulent practices in obtaining it,[1] but the usual practice is to set it aside summarily on motion or by action as authorized by statute.[2]

[1] Young v. Young, 17 Minn. 181 Gil. 153; True v. True, 6 Minn. 458 Gil. 315; Bray v. Church of St. Brandon, 39 Minn. 390, 40 N. W. 518; Sturm v. School District No. 70, 45 Minn. 88, 47 N. W. 462.

[2] See § 1374.

Judgment in action to quiet title.

§ 1407. In an application by a defendant to set aside a judgment quieting title in the plaintiff, rendered after service of summons by publication, the discretion of the court may be influenced by the long continued neglect of the defendant, both subsequent and prior to the judgment, to interfere with the adverse occupancy of the land by plaintiff, to pay taxes thereon, or to assert any rights respecting it.

Nauer v. Benham, 45 Minn. 252, 47 N. W. 796.

§ 1408. In an action to determine adverse claims in which the plaintiff relied on a tax title it was held proper on an application of the owner to open a default to consider the great disparity between the value of the property and the amount of taxes and interest paid by the plaintiff.

Martin v. Curley, 70 Minn. 489, 73 N. W. 405.

Notice of judgment.

§ 1409. The year within which a party may have relief from a default judgment begins to run from the time when he has actual notice of the judgment. Personal service of the summons in the action is not notice of the judgment within the meaning of the statute.

Wieland v. Shillock, 23 Minn. 227; Lord v. Hawkins, 39 Minn. 689, 38 N. W. 689; Dillon v. Porter, 36 Minn. 341, 31 N. W. 56.

Time of application—diligence—laches.

§ 1410. A party must make his application within a reasonable time after notice of the judgment and at all events within one year of such notice.[1] He must proceed with due diligence regardless of

Digitized by Google

the one year limitation. Because the court is authorized to entertain such an application within one year of notice it does not follow that the party may always take one year in which to make his application.[2] What is due diligence depends upon the facts of the particular case and slight attention should be paid to precedents.

[1] Gerish v. Johnson, 5 Minn. 23 Gil. 10; Groh v. Bassett, 7 Minn. 325 Gil. 254; Altman v. Gabriel, 28 Minn. 132, 9 N. W. 633; Sheffield v. Mullin, 28 Minn. 251, 9 N. W. 756; Frear v. Heichert, 34 Minn. 96, 24 N. W. 319; Van Aernam v. Winslow, 37 Minn. 514, 35 N. W. 381; Carlson v. Phinney, 56 Minn. 476, 58 N. W. 38; Stickney v. Jordain, 50 Minn. 258, 52 N. W. 861; Seibert v. Minneapolis etc. Ry. Co. 58 Minn. 72, 59 N. W. 828; Northern Trust Co. v. Crystal Lake Cemetery Assoc. 67 Minn. 131, 69 N. W. 708; First Nat. Bank v. Northern Trust Co., 69 Minn. 176, 71 N. W. 928; Jorgensen v. Boehmer, 9 Minn. 181 Gil. 166; McMurran v. Bourne, 81 Minn. 515, 84 N. W. 338; McMurran v. Meek, 47 Minn. 245, 49 N. W. 245; Dillon v. Porter, 36 Minn. 341, 31 N. W. 56; Kipp v. Cook, 46 Minn. 535, 49 N. W. 257.

[2] Groh v. Bassett, 7 Minn. 325 Gil. 254; Gerish v. Johnson, 5 Minn. 23 Gil. 10; Altman v. Gabriel, 28 Minn. 132, 9 N. W. 633.

§ 1411. The following periods of delay have been held to constitute want of due diligence under the circumstances: five months;[1] eleven months;[2] a few days;[3] nearly twelve months;[4] three months;[5] two months.[6]

[1] Groh v. Bassett, 7 Minn. 325 Gil. 254; Town of Hinckley v. Kettle River Ry. Co. 70 Minn. 105, 72 N. W. 835; St. Paul Land Co. v. Dayton, 39 Minn. 315, 40 N. W. 66.

[2] Altmann v. Gabriel, 28 Minn. 132, 9 N. W. 633; Carlson v. Phinney, 56 Minn. 476, 58 N. W. 38.

[3] Frear v. Heichert, 34 Minn. 96, 24 N. W. 319.

[4] Van Aernam v. Winslow, 37 Minn. 514, 35 N. W. 381; Weymouth v. Gregg, 40 Minn. 45, 41 N. W. 243.

[5] McClymond v. Noble, 84 Minn. 329, 87 N. W. 838.

[6] McMurran v. Meek, 47 Minn. 245, 49 N. W. 983.

Applicant must have a meritorious defence.

§ 1412. The applicant must have a good defence on the merits and exhibit it to the court on the motion.[1] The proper practice is to exhibit a proposed answer setting forth a good defence.[2] Of course he need not set forth the evidence of his defence and its truth or falsity cannot be tried on affidavits.[3] A verified general denial shows a good defence and is ordinarily sufficient.[4] But the court need not be content with a formal compliance in the answer with the rules of pleading which a party may follow when answering as a matter of right, but may require that in its denials the answers show the actual extent of the controversy upon the matters denied, as where the denials are of amounts stated in the complaint, and the exact amounts stated are not material.[5] A meritorious defence within the meaning of the rule, is not necessarily one which is

Digitized by Google

meritorious in an ethical sense but simply one which would have been valid if interposed regularly. All defences which are recognized as valid legal defences should receive the same consideration on a motion to open a default.[6] It is true that the discretion of the court must be exercised in furtherance of justice; this does not refer to the justice of the defence, but to the justice of relieving a party from his default. It is proper to open a default to allow a party to plead the statute of limitations [7] or a former adjudication.[8] A partial defence is a meritorious defence within the rule.[9]

[1] Osman v. Wisted, 78 Minn. 295, 80 N. W. 1127; People's Ice Co. v. Schlenker, 50 Minn. 1, 52 N. W. 219; Frasier v. Williams, 15 Minn. 288 Gil. 219; Town of Hinckley v. Kettle River Ry. Co. 70 Minn. 105, 72 N. W. 835; St. Paul Land Co. v. Dayton, 39 Minn. 315, 40 N. W. 66; Jones v. Swain, 57 Minn. 251, 59 N. W. 297; Flanigan v. Sable, 44 Minn. 417, 46 N. W. 854.

[2] McMurran v. Bourne, 81 Minn. 515, 84 N. W. 338.

[3] Lathrop v. O'Brien, 47 Minn. 428, 50 N. W. 530; McMurran v. Bourne, 81 Minn. 515, 84 N. W. 338.

[4] Fitzpatrick v. Campbell, 58 Minn. 20, 59 N. W. 629; Jones v. Swain, 57 Minn. 251, 59 N. W. 297. See also, Rhodes v. Walsh, 58 Minn. 196, 59 N. W. 1000.

[5] St. Paul & Duluth Ry. Co. v. Blackmar, 44 Minn. 514, 47 N. W. 172. See Jones v. Swain, 57 Minn. 251, 59 N. W. 297.

[6] Benedict v. Arnoux, 85 Hun (N. Y.) 283. See Washburn v. Sharpe, 15 Minn. 63 Gil. 43 and Dunnell Minn. Pl. § 705.

[7] Herman v. Rinker, 106 Pa. St. 121; Freeman v. Hill, 45 Kans. 435.

[8] Audubon v. Excelsior Fire Ins. Co. 10 Abb. Pr. 192.

[9] C. S. Congdon Hardware Co. v. Consolidated Apex Mining Co. 11 S. D. 376, 77 N. W. 1022; Douglass v. Todd, 96 Cal. 655.

§ 1413. In this state, where it is held that a party is not concluded by a failure to plead a counterclaim,[1] it would undoubtedly be held that a judgment should not be opened merely to enable a party to plead a counterclaim or setoff.[2] The question, however, is still open.[3] It is important to distinguish between a counterclaim or setoff and recoupment,[4] for the latter is a meritorious defence which authorizes the opening of a default.[5]

[1] Dunnell, Minn. Pl. § 574.

[2] Wills v. Browning, 96 Ind. 149; Slack v. Casey, 22 Ill. App. 412; Lahey v. Kingon, 13 Abb. Pr. (N. Y.) 192.

[3] Pine Mountain Iron & Coal Co. v. Tabour, 55 Minn. 287, 56 N. W. 895; John T. Noye Mfg. Co. v. Wheaton Roller Mill Co. 60 Minn. 117, 61 N. W. 910.

[4] See Dunnell, Minn. Pl. §§ 525–535.

[5] Slack v. Casey, 22 Ill. App. 412.

Sufficiency of proposed answer.

§ 1414. An application to open a default should not be denied on account of the insufficiency of the proposed answer unless such

Digitized by Google

insufficiency is so glaring that the answer would have been stricken out as frivolous, if it had been served in time.

Sheldon v. Risedorph, 23 Minn. 518; Woods v. Woods, 16 Minn. 81 Gil. 69; Forin v. City of Duluth, 66 Minn. 54, 68 N. W. 515; Rhodes v. Walsh, 58 Minn. 196, 59 N. W. 1000; Lathrop v. O'Brien, 47 Minn. 428, 50 N. W. 530.

Affidavit of merits.

§ 1415. The proper way to exhibit a meritorious defence is by a proposed answer duly verified.[1] If this is not done the merits should be shown by a formal affidavit of merits made by the party himself or some one having personal knowledge of the facts.[2] It is not necessary to present an affidavit of merits in addition to a proposed answer.[3] Any informality in the affidavit of merits may be waived by the court.[4] Neither the formal affidavit of merits provided for in the rules of the district court, nor the tender of a proposed answer, is indispensable, when the court does not require the same as a prerequisite to such relief, and when facts authorizing the exercise of the court's discretion are made to appear by the affidavit of the moving party.[5]

[1] McMurran v. Bourne, 81 Minn. 515, 84 N. W. 338.

[2] People's Ice Co. v. Schlenker, 50 Minn. 1, 52 N. W. 219; Forin v. City of Duluth, 66 Minn. 54, 68 N. W. 515; Russell v. Blakeman, 40 Minn. 463, 42 N. W. 391.

[3] People's Ice Co. v. Schlenker, 50 Minn. 1, 52 N. W. 219.

[4] Rhodes v. Walsh, 58 Minn. 196, 59 N. W. 1000; Russell v. Blakeman, 40 Minn. 463, 42 N. W. 391; Sheldon v. Risedorph, 23 Minn. 520.

[5] McMurran v. Bourne, 81 Minn. 515, 84 N. W. 338; Wood v. Schoenauer, 85 Minn. 138, 88 N. W. 411.

Counter affidavits.

§ 1416. Counter affidavits are not permissible to show want of merits or to controvert the allegations of the proposed answer or affidavit of merits. The court cannot try the merits of the cause on affidavits.

Lathrop v. O'Brien, 47 Minn. 428, 50 N. W. 530; McMurran v. Bourne, 81 Minn. 515, 84 N. W. 338; Francis v. Cox, 33 Cal. 323; Hanford v. McNair, 2 Wend. (N. Y.) 286.

Bona fide purchasers.

§ 1417. It is the general rule that the setting aside of a judgment, regular upon its face, had in a court of competent jurisdiction, and not affecting the title of real property, does not avoid a judicial sale of real property, under an execution issued thereon, made to a stranger who has purchased in good faith for a valuable consideration.[1] In the absence of statute the same rule applies to a judicial sale under a judgment affecting the title to real property. But a purchaser from the successful party to a judgment affecting the title of real property takes it subject to the judgment being set aside, except as otherwise provided by statute.[2] This rule, however, is sub-

Digitized by Google

ject to the qualification, that the purchaser, to be thus affected, must have been served with notice of the application to set aside or in some way made a party to the proceeding.[2] Our statute protects a bona fide purchaser from the successful party to a judgment which has been of record in the proper county for a period of three years next preceding the date of the application for relief.[4]

[1] Branley v. Dambly, 69 Minn. 282, 71 N. W. 1026; Gowen v. Conlow, 51 Minn. 213, 53 N. W. 365.

[2] Lord v. Hawkins, 39 Minn. 73, 38 N. W. 689.

[3] Aldrich v. Chase, 70 Minn. 243, 73 N. W. 161. See Welch v. Marks, 39 Minn. 481, 40 N. W. 611.

[4] Drew v. City of St. Paul, 44 Minn. 501, 47 N. W. 158; Whitacre v. Martin, 51 Minn. 421, 53 N. W. 806.

Application by municipal corporation.

§ 1418. While municipal corporations are subject to the same rules as other litigants, yet, in the application of these rules, regard must be had to the fact that such corporations are not natural persons, but have to act through the agency of public officers.

Glaeser v. City of St. Paul, 67 Minn. 368, 69 N. W. 1101. See also, Forin v. City of Duluth, 66 Minn. 54, 68 Minn. 515.

On appeal from justice court.

§ 1419. Upon an appeal from the judgment of a justice of the peace on questions of both law and fact, the court may relieve the defendant from a default and allow him to make answer although none was made in the justice court.

Libby v. Mikelborg, 28 Minn. 38, 8 N. W. 903; Webb v. Paxton, 36 Minn. 532, 32 N. W. 749.

Notice of motion.

§ 1420. The motion should be brought on by a written notice of eight days. If a restraining order is necessary or if some exigency exists which would cause injury to the moving party or render the relief sought ineffectual if he were required to give the regular notice of eight days an order to show cause, including a restraining clause, may be secured from the judge.

Marty v. Ahl, 5 Minn. 27 Gil. 14; Goodrich v. Hopkins, 10 Minn. 162 Gil. 130; Gillette-Herzog Mfg. Co. v. Ashton, 55 Minn. 75, 56 N. W. 576.

§ 1421. The attorney of a judgment creditor is, while his authority to enforce and collect the judgment continues, that is, for two years after the entry of judgment or until it is satisfied, authorized to act for his client in protecting and retaining the judgment against any proceeding in the same action to avoid it, and notice of such proceeding should be served on him.[1] Notice of a motion to vacate a judgment in favor of a non-resident plaintiff may be served on his attorney of record, although more than two years have elapsed since the entry thereof.[2] Purchasers of property affected by the judgment must be served with notice.[3]

[1] Sheldon v. Risedorph, 23 Minn. 518.

Digitized by Google

[2] Phelps v. Heaton, 79 Minn. 476, 82 N. W. 990.
[3] Aldrich v. Chase, 70 Minn. 243, 73 N. W. 161.

Who may apply.

§ 1422. No one but parties can move to open a default under our statute,[1] but a grantee or personal representative may be substituted as defendant and then apply for relief.[2]

[1] Kern v. Chalfant, 7 Minn. 487 Gil. 393. See McClymond v. Noble, 84 Minn. 329, 87 N. W. 838; Johnson v. Lough, 22 Minn. 203; Wolford v. Bowen, 57 Minn. 267, 59 N. W. 195.
[2] Boeing v. McKinley, 44 Minn. 392, 46 N. W. 766; Stocking v. Hanson, 22 Minn. 542. See Chisholm v. Chitherall, 12 Minn. 375 Gil. 251; McClymond v. Noble, 84 Minn. 329, 87 N. W. 838.

Terms.

§ 1423. It is within the discretion of the court to impose reasonable terms as a condition of granting relief under the statute.[1] Thus it has been held proper to open a default and grant leave to answer upon condition that the defendants consent to the appointment of a receiver of the property in controversy, pending the trial and determination of the issues raised by the answer.[2] Under the peculiar facts of the particular case the payment of seventy-five dollars was held not an improper condition.[3] Where a meritorious case for relief was presented by non-resident defendants it was held not a reasonable exercise of the discretion of the court to require, as a condition, that they file a bond, with resident sureties, to be approved by the court, in a sum sufficient to secure the payment of the amount of such money judgment as the plaintiffs might recover in the action.[4] It is improper to impose the condition that the defendant shall not plead the statute of limitations or other so-called unconscionable defences.[5] It is common practice to allow the judgment to stand as security.[6]

[1] Henderson v. Lange, 71 Minn. 468, 74 N. W. 173; Washburn v. Sharpe, 15 Minn. 63 Gil. 43. See St. Mary's Hospital v. National Benefit Co. 60 Minn. 61, 61 N. W. 824.
[2] Exley v. Berryhill, 36 Minn. 117, 30 N. W. 436.
[3] Ueland v. Johnson, 77 Minn. 543, 80 N. W. 700.
[4] Brown v. Brown, 37 Minn. 128, 33 N. W. 546.
[5] Kinderhook Bank v. Gifford, 40 Barb. (N. Y.) 659.
[6] Brown v. Brown, 37 Minn. 128, 33 N. W. 546; Barman v. Miller, 23 Minn. 458; Union Nat. Bank v. Benjamin, 61 Wis. 512; Hansee v. Fiero, 25 Abb. N. C. (N. Y.) 52.

Costs.

§ 1424. The imposition of costs on a motion to open a judgment is wholly discretionary with the court.[1] They are commonly covered by the terms, the distinction between terms and costs not being observed with nicety. Ordinarily the defendant ought to be required to pay the disbursements of the plaintiff in making proof on the default and entering up judgment.[2]

[1] Brown v. Brown, 37 Minn. 128, 33 N. W. 546.
[2] See Henderson v. Lange, 71 Minn. 468, 74 N. W. 173.

Digitized by Google

Renewal of motion.

§ 1425. Where a motion has been fully heard and determined it cannot be renewed, and the same questions again raised, except on leave of court first had. A second application founded on facts which were known or ought to have been known to the party when making the first should not be entertained.[1] An order to show cause why an application shall not be granted, is sufficient leave to renew the application, if it has been previously heard and denied.[2]

[1] Carlson v. Carlson, 49 Minn. 555, 52 N. W. 214; Weller v. Hammer, 43 Minn. 195, 45 N. W. 427; Swanstrom v. Marvin, 38 Minn. 359, 37 N. W. 455.

[2] Goodrich v. Hopkins, 10 Minn. 162 Gil. 130.

Waiver.

§ 1426. A stipulation extending the time to answer and providing that plaintiff may take judgment if the answer is not served within the extended time will not ordinarily estop the defendant from moving to open the default.

Barker v. Keith, 11 Minn. 65 Gil. 37; Dupries v. Milwaukee & St. Paul Ry. Co. 20 Minn. 156 Gil. 139.

Appeal.

§ 1427. An order granting or denying a motion to open a default is appealable.[1] An appeal from an order vacating a judgment does not have the effect of reinstating the judgment so as to give it operation as an estoppel.[2]

[1] People's Ice Co. v. Schlenker, 50 Minn. 1, 52 N. W. 219; County of Chisago v. St. Paul & Duluth Ry. Co. 27 Minn. 109, 6 N. W. 454; Holmes v. Campbell, 13 Minn. 66 Gil. 58.

[2] Hershey v. Meeker County Bank, 71 Minn. 255, 73 N. W. 967.

The question on appeal.

§ 1428. The matter of opening a default lies almost wholly in the discretion of the trial court and its action will not be reversed on appeal except for a clear abuse of discretion.[1] Particularly is this true when the determination of the trial court was made on conflicting affidavits.[2] If it is obvious that the trial court has acted wilfully, arbitrarily, capriciously, or under a misapprehension of the law, and in denial of justice, its action will be reversed on appeal, for its power in this regard is not absolute but judicial and must be judicially exercised.[3]

[1] Perrin v. Oliver, 1 Minn. 203 Gil. 176; Myrick v. Pierce, 5 Minn. 65 Gil. 47; True v. True, 6 Minn. 458 Gil. 315; Swift v. Fletcher, 6 Minn. 550 Gil. 386; Jorgensen v. Boehmer, 9 Minn. 181 Gil. 166; Goodrich v. Hopkins, 10 Minn. 162 Gil. 130; Barker v. Keith, 11 Minn. 65 Gil. 37; Whitcomb v. Shafer, 11 Minn. 232 Gil. 153; Woods v. Woods, 16 Minn. 81 Gil. 69; Reagan v. Madden, 17 Minn. 402 Gil. 378; Sheldon v. Risedorph, 23 Minn. 518; Libby v. Mikelborg, 28 Minn. 38, 8 N. W. 903; Moran v. Mackey, 32 Minn. 266, 20 N. W. 159; Smith v. Harmon, 32 Minn. 312, 20 N. W. 238; Frear v. Heichert, 34 Minn.

Digitized by Google

96, 24 N. W. 319; Sandberg v. Berg, 35 Minn. 212, 28 N. W. 255; Hallam v. Doyle, 35 Minn. 337, 29 N. W. 130; Exley v. Berryhill, 36 Minn. 117, 30 N. W. 436; St. Paul Land Co. v. Dayton, 39 Minn. 315, 40 N. W. 66; Bray v. Church of Brandon, 39 Minn. 390, 40 N. W. 518; Russell v. Blakeman, 40 Minn. 463, 42 N. W. 391; Bridgman v. Dambly, 41 Minn. 526, 43 N. W. 482; Foote v. Branch, 42 Minn. 62, 43 N. W. 782; Weller v. Hammer, 43 Minn. 195, 45 N. W. 427; Flanigan v. Sable, 44 Minn. 417, 46 N. W. 854; Boeing v. McKinley, 44 Minn. 392, 46 N. W. 766; Sturm v. School District No. 70, 45 Minn. 88, 47 N. W. 462; Nauer v. Benham, 45 Minn. 252, 47 N. W. 796; Granse v. Frings, 46 Minn. 352, 49 N. W. 60; Lathrop v. O'Brien, 47 Minn. 428, 50 N. W. 530; McMurran v. Meek, 47 Minn. 245, 49 N. W. 983; People's Ice Co. v. Schlenker, 50 Minn. 1, 52 N. W. 219; Stickney v. Jordain, 50 Minn. 258, 52 N. W. 861; Gerdtzen v. Cockrell, 52 Minn. 501, 55 N. W. 58; Pine Mountain Iron & Coal Co. v. Tabour, 55 Minn. 287, 56 N. W. 895; Wolford v. Bowen, 57 Minn. 267, 59 N. W. 195; Fitzpatrick v. Campbell, 58 Minn. 20, 59 N. W. 629; Rhodes v. Walsh, 58 Minn. 196, 59 N. W. 1000; St. Mary's Hospital v. National Benefit Co. 60 Minn. 61, 61 N. W. 824; Missouri, Kansas & Texas Trust Co. v. Norris, 61 Minn. 256, 63 N. W. 634; City of Duluth v. Dibblee, 62 Minn. 18, 63 N. W. 1117; Northern Trust Co. v. Markell, 61 Minn. 271, 63 N. W. 735; Forin v. City of Duluth, 66 Minn. 54, 68 N. W. 515; Bates v. Bates, 66 Minn. 135, 68 Minn. 845; Stewart v. Cannon, 66 Minn. 64, 68 N. W. 604; Northern Trust Co. v. Crystal Lake Cemetery Assoc. 67 Minn. 131, 69 N. W. 708; Glaeser v. City of St. Paul, 67 Minn. 368, 69 N. W. 1101; First Nat. Bank v. Northern Trust Co. 69 Minn. 176, 71 N. W. 928; Town of Hinckley v. Kettle River Ry. Co. 70 Minn. 105, 72 N. W. 835; Martin v. Curley, 70 Minn. 489, 73 N. W. 405; Milwaukee Harvester Co. v. Schroeder, 72 Minn. 393, 75 N. W. 606; Whitney v. Sherin, 74 Minn. 4, 76 N. W. 787; Ueland v. Johnson, 77 Minn. 543, 80 N. W. 700; Hull v. Chapel, 77 Minn. 159, 79 N. W. 669; Schuler v. Wood, 81 Minn. 372, 84 N. W. 121; McMurran v. Bourne, 81 Minn. 515, 84 N. W. 338; Deering v. Donovan, 82 Minn. 162, 84 N. W. 745; McClymond v. Noble, 84 Minn. 329, 87 N. W. 838; Wood v. Schoenauer, 85 Minn. 138, 88 N. W. 411; Kipp v. Cook, 46 Minn. 535, 49 N. W. 257.

[8] Libby v. Mikelborg, 28 Minn. 38, 8 N. W. 903; Swanstrom v. Marvin, 38 Minn. 359, 37 N. W. 455; Flanigan v. Duncan, 47 Minn. 250, 49 N. W. 981; Moran v. Mackey, 32 Minn. 266, 20 N. W. 159.

[8] Hildebrandt v. Robbecke, 20 Minn. 100 Gil. 83; Altmann v. Gabriel, 28 Minn. 132, 9 N. W. 633; Welch v. Marks, 39 Minn. 481, 40 N. W. 611; Weymouth v. Gregg, 40 Minn. 45, 41 N. W. 243; People's Ice Co. v. Schlenker, 50 Minn. 1, 52 N. W. 219; Baxter v. Chute, 50 Minn. 164, 52 N. W. 379; John T.

Digitized by Google

Noye Mfg. Co. v. Wheaton Roller Mill Co. 60 Minn. 117, 61 N. W. 910; Potter v. Holmes, 74 Minn. 508, 77 N. W. 416; Jones v. Swain, 57 Minn. 251, 59 N. W. 297.

§ 1429. The supreme court will affirm the action of the trial court as a matter of course if the record on appeal does not contain all the papers upon which the order was based.

Downs v. Nourse, 30 Minn. 552, 16 N. W. 412.

§ 1430. Where the trial court grants a defendant leave to answer in a case within its discretion the supreme court will not reverse on the ground that the proposed answer is insufficient, unless the insufficiency is such that, had the answer been served in time, it would have been struck out on motion.

Sheldon v. Risedorph, 23 Minn. 518; Forin v. City of Duluth, 66 Minn. 54, 68 N. W. 515.

Power of probate court.

§ 1431. A probate court is authorized to vacate its orders or judgments on the ground of fraud, surprise, excusable neglect or inadvertence.[1] A party in interest who failed to appear and oppose the admission to probate of a proposed will may apply to the court to vacate the order admitting it to probate, and for leave to appear and oppose its admission.[2] So, too, in a proper case, an order allowing claims may be vacated for the purpose of allowing the claims to be contested.[3] "While there is now no question as to the power of the probate court, in certain cases, to vacate its orders, yet the exercise of this power, even in the absence of any statutory limitation, is subject to certain settled principles; and the action of the court, if not authorized by those principles, is subject to review and reversal. And while we do not think that a final decree of distribution of itself causes the estate to so pass out of the court, and beyond its jurisdiction, as to deprive it of power to set the decree aside if obtained by fraud, or erroneously rendered by inadvertence, yet it would require a strong case to warrant a court in doing so after the lapse of two years."[4] The probate of a will cannot be set aside for failure to appoint a guardian ad litem for minors interested in the estate.[5] The probate court loses authority to vacate its orders and judgments when the subject matter has passed beyond its jurisdiction.[6]

[1] In re Gragg, 32 Minn. 142, 19 N. W. 651; In re Hause, 32 Minn. 155, 19 N. W. 973; Levi v. Longini, 82 Minn. 324, 84 N. W. 1017, 86 N. W. 333.

[2] Larson v. How, 71 Minn. 250, 73 N. W. 966.

[3] In re Gragg, 32 Minn. 142, 19 N. W. 651; In re Kidder's Estate, 53 Minn. 529, 55 N. W. 738.

[4] Fern v. Leuthold, 39 Minn. 212, 39 N. W. 399.

[5] In re Mousseau's Will, 30 Minn. 202, 14 N. W. 887.

[6] State v. Probate Court, 33 Minn. 94, 22 N. W. 10. See also, Hurley v. Hamilton, 37 Minn. 160, 33 N. W. 912; Mousseau v. Mousseau, 40 Minn. 236, 41 N. W. 977; Kurtz v. St. Paul & Duluth Ry. Co. 65 Minn. 60, 67 N. W. 808.

Digitized by Google

CHAPTER XVI

EXECUTION

Means of enforcing judgments generally—statute.

§ 1432. "Where a judgment requires the payment of money, or the delivery of real or personal property, the same is enforced in these respects by execution, as provided in the last three sections [§§ 1434, 1438, 1440, infra]. Where it requires the performance of any other act, a certified copy of the judgment may be served upon the party against whom it is given, or upon the person or officer who is required thereby, or by law, to obey the same, and his obedience thereto enforced. If he refuses, he may be punished by the court as for contempt."

[G. S. 1894 § 5446]

§ 1433. Service of a copy on the attorney of the party is insufficient.

Fero v. Van Evra, 9 How. Pr. (N. Y.) 148.

Kinds of executions—statute.

§ 1434. "There are two kinds of writs of execution: one against the property of the judgment debtor, and the other for the delivery of the possession of real or personal property, or such delivery with damages for the detention, or taking and withholding the same."

[G. S. 1894 § 5443]

§ 1435. An alias execution may issue under our practice as at common law.[1] A writ of assistance may issue in an action to foreclose a mortgage.[2]

[1] Walter v. Greenwood, 29 Minn. 87, 12 N. W. 145. See also, Lay v. Shaubhut, 6 Minn. 273 Gil. 182; Shaubhut v. Hilton, 7 Minn. 506 Gil. 412; Hutchins v. County Com'rs, 16 Minn. 13 Gil. 1; First Nat. Bank v. Rogers, 15 Minn. 381 Gil. 305; Butler v. White, 25 Minn. 432; Sherburne v. Rippe, 35 Minn. 540, 29 N. W. 322; Suchaneck v. Smith, 53 Minn. 96, 54 N. W. 932; Tillman v. Jackson, 1 Minn. 183 Gil. 157; Erickson v. Johnson, 22 Minn. 380.

[2] Belknap v. Van Riper, 76 Minn. 268, 79 N. W. 103.

Time within which writ may issue—statute.

§ 1436. "The party in whose favor judgment is given, may, at any time within ten years after the entry thereof, proceed to enforce the same, as prescribed by statute."

[G. S. 1894 § 5442]

§ 1437. An execution issued more than ten years from the entry of judgment is void and not merely voidable.[1] An action will not lie to enforce the lien of a judgment where the time prescribed for enforcing it by execution has expired.[2] A judgment cannot be en-

Digitized by Google

forced by sale after the expiration of the statutory period although it is based on a levy made within the period. It is not enough to initiate proceedings in execution prior to the expiration of the statutory period and complete them after that event.[3] But it has been held that an action on a judgment may be commenced at any time within the ten years and proceed to judgment afterwards.[4] In computing the period of ten years the statutory rule of computation applies and the day upon which the judgment is entered is to be excluded,[5] but of course this does not mean that execution may not issue on that day. Under a former statute it was held that the time during which a judgment creditor was, on motion of the judgment debtor, enjoined from issuing execution, should be excluded from the statutory period.[6] Execution may issue before costs are inserted in the judgment.[7] Whether execution may issue before the filing of the judgment roll is unsettled.[8]

[1] Hanson v. Johnson, 20 Minn. 194 Gil. 172.
[2] Ashton v. Slater, 19 Minn. 347 Gil. 300; Dole v. Wilson, 39 Minn. 330, 40 N. W. 161. See Morrill v. Madden, 35 Minn. 493, 29 N. W. 193.
[3] Newell v. Dart, 28 Minn. 248, 9 N. W. 732; Spencer v. Haug, 45 Minn. 231, 50 N. W. 305.
[4] Sandwich Mfg. Co. v. Earl, 56 Minn. 390, 57 N. W. 161.
[5] Spencer v. Haug, 45 Minn. 231, 50 N. W. 305.
[6] Wakefield v. Brown, 38 Minn. 361, 37 N. W. 788.
[7] Richardson v. Rogers, 37 Minn. 461, 35 N. W. 270.
[8] See § 1266.

Form and contents of writ—statute.

§ 1438. "The writ of execution shall be under the seal of the court, subscribed by the clerk, tested in the name of the district judge, indorsed by the attorney of the party applying therefor, and directed to the sheriff, or coroner when the sheriff is a party or interested; it shall intelligibly refer to the judgment, stating the court, the county where the judgment roll or transcript is filed, the names of the parties, the amount of the judgment, if it is for money, the amount actually due thereon, and the time of docketing in the county to which the execution is issued, and shall require the officer substantially as follows:

(1) If it is against the property of the judgment debtor, it shall require the officer to satisfy the judgment, with interest, out of the personal property of such debtor, and if sufficient personal property cannot be found, out of the real property belonging to him on the day when the judgment was docketed in the county, or at any time thereafter not exceeding ten years. And in case real property has been levied upon by virtue of a writ of attachment, in favor of the judgment creditor, in the same action in which the judgment was rendered, and the judgment creditor has, subsequently to such levy, paid the taxes upon the real property so attached, and filed in the office of the clerk of the court the receipt of the proper officer for such taxes, the said receipt shall be attached to and become a

Digitized by Google

part of the judgment roll, and the execution shall also specify the filing of such receipt, with the date of filing, date of receipt, and amount thereof; and in case of the sale under execution of any such real estate, the proceeds of such sale, after deducting the costs and expenses thereof, shall be first applied to the payment of the amount so paid for taxes, with the interest accrued thereon;

(2) If it is against real or personal property in the hands of personal representatives, heirs, devisees, legatees, tenants of real property, or trustees, it shall require the officer to satisfy the judgment, with interest, out of such property;

(3) If it is against defendants jointly indebted upon a contract, a part of whom only have been summoned in the action, it shall issue in form against all the defendants, but the attorney of the party causing it to be issued shall indorse thereon the names of those defendants who were not summoned, and such execution shall not be levied upon the sole property of any such defendant; but it may be collected out of the personal property of any such defendant owned by him as a partner with the other defendants summoned or any of them;

(4) If it is for the delivery of the possession of real or personal property, it shall require the officer to deliver the possession of the same, particularly describing it, to the party entitled thereto, and may, at the same time, require the officer to satisfy any costs, charges, damages, rents or profits, recovered by the same judgment, out of the personal property of the party against whom it was rendered, and the value of the property for which the judgment was recovered, to be specified therein, if a delivery thereof cannot be had; and if sufficient personal property cannot be found, then out of the real property, as provided in the first subdivision of this section, and in that respect it shall be deemed an execution against property."

[G. S. 1894 § 5444]

§ 1439. The writ must be dated as of the day on which it is issued from the clerk's office and not as of the day upon which it is delivered to the sheriff.[1] A writ not under the seal of the court is probably void.[2] The fact that a writ does not run in the name of the state does not render it void.[3] A misrecital of the date of the judgment is immaterial if the judgment is otherwise sufficiently identified.[4] If an attachment has issued it is not necessary for the execution to refer to the attachment proceedings but it may be in the ordinary form.[5] Under an execution in which an officer is commanded to satisfy the same out of the property of A. and B., judgment debtors, he may seize and sell the separate property of either or the joint property of both.[6]

[1] G. S. 1894 § 4848; Mollison v. Eaton, 16 Minn. 426 Gil. 383.

[2] See Wheaton v. Thompson, 20 Minn. 196 Gil. 175.

[3] Thompson v. Bickford, 19 Minn. 17 Gil. 1.

[4] Millis v. Lombard, 32 Minn. 259, 20 N. W. 187.

[5] Hencke v. Twomey, 58 Minn. 550, 60 N. W. 667.

[6] West Duluth Land Co. v. Bradley, 75 Minn. 275, 77 N. W. 964.

Digitized by Google

When returnable—renewals—statute.

§ 1440. "The execution shall be made returnable within sixty days after its receipt by the officer to the clerk with whom the judgment roll is filed; but the judgment creditor or his attorney may, at any time within said sixty days, demand the money received and collected by said sheriff upon execution in his hands, and the sheriff shall immediately pay the same over to said judgment creditor, or his said attorney, after deducting his proper fees thereon. On the return of an execution unsatisfied in whole or in part, or just before the expiration of the period of sixty days, the clerk may renew the same for a further period of sixty days, on the oral or written request of the judgment creditor, or his attorney, by indorsing on said execution the words following: 'Renewed sixty days from the date hereof, at the request of the judgment creditor,' to which indorsement he shall add the true date of making the same, and attest the same by his signature and the seal of the court, and shall thereupon redeliver the same, so indorsed, to the officer returning the same; and such renewal shall have the effect of extending the life of the execution for an additional period of sixty days, fully preserving all levies made and rights acquired under the execution before such renewal; and such execution may be again so renewed, from time to time, by indorsement by the clerk, as aforesaid, with the same effect as such first renewal."

[G. S. 1894 § 5445]

§ 1441. Regularly an execution has 60 days to run and although a sheriff may, on his own motion and under his official responsibility, rightfully return an execution before the 60 days have expired, upon becoming satisfied that the defendant has not, and will not have within that time, any property, out of which the execution or a part thereof can be satisfied, yet if such return is made at the solicitation of the plaintiff it cannot be made the foundation of supplementary proceedings.[1] The provision allowing the sheriff 60 days in which to discharge his duties was designed to afford him reasonable opportunity to execute the process free from unreasonable demand by an impatient creditor for more peremptory service, and to extend indulgence for a limited time to a delinquent and embarrassed debtor.[2] But an officer who knows or has reasonable ground for knowing of the existence of property out of which the execution may be made acts at his peril in not making an immediate levy.[3] A levy made after the expiration of the 60 days is void and not merely voidable and the purchaser at the sale acquires no title.[4] A levy may be made on the return day.[5] Where a levy has been made before the return day it may be completed by sale after such day and the officer may retain the writ in his possession for that purpose.[6] But the fact that a levy is made within the 60 days does not authorize additional levies after the expiration of that period.[7] An order of a court of competent jurisdiction staying the sheriff from interference, under an execution, with the property of the judgment debtor, suspends, during its continuance, the running of the period of 60 days. So a stay procured by an appeal operates as a suspension of the

Digitized by Google

time within which the sheriff is required to return the writ, and in such case the sheriff retains the execution, and a levy made thereon, until the final determination of the appeal, even though years elapse; and then, in case of affirmance, makes the amount by virtue of his original levy.[8] A valid return of "unsatisfied" may be made after the expiration of 60 days so as to sustain a creditors' suit.[9]

[1] Spencer v. Cuyler, 17 How. Pr. (N. Y.) 157.
[2] Ansonia Brass & Copper Co. v. Conner, 103 N. Y. 502.
[3] Guiterman v. Sharvey, 46 Minn. 183, 48 N. W. 780; Elmore v. Hill, 46 Wis. 618.
[4] Ansonia Brass & Copper Co. v. Conner, 103 N. Y. 502.
[5] Lowry v. Reed, 89 Ind. 442; Prescott v. Wright, 6 Mass. 20.
[6] Barrett v. McKenzie, 24 Minn. 20; Knox v. Randall, 24 Minn. 479; Spencer v. Haug, 45 Minn. 231, 47 N. W. 294; Bradley v. Sandilands, 66 Minn. 40, 68 N. W. 321; Ansonia Brass & Copper Co. v. Conner, 103 N. Y. 502.
[7] McDonald v. Gronefeld, 45 Mo. 28.
[8] Ansonia Brass & Copper Co. v. Conner, 103 N. Y. 502.
[9] Le Saulnier v. Krueger, 85 Wis. 214.

§ 1442. The above statutory provision authorizing a renewal of an execution was enacted merely to avoid the necessity of issuing an alias execution and does not in any way affect any common law rule governing executions. It affords a simple and cumulative remedy.[1] An alias execution may still be issued as at common law.[2]

[1] Barrett v. McKenzie, 24 Minn. 20.
[2] Walter v. Greenwood, 29 Minn. 87, 12 N. W. 145. See § 1435.

Successive executions in action against stockholders.

§ 1443. In an action to enforce the statutory liability of stockholders in a corporation successive executions may be issued.

Harper v. Carroll, 66 Minn. 487, 69 N. W. 610, 1069.

Return of officer.

§ 1444. The return of the officer is his official answer respecting the duty enjoined upon him by the writ and is intended to inform the court of what has been done in the premises. Upon being made and filed, it becomes a part of the record in the action, and partakes of its nature, in that it imports absolute verity as to every statement of fact contained in it, concerning which it is his duty therein to speak. So long as it remains a part of the record, it cannot, as to any such statement, be controverted or questioned collaterally by any of the parties thereto or their privies, for the purpose of invalidating the proceedings of the officer or affecting any rights dependent thereon.[1] But the return may be controverted in a direct proceeding even by the parties.[2] And the parties may always controvert it in another action, its conclusive character being limited to the action in which it is made.[3] As to strangers the return is prima facie evidence of the facts therein stated but is not conclusive, even collaterally.[4] In an action against the officer by any of the parties or their privies the officer is estopped from denying the truth of

Digitized by Google

his return as to all matters material to be returned. If his return is erroneous in respect to any matter of fact therein stated, his remedy is to get it amended in accordance with the facts, upon application to the court and leave granted.[5] A return will never be set aside or amended to the material injury of innocent third parties.[6] In reporting his acts under the writ the officer is only required to give the ultimate facts. A return which certifies in general terms that the officer "levied" on certain property is sufficient, it not being necessary to state the particulars of the levy.[7] In construing the return it is to be presumed, in the absence of a contrary showing upon its face, that the officer has done all that was required of him, both in the execution of the process and in the making of the return thereto.[8] The return need not be made within 60 days of the issuance of the writ.[9] Irregularities in the return will not be permitted to prejudice the purchaser at the sale or redemptioners.[10] Evidence that after a levy on personal property the sheriff surrendered the property to the judgment debtor does not contradict the return.[11] A return may be amended, on motion, to conform to the facts.[12] The court may set aside the return on an execution of satisfaction where, in fact, there has been no satisfaction.[13] Oral evidence not inconsistent with the return is always admissible to prove what was done under the writ.[14] Where the plaintiff had levied an attachment on personal property of the defendant and subsequently an execution was returned "no property found" with the knowledge and consent of the plaintiff it was held that the return constituted a waiver of the attachment as to innocent third parties.[15] A return of "unsatisfied" is not equivalent to a return that the party had no property, personal or real, out of which the amount specified in the execution, or any part of the same, could be collected. The reasons for the non-satisfaction of the writ ought to be stated.[16] A return may be made by an officer after the expiration of his term of office.[17]

[1] State v. Penner, 27 Minn. 269, 6 N. W. 790.
[2] Crosby v. Farmer, 39 Minn. 305, 40 N. W. 71.
[3] Stewart v. Duncan, 47 Minn. 285, 50 N. W. 227.
[4] Tullis v. Brawley, 3 Minn. 277 Gil. 191; Clawsen v. Whitney, 39 Minn. 50, 38 N. W. 759; Stewart v. Duncan, 47 Minn. 285, 50 N. W. 227.
[5] State v. Penner, 27 Minn. 269, 6 N. W. 790; Ryan Drug Co. v. Peacock, 40 Minn. 470, 42 N. W. 298.
[6] Castner v. Symonds, 1 Minn. 427 Gil. 310; Crosby v. Farmer, 39 Minn. 305, 40 N. W. 71. See Butler v. White, 25 Minn. 432; Lay v. Shaubhut, 6 Minn. 273 Gil. 182.
[7] Tullis v. Brawley, 3 Minn. 277 Gil. 191; Rohrer v. Turrill, 4 Minn. 407 Gil. 309; Folsom v. Carli, 5 Minn. 333 Gil. 264; Hutchins v. County Com'rs, 16 Minn. 31 Gil. 1; Hossfeldt v. Dill, 28 Minn. 469, 10 N. W. 781.
[8] State v. Penner, 27 Minn. 269, 6 N. W. 790; Tullis v. Brawley, 3 Minn. 277 Gil. 191.
[9] Barrett v. McKenzie, 24 Minn. 20; Knox v. Randall, 24 Minn.

Digitized by Google

479; Spencer v. Haug, 45 Minn. 231, 47 N. W. 794; Bradley v. Sandilands, 66 Minn. 40, 68 N. W. 321.

[10] Millis v. Lombard, 32 Minn. 259, 20 N. W. 187; Hutchins v. County Com'rs, 16 Minn. 13 Gil. 1; Spencer v. Haug, 45 Minn. 231, 47 N. W. 794.

[11] First Nat. Bank v. Rogers, 15 Minn. 381 Gil. 305.

[12] Hutchins v. County Com'rs, 16 Minn. 13 Gil. 1; State v. Penner, 27 Minn. 269, 6 N. W. 790.

[13] D. M. Osborne & Co. v. Wilson, 37 Minn. 8, 32 N. W. 786; Suchaneck v. Smith, 53 Minn. 96, 54 N. W. 932; Lay v. Shaubhut, 6 Minn. 273 Gil. 182; Shaubhut v. Hilton, 7 Minn. 506 Gil. 412.

[14] Millis v. Lombard, 32 Minn. 259, 20 N. W. 187.

[15] Butler v. White, 25 Minn. 432.

[16] Sherburne v. Rippe, 35 Minn. 540, 29 N. W. 322.

[17] Knox v. Randall, 24 Minn. 479. See G. S. 1894 § 792.

Issuance of writ after death of party—statute.

§ 1445. "Notwithstanding the death of a party after judgment, execution thereon against his property may be issued and executed in the same manner and with the same effect as if he was still living; except that such execution cannot be issued within a year after his death."

[G. S. 1894 § 5447]

§ 1446. This statute is applicable only to cases where a lien has been acquired on real property prior to the death of the party. It has no application to personal property. A judgment creditor who has acquired no lien prior to the death of the debtor must proceed to establish and collect his claim as a general creditor in the due course of administration.[1] A judgment creditor may take advantage of this provision although he presented his judgment for payment in the course of the administration of the estate of the deceased in the probate court.[2] If there are several judgment debtors and one dies execution may issue against the property of the others.[3] If the execution is partially executed before the death of the party, as by the commencement of publication of notice of sale, it may be completed without regard to his death.[4] If an execution is delivered to the officer before the death he may make a levy and sale without regard to the death.[5]

[1] Byrnes v. Sexton, 62 Minn. 135, 64 N. W. 155.

[2] Fowler v. Mickley, 39 Minn. 28, 38 N. W. 634.

[3] Day v. Rice, 19 Wend. (N. Y.) 645.

[4] Wood v. Morehouse, 45 N. Y. 368.

[5] Becker v. Becker, 47 Barb. (N. Y.) 497.

To what sheriff issued—different counties—statute.

§ 1447. "When the execution is against the property of the judgment debtor, it may be issued to the sheriff of any county where the judgment is docketed. Where it requires the delivery of real or personal property, it shall be issued to the sheriff of the county

Digitized by Google

where the property or some part thereof is situated. Executions may be issued at the same time to different counties."

[G. S. 1894 § 5448]

§ 1448. In issuing an execution to another county it is common practice for the clerk of the county where the judgment was rendered to deliver to the attorney a transcript of the original docket and an execution with the date of the docketing in the other county left blank, with the understanding that the attorney will have the judgment properly docketed in the latter county and the date of the docketing inserted in the execution before it is delivered to the sheriff of such county; and if this is done an execution so issued will be valid.[1] And if, in such cases, the execution is delivered to the sheriff before the judgment is docketed in his county the subsequent docketing of the judgment will cure the defect as against the judgment creditor and all who are not bona fide purchasers. It is not necessary to withdraw the writ and redeliver it to the sheriff or to issue a new writ.[2] It has been held in Wisconsin that an identical statute is the sole authority for issuing an execution to another county,[3]—but that is probably not true in this state.[4] This statute does not authorize an execution to issue in any county where a judgment may be docketed; the execution must in all cases issue from the county where the judgment was rendered.[5] Execution may issue to another county although the judgment debtor has leviable property in the county where the judgment was rendered.[6]

[1] Gowan v. Fountain, 50 Minn. 264, 52 N. W. 862; Dodge v. Chandler, 9 Minn. 97 Gil. 87; Mollison v. Eaton, 16 Minn. 426 Gil. 383.

[2] Hoerr v. Meihofer, 77 Minn. 228, 79 N. W. 964; Rogers v. Cherrier, 75 Wis. 54, 43 N. W. 828.

[3] Kentzler v. Chicago etc. Ry. Co. 47 Wis. 641; Bugbee v. Lombard, 88 Wis. 271.

[4] Gowan v. Fountain, 50 Minn. 264, 52 N. W. 862.

[5] Bostwick v. Benedict, 4 S. D. 414.

[6] Brush v. Lee, 36 N. Y. 49.

What sheriff to execute writs.

§ 1449. The general rule is that the sheriff in office in any county is the proper person to execute all process running to the sheriff of such county.[1] Provision is made by statute allowing an outgoing sheriff to complete an execution begun during his term.[2] But this is merely permissive.[3] Where a sheriff levies an attachment in an action, an execution on the judgment in the action, issued after such sheriff goes out of office, should be delivered to and executed by the sheriff in office when it issues.[4] When a sheriff dies, becomes insane, removes from the state or is in any manner unable to act, provision is made by statute for his successor in office to complete any execution begun by him.[5]

[1] Butler v. White, 25 Minn. 432; Beebe v. Fridley, 16 Minn. 518 Gil. 467.

Digitized by Google

[2] G. S. 1894 § 792. See Knox v. Randall, 24 Minn. 479.
[3] Butler v. White, 25 Minn. 432.
[4] Id.
[5] G. S. 1894 § 792.

Priority.

§ 1450. It is the duty of the sheriff to execute writs of execution against the same debtor in the order in which they come into his hands. But the liens of creditors upon personal property take precedence according to the order in which the executions are actually levied and not in the order in which they are delivered to the sheriff.[1] Where one writ is delivered to the sheriff and another to his deputy the first one actually executed takes precedence.[2] In the case of real property the rule is different. Judgment liens on real property take precedence in accordance with the docketing of the judgments and no advantage is obtained by diligence in execution.[3]

[1] Albrecht v. Long, 25 Minn. 163.
[2] Albrecht v. Long, 27 Minn. 81, 6 N. W. 420.
[3] Jackson v. Holbrook, 36 Minn. 494, 32 N. W. 852.

Effect of injunction.

§ 1451. The effect of an injunction of an execution sale is to stop the proceedings upon the execution where they are. But such injunction does not operate to kill the execution, or to destroy or impair a levy made under it. It is therefore competent for the sheriff holding such writ to go on after the dissolution of the injunction, and even after the expiration of his term of office, and complete the proceedings commenced by him.

Knox v. Randall, 24 Minn. 479. See Pettingill v. Moss, 3 Minn. 222 Gil. 151 (overruled in part by amendment of statute).

Effect of creditors' bill.

§ 1452. The pendency of an action in the nature of a creditors' bill to enforce a judgment does not prevent the issuance of an execution upon the same judgment and a sale. The execution creditor has cumulative remedies and he may pursue them concurrently.

Kumler v. Ferguson, 22 Minn. 117. See Jackson v. Holbrook, 36 Minn. 494, 32 N. W. 852.

Execution against several.

§ 1453. Under an execution in which an officer is commanded to satisfy the same out of the property of A. and B., judgment debtors, he may seize and sell the separate property of either or the joint property of both.

West Duluth Land Co. v. Bradley, 75 Minn. 275, 77 N. W. 964. See Daly v. Bradbury, 46 Minn. 396, 49 N. W. 190.

Amendment of writ.

§ 1454. A writ of execution may be amended as to matters of form even after a sale of real property under it.

Thompson v. Bickford, 19 Minn. 17 Gil. 1; Mollison v. Eaton,

Digitized by Google

16 Minn. 426 Gil. 383; Casper v. Klippen, 61 Minn. 353, 63 N. W. 737.

Collateral attack.

§ 1455. An execution cannot be collaterally attacked for irregularity. An execution which is not absolutely void is good until set aside by the court which issued it in a direct proceeding.

Thompson v. Bickford, 19 Minn. 17 Gil. 1.

Sheriff acts as officer of the law.

§ 1456. A sheriff, in making a levy and sale, acts not as the agent of the execution creditor but as the officer of the law.[1] Notice to the sheriff is not notice to the creditor.[2]

[1] Armstrong v. Vroman, 11 Minn. 220 Gil. 142; Horton v. Maffitt, 14 Minn. 289 Gil. 216; Davis v. Seymour, 16 Minn. 210 Gil. 184; McCarthy v. Grace, 23 Minn. 182; Nopson v. Horton, 20 Minn. 268 Gil. 239; Tinkcom v. Lewis, 21 Minn. 132; Schroeder v. Lahrman, 28 Minn. 75, 9 N. W. 173; Hall v. Swensen, 65 Minn. 391, 67 N. W. 1024.

[2] McCarthy v. Grace, 23 Minn. 182.

Authority of attorney—substitution—lien.

§ 1457. An attorney in the action for a judgment creditor may issue execution and receive the money collected on it within two years after the judgment.[1] But a judgment creditor may employ a new attorney to enforce his judgment without any formal substitution or notice.[2] If an assignee of a judgment acquiesces in the acts of an attorney of the judgment creditor he is bound by them. As against such assignee the sheriff may withhold the amount of the attorney's lien out of the proceeds of an execution sale.[3] An attorney has no implied authority to stipulate for a private sale.[4]

[1] G. S. 1894 § 6184; Berthold v. Fox, 21 Minn. 51; Gill v. Truelson, 39 Minn. 373, 40 N. W. 254; Sheldon v. Risedorph, 23 Minn. 518; Schoregge v. Gordon, 29 Minn. 367, 13 N. W. 194.

[2] Hinkley v. St. Anthony Falls Water Power Co. 9 Minn. 55 Gil. 44; Berthold v. Fox, 21 Minn. 51; Knox v. Randall, 24 Minn. 479; Gill v. Truelson, 39 Minn. 373, 40 N. W. 254.

[3] Gill v. Truelson, 39 Minn. 373, 40 N. W. 254.

[4] Kronschnable v. Knoblauch, 21 Minn. 56.

Effect of misnomer.

§ 1458. Where a party is sued under a wrong name the judgment is not absolutely void, but may be amended. A sheriff levying on such a judgment cannot justify under the execution until it and the judgment and all proceedings in the action are amended in a direct proceeding for that purpose.

Casper v. Klippen, 61 Minn. 353, 63 N. W. 737.

Nature of sheriff's interest.

§ 1459. A debtor loses no rights in his property when it is levied upon except the right of possession and control. On payment of the debt he has the right to have it returned to him exactly in the

Digitized by Google

same condition in which it was at the time of the seizure, usual wear and tear of removal and preservation only excepted. The sheriff has no personal right of possession; his possession is that of the law, whose agent he is, and he has no right to use the property, or profit by its possession. In the interval between the levy and sale the debtor is not divested of his ownership in the property, but the incident of title, the right to possess, use and dispose of the property, is suspended only, which he may regain at any moment by paying the debt.

Banker v. Caldwell, 3 Minn. 94 Gil. 46.

Care and management of property by sheriff.

§ 1460. In reference to the care and management of personal property levied on much must be left to the judgment of the officer. There are many irregularities for which the officer would be liable in damages to an aggrieved party which would not render him a trespasser from the beginning by relation. He will not, by reason of his disposition or management of personal property before sale, become a trespasser from the beginning unless he has been guilty of a substantial violation of the legal rights of the party and of such a character as to show a gross or wanton disregard of duty on his part. Where a sheriff, before sale on execution, caused grain which he had previously levied on in the stack or shock, to be threshed and placed in an elevator, it was held not to be such an abuse of discretion as to make him a trespasser from the beginning.

Ladd v. Newell, 34 Minn. 107, 24 N. W. 366. See Liljengren v. Ege, 46 Minn. 488, 49 N. W. 250.

Sheriff bound to levy under fair writ.

§ 1461. It is the imperative duty of a sheriff to levy an execution issuing to him out of a court of competent jurisdiction and fair on its face. He has no discretion in the matter. It is no concern of his that the judgment was obtained fraudulently or is irregular or erroneous, if it has not been reversed, stayed or enjoined.

Baker v. Sheehan, 29 Minn. 235, 12 N. W. 704; Armour Packing Co. v. Richter, 42 Minn. 188, 43 N. W. 1114; Breuer v. Elder, 33 Minn. 147, 22 N. W. 622; Johnson v. Randall, 74 Minn. 44, 76 N. W. 791; Liljengren v. Ege, 46 Minn. 488, 49 N. W. 250.

Sheriff protected by fair writ.

§ 1462. A writ of execution fair on its face and issuing from a court of competent jurisdiction is a full protection to the officer levying under it.

Orr v. Box, 22 Minn. 485; Gunz v. Heffner, 33 Minn. 215, 22 N. W. 386; Farmer v. Crosby, 43 Minn. 459, 45 N. W. 866; Johnson v. Randall, 74 Minn. 44, 76 N. W. 791; C. N. Nelson Lumber Co. v. McKinnon, 61 Minn. 219, 63 N. W. 630; Kelso v. Younggren (Minn.) 90 N. W. 316. See Hill v. Rasicot, 34 Minn. 270, 25 N. W. 604.

Digitized by Google

Excessive levy.

§ 1463. Of course much must be left to the discretion of the officer in determining the amount of property to be levied upon but a clearly excessive levy made wilfully renders the officer liable.

Sharvy v. Cash, 66 Minn. 200, 68 N. W. 1070; Pierce v. Wagner, 64 Minn. 265, 66 N. W. 977, 67 N. W. 537.

Neglect of sheriff in execution of writ—summary remedy.

§ 1464. "If any sheriff neglects to make due return of any writ or other process delivered to him to be executed, or is guilty of any misconduct in relation to the execution thereof, he may be proceeded against by the party interested in the manner provided in the preceding section [§ 1465 infra]; and in addition to requiring the performance of the duty neglected, or the correction of the injury done, the court may impose upon such sheriff a fine for the use of the county not exceeding two hundred dollars: provided that nothing herein shall prevent the person injured from maintaining an action for damages against the sheriff or upon his official bond."

[G. S. 1894 § 789] See Breuer v. Elder, 33 Minn. 149, 22 N. W. 622 and cases under §§ 1461, 1465.

Failure of sheriff to pay over money received on execution.

§ 1465. It is provided by statute that if any sheriff or deputy sheriff fails to settle with and pay over to the person or persons entitled thereto any money he may have collected or received by virtue of any execution, such person or persons may proceed against such sheriff and deputy sheriff in a summary manner before the district court by an order upon him to show cause why he should not pay over such money; and upon the hearing thereof the court may order such sheriff or deputy sheriff to pay to the person or persons so entitled thereto, the amount found due, with twenty per centum thereon as damages for such failure, together with all costs of the proceedings, and upon failure to comply with such order, he may be committed to jail as for a contempt.

G. S. 1894, § 788; Coykendall v. Way, 29 Minn. 164, 12 N. W. 452; Kumler v. Brandenburg, 39 Minn. 59, 38 N. W. 704; In re Grundysen, 53 Minn. 346, 55 N. W. 557; Hull v. Chapel, 71 Minn. 408, 74 N. W. 156; William Deering & Co. v. Burke, 74 Minn. 80, 76 N. W. 1020; Breuer v. Elder, 33 Minn. 147, 22 N. W. 622.

Levy on personalty—how far satisfaction of judgment.

§ 1466. A levy on sufficient personal property of the execution debtor is prima facie a satisfaction of the judgment. It may operate as a satisfaction and must be fairly tried. But if it fails, in whole or in part, without any fault of the plaintiff he may go to his further execution. He must fairly exhaust the first, and while that is going on he can neither sue on the judgment nor have another fi. fa., nor a ca. sa., nor can he redeem lands sold on another judgment. When a judgment debtor shows a levy upon sufficient of his personal property to satisfy the debt, and that it is undisposed of after a reasonable

Digitized by Google

time, the burden of proof rests on those who assert that there has been no satisfaction.[1] This presumption of satisfaction arises from the fact that the debtor has been deprived of his property in the regular course of execution, and that therefore he ought to be exonerated from further liability, and the judgment creditor be compelled to look to the sheriff. But if the debtor has not been deprived of his property by reason of the levy; if it has been left in his possession, and eloigned or abandoned, and returned to him, or released from the levy and delivered to a third person upon the debtor's request, the presumption ceases.[2]

[1] First Nat. Bank v. Rogers, 13 Minn. 407 Gil. 376; Bennett v. McGrade, 15 Minn. 132 Gil. 99.

[2] First Nat. Bank v. Rogers, 15 Minn. 381 Gil. 305; Willis v. Jelineck, 27 Minn. 18, 6 N. W. 373. See D. M. Osborne v. Wilson, 37 Minn. 8, 32 N. W. 786.

Levy on real property not a satisfaction.

§ 1467. A levy on real property is not a satisfaction of the judgment.[1] But if a sale follows and the property is bid off for the amount of the judgment or more the judgment is thereby satisfied.[2] The levy, sale, and return of satisfaction may, however, be set aside for cause.[3]

[1] Davidson v. Gaston, 16 Minn. 230 Gil. 202.

[2] Warren v. Fish, 7 Minn. 432 Gil. 347; Holmes v. Campbell, 10 Minn. 401 Gil. 320.

[3] Lay v. Shaubhut, 6 Minn. 273 Gil. 182; Shaubhut v. Hilton, 7 Minn. 506 Gil. 412.

Presumption of regularity.

§ 1468. In the absence of evidence to the contrary it will always be presumed that in making a levy and sale the officer properly discharged his duty and complied with all the requirements of the law.

State v. Penner, 27 Minn. 269, 6 N. W. 790; Tullis v. Brawley, 3 Minn. 277 Gil. 191; Knox v. Randall, 24 Minn. 479; Merrill v. Nelson, 18 Minn. 366 Gil. 335; Galde v. Forsyth, 72 Minn. 248, 75 N. W. 219; Bradley v. Sandilands, 66 Minn. 40, 68 N. W. 321; Clawsen v. Whitney, 39 Minn. 50, 38 N. W. 759.

Officer acts in ministerial capacity—not a judicial sale.

§ 1469. A sale on execution is not a judicial sale. The officer making the sale acts as the ministerial officer of the law and not as the organ of the court. He is not its instrument or agent, as in judicial sales, and the court is not the vendor. His authority to sell rests on the law and on the writ, and does not, as in judicial sales, emanate from the court. The functions of the court terminate at the rendition of the judgment except when its power is invoked to set the sale aside, for cause, on motion. The court does not direct what shall be levied on or sold, nor how the sale shall be made. The validity of the purchase does not depend upon its sanction and approval.

First Nat. Bank v. Rogers, 22 Minn. 224; Willard v. Finnegan, 42 Minn. 476, 44 N. W. 585; Johnson v. Laybourn, 56 Minn. 332, 57 N. W. 935.

Digitized by Google

Receiptor.

§ 1470. When personal property is levied upon by a taking into the custody of the officer he need not take it from the premises but may leave it with a receiptor.[1] The liability of the receiptor depends on the special contract but it is ordinarily one of mere bailment and he may excuse a non-delivery to the sheriff by proof that the property did not at the time of the levy belong to the execution debtor but to another person into whose possession it has gone.[2]

[1] Horgan v. Lyons, 59 Minn. 217, 60 N. W. 1099.

[2] Mason v. Aldrich, 36 Minn. 283, 30 N. W. 884.

Execution on satisfied judgment—sale void.

§ 1471. As to an execution creditor a sale on a judgment which has been satisfied is absolutely void. He is charged with notice and is not a bona fide purchaser. The plaintiff in execution is deemed to have notice of vices or irregularities affecting the validity of the proceedings; and defects affecting a sale to a purchaser with actual notice of them will also affect a sale to the plaintiff in the writ, whether he had actual notice or not.

Plummer v. Whitney, 33 Minn. 427, 23 N. W. 841; Norgren v. Edson, 51 Minn. 567, 53 N. W. 876. See Franklin v. Warden, 9 Minn. 124 Gil. 114; Gunz v. Heffner, 33 Minn. 215, 22 N. W. 386; Herrick v. Morrill, 37 Minn. 250, 33 N. W. 849.

Execution on judgment void on face—sale void.

§ 1472. An execution sale on a judgment void for want of jurisdiction appearing on its face is absolutely void and the purchaser acquires no title although he purchased in good faith.

Barber v. Morris, 37 Minn. 194, 33 N. W. 559.

Joint debtors and sureties—contribution and subrogation—statute.

§ 1473. "When property liable to an execution against several persons is sold thereon, and more than a due proportion of the judgment is levied upon the property of one of them, or one of them pays, without a sale, more than his proportion, he may compel contributions from the others; and when a judgment is against several, and is upon an obligation of one of them as security for another, and the surety pays the amount, or any part thereof, either by sale of his property, or before sale, he may compel repayment from the principal. In such cases, the person so paying or contributing is entitled to the benefit of the judgment, to enforce contribution or repayment, if, within ten days after his payment, he files with the clerk of the court where the judgment was rendered, notice of his payment, and claim to contribution or repayment; upon filing such notice, the clerk shall make an entry thereof in the margin of the docket."

[G. S. 1894 § 5479]

§ 1474. Under this section, where one of several debtors, against whom there is a joint judgment, pays more than his proportion, and files notice of his payment and claim to contribution, he is ipso facto subrogated to the right of the judgment creditor in the judgment,

Digitized by Google

and may issue execution thereon to enforce contribution from the other judgment debtors. To entitle a party to the right of contribution or subrogation it is not necessary that his judgment should have been levied on before he paid the judgment.

Ankeny v. Moffett, 37 Minn. 109, 33 N. W. 320.

Waste may be restrained—statute.

§ 1475. "Until the expiration of the time allowed for redemption, the court may restrain the commission of waste on the property, by order granted with or without notice, on application of the purchaser or judgment creditor; but it is not waste for the person in possession of the property at the time of sale, or entitled to possession afterward, during the period allowed for redemption, to continue to use it in the same manner in which it was previously used, or to use it in the ordinary course of husbandry, or to make the necessary repairs of buildings thereon, or to use wood or timber on the property therefor, or for the repairs of fences, or for fuel in his family, while he occupies the property."

[G. S. 1894 § 5477]

Interest of purchaser at sale leviable—statute.

§ 1476. "The interest acquired upon any sale is subject to the lien of any attachment or judgment duly made or docketed against the person holding the same, as in case of real property; and may be attached or sold upon execution, in the same manner."

[G. S. 1894 § 5476] See Lindley v. Crombie, 31 Minn. 232, 17 N. W. 372.

Eviction of purchaser—recovery—new execution—statute.

§ 1477. "If the purchaser of real property sold on execution, or his successor in interest, is evicted therefrom in consequence of irregularity in the proceedings concerning the sale, or of the reversal or the discharge of the judgment, he may recover the price paid, with interest, from the judgment creditor; such judgment creditor, if the recovery was in consequence of the irregularity, shall thereupon be entitled to a new execution on the judgment, at any time within ten years after such eviction, for the price paid on the sale with interest; and for that purpose the judgment shall be deemed valid against the judgment debtor, his personal representatives, heirs or devisees; but not against a purchaser in good faith as [or] an incumbrancer where title or incumbrance has accrued before a levy on such new execution."

[G. S. 1894 § 5478]

Stay of execution—bond—statute.

§ 1478. "Execution upon any judgment, rendered for the recovery of money only, in any district court of this state, may be stayed for the period of six months: provided, that, in order to obtain such stay, the party applying therefor shall, within ten days after judgment is rendered and docketed, file a bond, with two or more responsible freeholders of this state as sureties, with the clerk of

Digitized by Google

the court in which said judgment was rendered, in double the amount of the judgment and costs, which bond shall first be approved by the judge of said court, or the court commissioner of such county, conditioned that the judgment debtor will pay the amount of such judgment, interest and costs, within the time for which said stay is granted, and for the authorizing and empowering the issuing of an execution for such amount against the judgment debtor and sureties, upon default of such payment: provided that the interest to be allowed shall be at the rate of twelve per cent. per annum on the amount of the judgment, including the costs."

[G. S. 1894 § 5480] See Harper v. Carroll, 66 Minn. 487, 69 N. W. 610, 1069.

Execution against debtor and sureties—statute.

§ 1479. "If the judgment, interest and costs be not paid at the expiration of the time for which the same may have been stayed, the judgment creditor may have execution issued against the judgment debtor and his sureties, for the amount of such judgment, costs and interest as aforesaid."

[G. S. 1894 § 5481]

Justification of sureties—statute.

§ 1480. "Each surety must justify, by affidavit, that he is a resident and freeholder of this state, and worth the amount specified in the undertaking, above his debts and liabilities, and exclusive of his property exempt from execution."

[G. S. 1894 § 5482]

Obligee—service on creditor—exception—statute.

§ 1481. "The bond herein prescribed shall run to the judgment creditor, his executors, administrators or assigns, a copy of which shall be served on the judgment creditor, his agent or attorney, if resident of the county wherein the judgment was rendered, within ten days from such rendition; and the judgment creditor may except to the bond or the sufficiency of the sureties, and upon notice, or by order to show cause, the court may, in its discretion, order the execution to issue at once, notwithstanding such bond, unless the judgment debtor give such further bond and sureties as shall be deemed sufficient by the court; and the court may require the proposed sureties to justify orally, if required by the judgment creditor; and for cause shown, the court may require a still further bond and sureties at any time, and, in default thereof, may order execution to issue."

[G. S. 1894 § 5483]

Return of officer on execution against sureties—statute.

§ 1482. "Every officer to whom an execution shall issue against sureties, as provided in the preceding sections, shall certify, in his return thereon, whether the same, and what amount, if any, was collected from the sureties, and the true date of such collection."

[G. S. 1894 § 5484]

Digitized by Google

Stay after levy—statute.

§ 1483. "If the stay herein provided shall be granted after an execution shall have issued, or after levy made, then and in that case the levy shall be released, and the execution returned, with the cause of such return thereon noted by the officer."

[G. S. 1894 § 5485]

Remedies of owner for wrongful levy.

§ 1484. The owner of personal property wrongfully taken on execution has several remedies. He may sue the officer for a recovery of the property,[1] if he is not the defendant in the action;[2] or for conversion [3] or trespass.[4] He may sue the purchaser at the execution sale for conversion.[5] If the judgment on which the execution is based is void he may sue the execution creditor.[6] If the writ is issued maliciously at the instance of the attorney of the execution creditor the owner may sue the attorney.[7] If the property when taken by the officer is not in the possession of the owner but in the possession of the execution debtor the owner cannot sue the officer until he has made a demand as provided by statute.[8] A demand is also sometimes necessary when the property taken is exempt.[9] The owner of real property wrongfully levied upon and sold has several alternative remedies. He may frequently enjoin the sale.[10] He may sometimes have the sale set aside as a cloud on his title.[11] If he is in possession he can wait until the purchaser brings an action against him and then attack the sale as void.[12] He may test the sale in a statutory action to determine adverse claims,[13] or for partition.[14] He may bring an action to have the sale set aside [15] or he may achieve the same object by motion.[16]

[1] Whitney v. Swensen, 43 Minn. 337, 45 N. W. 609; Caldwell v. Arnold, 8 Minn. 265 Gil. 231; Howard v. Rugland, 35 Minn. 388, 29 N. W. 63; Hazeltine v. Swensen, 38 Minn. 424, 38 N. W. 110; Lynd v. Picket, 7 Minn. 184 Gil. 128; Dodge v. Chandler, 9 Minn. 97 Gil. 87; Williams v. McGrade, 13 Minn. 46 Gil. 39; Hanson v. Bean, 51 Minn. 546, 53 N. W. 871; Leonard v. Maginnis, 34 Minn. 506, 26 N. W. 733; Prouty v. Barlow, 74 Minn. 130, 76 N. W. 946; McNeil v. Rider, 79 Minn. 153, 81 N. W. 830; Butler v. White, 25 Minn. 432.

[2] Kelso v. Younggren, (Minn.) 90 N. W. 316.

[3] Barry v. McGrade, 14 Minn. 163 Gil. 126; Moulton v. Thompson, 26 Minn. 120, 1 N. W. 836; Molm v. Barton, 27 Minn. 530, 8 N. W. 765; Tyler v. Hanscom, 28 Minn. 1, 8 N. W. 825; Ohlson v. Manderfeld, 28 Minn. 390, 10 N. W. 418; Hossfeldt v. Dill, 28 Minn. 469, 10 N. W. 781; Lampsen v. Brander, 28 Minn. 526, 11 N. W. 94; Allen v. Coates, 29 Minn. 46, 11 N. W. 132; Sanders v. Chandler, 26 Minn. 273, 3 N. W. 351; Casper v. Klippen, 61 Minn. 353, 63 N. W. 737; Johnson v. Randall, 74 Minn. 44, 76 N. W. 791; Rollofson v. Nash, 75 Minn. 237, 77 N. W. 954; Linde v. Gaffke, 81 Minn. 304, 84 N. W. 41; Perkins v. Zarracher, 32 Minn. 71, 19 N. W. 385; Schneider v. Anderson, 77 Minn. 124, 79 N. W. 603; Kronsch-

Digitized by Google

nable v. Knoblauch, 21 Minn. 56; Matteson v. Munro, 80 Minn. 340, 83 N. W. 153.

[4] Buck v. Colbath, 7 Minn. 310 Gil. 238; Haugen v. Younggren, 57 Minn. 170, 58 N. W. 988; Granning v. Swenson, 49 Minn. 381, 52 N. W. 30; Matteson v. Munro, 80 Minn. 340, 83 N. W. 153.

[5] Heberling v. Jaggar, 47 Minn. 70, 49 N. W. 396.

[6] Gunz v. Heffner, 33 Minn. 215, 22 N. W. 386; Ladd v. Newell, 34 Minn. 107, 24 N. W. 366; Farmer v. Crosby, 43 Minn. 459, 45 N. W. 866.

[7] Farmer v. Crosby, 43 Minn. 459, 45 N. W. 866.

[8] Laws 1897 ch. 171; Dunnell, Minn. Pl. § 1006; Barry v. McGrade, 14 Minn. 163 Gil. 126; Butler v. White, 25 Minn. 432; Tyler v. Hanscom, 28 Minn. 1, 8 N. W. 825; Ohlson v. Manderfeld, 28 Minn. 390, 10 N. W. 418; Granning v. Swenson, 49 Minn. 381, 52 N. W. 30; Lampsen v. Brander, 28 Minn. 526, 11 N. W. 94; Moulton v. Thompson, 26 Minn. 120, 1 N. W. 836; Perkins v. Zarracher, 32 Minn. 71, 19 N. W. 385; Hazeltine v. Swensen, 38 Minn. 424, 38 N. W. 110; Johnson v. Bray, 35 Minn. 248, 28 N. W. 504; Schneider v. Anderson, 77 Minn. 124, 79 N. W. 603; Vose v. Stickney, 8 Minn. 75 Gil. 51.

[9] Tullis v. Orthwein, 5 Minn. 377 Gil. 305; Lynd v. Pickett, 7 Minn. 184 Gil. 128.

[10] Hart v. Marshall, 4 Minn. 294 Gil. 211; Hanson v. Johnson, 20 Minn. 194 Gil. 172; Wickham v. Davis, 24 Minn. 167; Hamilton v. Wood, 55 Minn. 482, 57 N. W. 208; Kugath v. Meyers, 62 Minn. 399, 64 N. W. 1138; Pelican River Milling Co. v. Maurin, 67 Minn. 418, 69 N. W. 1149.

[11] Plummer v. Whitney, 33 Minn. 427, 23 N. W. 841; Hanson v. Johnson, 20 Minn. 194 Gil. 172; Norgren v. Edson, 51 Minn. 567, 53 N. W. 876; Butman v. James, 34 Minn. 547, 27 N. W. 66.

[12] Herrick v. Ammerman, 32 Minn. 544, 21 N. W. 836.

[13] Herrick v. Morrill, 37 Minn. 250, 33 N. W. 849; Plummer v. Whitney, 33 Minn. 427, 23 N. W. 841.

[14] Barber v. Morris, 37 Minn. 194, 33 N. W. 559.

[15] Jakobsen v. Wigen, 52 Minn. 6, 53 N. W. 1016.

[16] Cunningham v. Water-Power Co. 74 Minn. 282, 77 N. W. 137; Jakobsen v. Wigen, 52 Minn. 6, 53 N. W. 1016.

Liability of execution creditor.

§ 1485. If a judgment creditor causes execution to issue on a void judgment he is liable to the execution debtor.[1] An erroneous judgment is valid till reversed and protects the plaintiff in enforcing it. Where, on an erroneous judgment, before its reversal, execution is issued, and the defendant's property levied on and sold, the defendant, after a reversal, is entitled to restitution from the plaintiff of only so much as plaintiff received on the execution; he cannot recover the full value of the property if it was sold for less.[2] Where a judgment creditor, in order to satisfy a balance due on

Digitized by Google

his judgment, legally sold a tract of land and bid it in himself for more than the amount due on the judgment, but for less than the value of the land, it was held that he was only liable to account for the amount of his bid in excess of the amount due on the judgment.[3] Where by mistake a judgment creditor sells land not belonging to the judgment debtor he is not liable to the latter.[4]

[1] Gunz v. Heffner, 33 Minn. 215, 22 N. W. 386; Ladd v. Newell, 34 Minn. 107, 24 N. W. 366; Farmer v. Crosby, 43 Minn. 459, 45 N. W. 866.

[2] Peck v. McLean, 36 Minn. 228, 30 N. W. 759.

[3] Henry v. Meighen, 46 Minn. 548, 49 N. W. 323.

[4] Id.

Action to set aside obstruction to execution sale.

§ 1486. Where, after the rendition and docketing of a judgment against a debtor in whose name the title to certain land stood of record, he executed a conveyance of the property in which he fraudulently recited that he merely held the title in trust for the grantee who had always been the beneficial owner of the premises, it was held that an action would not lie to remove the obstruction to a sale or execution created by the recital.

Cornman v. Sidle, 65 Minn. 84, 67 N. W. 667. See Dunnell, Minn. Pl. §§ 1229–1247.

Payment by stranger—statute.

§ 1487. "After the issuing of execution against property, any person indebted to the judgment debtor may pay to the sheriff the amount of his debt, or so much thereof as may be necessary to satisfy the execution, and the sheriff's receipt is a sufficient discharge for the amount so paid."

[G. S. 1894 § 5488]

§ 1488. This provision is not applicable to a judgment recovered for the wrongful seizure of exempt property.

Below v. Robbins, 76 Wis. 600.

PROPERTY SUBJECT TO LEVY

General statute.

§ 1489. "All goods, chattels, real or personal, and all property, real, personal or mixed, including all rights and shares in the stock of any corporation, all money, bills, notes, book-accounts, debts, credits, and other evidences of indebtedness, belonging to the judgment debtor, may be levied upon and sold on execution. Until a levy, property not subject to the lien of the judgment is not affected by the execution."

[G. S. 1894 § 5449]

§ 1490. The following have been held subject to levy and sale on execution: a judgment for money;[1] equitable interests in land;[2] interest of mortgagor of real property;[3] interest of mortgagor of

Digitized by Google

personal property;[4] interest of obligor to bond for a deed;[5] interest of obligee to bond for a deed;[6] interest of pledgor in promissory note if pledgee consents to surrender possession;[7] land sold by debtor in fraud of creditors;[8] interest of one member of firm in action against such member alone;[9] the property of one partner to satisfy a partnership debt;[10] the interest of a beneficiary in an unauthorized trust who takes the legal title by virtue of the statute of uses;[11] an unpublished book;[12] interest of judgment debtor during period of redemption from sale of his land on execution;[13] the interest of a purchaser at an execution sale even before period of redemption expires;[14] property of the judgment debtor conveyed by him to another in fraud of creditors.[15]

[1] Henry v. Traynor, 42 Minn. 234, 44 N. W. 11; Wheaton v. Spooner, 52 Minn. 417, 54 N. W. 372.

[2] Atwater v. Manchester Savings Bank, 45 Minn. 341, 48 N. W. 187; Reynolds v. Fleming, 43 Minn. 513, 45 N. W. 1099.

[3] Muller v. Flavin, 13 S. D. 595, 83 N. W. 687.

[4] See § 1494.

[5] Welles v. Baldwin, 28 Minn. 408, 10 N. W. 427; Minneapolis etc. Ry. Co. v. Wilson, 25 Minn. 382; Coolbaugh v. Roemer, 30 Minn. 424, 15 N. W. 869; Berryhill v. Potter, 42 Minn. 279, 44 N. W. 251; Steele v. Taylor, 1 Minn. 275 Gil. 210.

[6] Reynolds v. Fleming, 43 Minn. 513, 45 N. W. 1099.

[7] Mower v. Stickney, 5 Minn. 397 Gil. 321.

[8] Arper v. Baze, 9 Minn. 108 Gil. 98; Campbell v. Jones, 25 Minn. 155; Jackson v. Holbrook, 36 Minn. 494, 32 N. W. 852.

[9] Day v. McQuillan, 13 Minn. 205 Gil. 192; Allis v. Day, 13 Minn. 199 Gil. 189; Caldwell v. Auger, 4 Minn. 217 Gil. 156; Barrett v. McKenzie, 24 Minn. 20; Wickham v. Davis, 24 Minn. 167; Hankey v. Becht, 25 Minn. 212; Moquist v. Chapel, 62 Minn. 258, 64 N. W. 567.

[10] Daly v. Bradbury, 46 Minn. 396, 49 N. W. 190.

[11] Farmers' Nat. Bank v. Moran, 30 Minn. 165, 14 N. W. 805.

[12] Banker v. Caldwell, 3 Minn. 94 Gil. 46.

[13] Parke v. Hush, 29 Minn. 434, 13 N. W. 668.

[14] Lindley v. Crombie, 31 Minn. 232. See § 1476.

[15] Campbell v. Jones, 25 Minn. 155; Kugath v. Meyers, 62 Minn. 399, 64 N. W. 1138; Fisher v. Utendorfer, 68 Minn. 226, 71 N. W. 29.

§ 1491. The following have been held not subject to levy and sale on execution: the interest of a mortgagee in either real or personal property so long, at least, as he holds it in good faith as security and has not applied it to the satisfaction of the debt by foreclosure or otherwise and it is immaterial whether there has been a breach in the conditions of the mortgage or not;[1] interest of agent holding property for sale on commission;[2] interest of bailee;[3] interest of partner in profits only;[4] a claim for unliquidated damages;[5] a mortgage never recorded, not accompanied by any evidence of personal liability, and which has been lost;[6] a mere equitable lien;[7] property garnished;[8] property in custodia legis;[9] the

Digitized by Google

equitable interest of residuary legatee in trust fund;[10] money or other personal property on the debtor's person and all personal property not in view.[11]

[1] Butman v. James, 34 Minn. 547, 27 N. W. 66; Prout v. Root, 116 Mass. 410; Jackson v. Willard, 4 Johns. (N. Y.) 41.

[2] Vose v. Stickney, 8 Minn. 75 Gil. 51; Benz v. Grissell, 24 Minn. 169.

[3] Williams v. McGrade, 13 Minn. 174 Gil. 165; Heberling v. Jaggar, 47 Minn. 70, 49 N. W. 396.

[4] Hankey v. Becht, 25 Minn. 212.

[5] Stromberg v. Lindberg, 25 Minn. 513; Paine v. Gunniss, 60 Minn. 257, 62 N. W. 280.

[6] Gale v. Battin, 16 Minn. 148 Gil. 133.

[7] Kugath v. Meyers, 62 Minn. 399, 64 N. W. 1138.

[8] Langdon v. Thompson, 25 Minn. 509.

[9] Davis v. Seymour, 16 Minn. 210 Gil. 184; Wheaton v. Spooner, 52 Minn. 417, 54 N. W. 372; Noyes v. Beaupre, 32 Minn. 496, 21 N. W. 728; North Star Boot & Shoe Co. v. Lovejoy, 33 Minn. 229, 22 N. W. 388; Strong v. Brown, 41 Minn. 304, 43 N. W. 67; Buck v. Colbath, 7 Minn. 310 Gil. 238; Lord v. Meachem, 32 Minn. 66, 19 N. W. 346; Second Nat. Bank v. Schranck, 43 Minn. 38, 44 N. W. 38; Watkins v. Minnesota Thresher Mfg. Co. 41 Minn. 150, 42 N. W. 862; Wright, Barrett & Stilwell Co. v. Robinson, 79 Minn. 272, 82 N. W. 632; Kelso v. Younggren, (Minn.) 90 N. W. 316. See Laws 1899 ch. 301 § 4.

[10] Merriam v. Wagener, 74 Minn. 215, 77 N. W. 44.

[11] Caldwell v. Sibley, 3 Minn. 406 Gil. 300.

Growing crops—statute.

§ 1492. "A levy may be made upon grain or grass while growing, and upon any other unharvested crops; but no sale thereof shall be made, under such levy, until the same is ripe, or fit to be harvested; and any levy thereon, by virtue of an execution issued by a justice of the peace, or any court of record, shall be continued beyond the return-day thereof, if necessary, and remain in life; and the execution thereof may be completed at any time within thirty days after such grain, grass, or other unharvested crop is ripe, or fit to be harvested."

[G. S. 1894 § 5464]

§ 1493. Growing grain may be levied on at any period of its growth, whether the growth is going on below or above the surface of the soil.[1] The word "crops" had, long before this statute, acquired in law a meaning synonymous with or equivalent to the common-law term "emblements," and neither of them included fruits or perennial trees or shrubs, and it is to be presumed that the term "crops" is used in the statute in this same sense. The only change effected by the statute as to the kinds of products of the earth which may be levied on while still attached to the soil is, perhaps, to include perennial grasses. The main purpose of the statute was, while

Digitized by Google

permitting immature growing crops to be levied on, to prohibit their sale until they were ripe and fit to be harvested. Blackberries, while growing on the bushes, are not subject to levy as personal property. It is only annual crops, that is, crops requiring fresh planting or sowing each year, that are subject to levy as personalty.[2] Where after judgment recovered, the judgment debtor conveyed away exempt real property, with growing crops thereon, which were subject to levy, with intent to defraud his creditors, it was held that the crops might be reached and subjected to process in the hands of the fraudulent grantee. The severable character of the property is not changed by the conveyance and may be levied upon though the land may remain exempt.[3] Whether crops growing on a homestead are exempt is an open question in this state.[4] The mode of levying on growing crops is regulated by § 1500.[5]

[1] Gillit v. Truax, 27 Minn. 528, 8 N. W. 767.
[2] Sparrow v. Pond, 49 Minn. 412, 52 N. W. 36.
[3] Erickson v. Paterson, 47 Minn. 525, 50 N. W. 699.
[4] Sparrow v. Pond, 49 Minn. 412, 52 N. W. 36.
[5] See Howard v. Rugland, 35 Minn. 388, 29 N. W. 63; Hossfeldt v. Dill, 28 Minn. 469, 10 N. W. 781.

Pledged or mortgaged chattels—statute.

§ 1494. "When goods or chattels are pledged or mortgaged for the payment of money, or the performance of any contract or agreement, the right and interest in such goods of the person making such pledge or mortgage may be sold on execution against him, and the purchaser shall acquire all the right and interest of the defendant or judgment debtor, and be entitled to the possession of such goods and chattels, on complying with the terms and conditions of the pledge or mortgage."

[G. S. 1894 § 5458]

§ 1495. Upon a levy after default but before possession has been taken by the mortgagee the officer may take the chattels into his actual possession, and, as against the mortgagee, detain them for the purposes of the sale under the writ.[1] And even after the mortgagee has taken possession and until the equity of redemption is finally cut off the officer may take actual possession for the purposes of the sale.[2] The sheriff has no authority to deliver possession to the purchaser at the sale until the latter has complied with the terms and conditions of the mortgage.[3] The right of redemption pertains to the whole of the property mortgaged and is not apportionable. Hence the sheriff is not authorized to levy upon only a portion of the mortgaged property, although he may take possession of different articles at different times.[4] But in the absence of a showing that the mortgagee has been prejudiced a levy will not be set aside for the failure of the sheriff to seize all the mortgaged property.[5] A railroad, with its rolling stock, and personal property belonging to the road and appertaining thereto, is, in favor of mortgagees, one property, and the different items cannot, as to such mortgagees, be levied on separately.[6] The levy must in all cases be confined to the

Digitized by Google

"right and interest" of the mortgagor.[7] A levy of a writ of attachment by the mortgagee upon personal property mortgaged to him is not a waiver of his lien; and the mere fact of the levy does not estop him to purchase or claim under his lien.[8] An execution creditor has the right, as soon as he has acquired a lien upon chattels by a levy of his execution, to redeem them from a mortgage which is a prior lien thereon and upon payment of the amount due on such mortgage he is entitled to be subrogated to the rights of the mortgagee and to that end he has a right to demand and receive an assignment of the mortgage.[9] If a mortgagee or pledgee takes possession of the mortgaged or pledged chattels before any other lien attaches thereto, his title is valid as against subsequent attachment or execution creditors, there being no fraud in fact, although the mortgage was not filed nor the chattels delivered when the contract of pledge was made.[10] In case of a contract, for work and payment therefor, between employer and employe secured by the former by chattel mortgage, the right of the employe to go on under the contract and hold and enforce the mortgage as security therefor, is not affected by a levy by a creditor of the mortgagor upon the mortgaged property.[11] If the maker of a pledged note pays it to the pledgee, after it has been levied on by the sheriff, with notice of the levy, he is not thereby discharged as to the balance above the debt for which it was pledged.[12]

[1] Barber v. Amundson, 52 Minn. 358, 54 N. W. 733. See Chophard v. Bayard, 4 Minn. 533 Gil. 418.

[2] Hackleman v. Goodman, 75 Ind. 202; Haynes v. Leppig, 40 Mich. 602; Smith v. Menominee Circuit Judge, 53 Mich. 560; Cary v. Hewitt, 26 Mich. 223; Nelson v. Ferris, 30 Mich. 497.

[3] Heimberger v. Boyd, 18 Ind. 420; Broadhead v. McKay, 46 Ind. 595; Kackley v. Heitz, 91 Ind. 437.

[4] Worthington v. Hanna, 23 Mich. 534; Harvey v. McAdams, 32 Mich. 472; Baldwin v. Talbot, 46 Mich. 19; Laing v. Perrott, 48 Mich. 298.

[5] Galde v. Forsyth, 72 Minn. 248, 75 N. W. 219.

[6] Central Trust Co. v. Moran, 56 Minn. 188, 57 N. W. 471.

[7] Bayne v. Patterson, 40 Mich. 659; Appleton Mill Co. v. Warder, 42 Minn. 117, 42 N. W. 791.

[8] Byram v. Stout, 127 Ind. 195.

[9] Lucking v. Wesson, 25 Mich. 443; Hunt v. Sackett, 31 Mich. 24.

[10] Prouty v. Barlow, 74 Minn. 130, 76 N. W. 946.

[11] Minor v. Sheehan, 30 Minn. 419, 15 N. W. 687.

[12] Mower v. Stickney, 5 Minn. 397 Gil. 321.

Digitized by Google

HOW LEVY IS TO BE MADE

Property subject to lien of judgment—statute.

§ 1496. "Upon property subject to the lien of the judgment, a minute by the officer on the execution of the time when said execution was delivered to him, stating that at such time he levied upon such property (describing it), shall be deemed a sufficient levy. And the officer, at the request of the judgment creditor, may, at any time before or at the time of the execution sale, or during the progress of sale, release such property, or such part thereof as may not have been actually sold, from such levy, before satisfaction in full of the judgment; and the judgment, or such part thereof as shall not have been actually satisfied by a payment or sale, and the lien thereof, shall not be in any way affected by such levy and release, but the same shall remain in full force and effect to the same extent as if no levy had been made."

[G. S. 1894 § 5450]

§ 1497. No formal levy on real property is necessary.[1] It is not necessary that the officer should go upon the property, or that it should be within his view, or that he should make any oral declaration of the levy, or that he should serve notice on the owner or occupant. All that is necessary to constitute a valid levy is that the officer holding the execution make some entry or memorandum indicative of his intention to make the property liable to the process.[2] It is not indispensable that he should note on the writ the time when it was delivered to him.[3] The validity of a sale on execution does not depend on an exact compliance with this section as to the "minute" to be made on the writ.[4]

[1] Folsom v. Carli, 5 Minn. 333 Gil. 264; Tullis v. Brawley, 3 Minn. 277 Gil. 191; Rohrer v. Turrill, 4 Minn. 407 Gil. 309; Bidwell v. Coleman, 11 Minn. 78 Gil. 45; Lockwood v. Bigelow, 11 Minn. 113 Gil. 70; Hutchins v. County Com'rs, 16 Minn. 13 Gil. 1; Knox v. Randall, 24 Minn. 479.

[2] Rodgers v. Bonner, 55 Barb. (N. Y.) 9; Id. 45 N. Y. 379.

[3] Hutchins v. County Com'rs, 16 Minn. 13 Gil. 1.

[4] Id.

Personal property capable of manual delivery—statute.

§ 1498. "Personal property, capable of manual delivery, shall be levied upon by the officer taking it into his custody."

[G. S. 1894 § 5451]

§ 1499. It is not enough to take merely; he must take into his custody, that is to say, into his keeping; or, in other words, he must keep as well as take. This requires at least such a custody as to enable an officer to retain and assert his power and control over the property, and so that it cannot probably be withdrawn or taken by another, without his knowing it.[1] That is, the officer must take the property into his actual possession and out of the possession of the debtor; there must be an actual manucaption. The

Digitized by Google

property should be taken off the premises of the debtor immediately or a deputy left in charge. Under no circumstances should the property be left in charge of the debtor, for if it is, it is subject to other levies and a good title can be acquired by a bona fide purchaser.[2] The rule in this state is far stricter than in New York and many states.[3] It is to be observed, however, that a levy may be good as against the debtor or a trespasser, and not good as against other creditors and bona fide purchasers.[4] As against the debtor and trespassers a levy may be good although the property is left in the possession of the debtor.[5] After the officer has taken property into his custody he may leave it in charge of a receiptor,[6] but it is not advisable to leave it in charge of a receiptor on the premises of the debtor, if it can be conveniently removed.

[1] Wilson v. Powers, 21 Minn. 193; Barber v. Amundson, 52 Minn. 358, 54 N. W. 733.

[2] Dutertre v. Driard, 7 Cal. 549; Taffts v. Manlove, 14 Cal. 47; Bryant v. Osgood, 52 N. H. 182; Auby v. Rathbun, 11 S. D. 474, 78 N. W. 952; Jewett v. Guyer, 38 Vt. 209.

[3] See 8 Ency. Pl. & Pr. 525; 11 Am. & Eng. Ency. Law 657.

[4] Horgan v. Lyons, 59 Minn. 217, 60 N. W. 1099.

[5] Taffts v. Manlove, 14 Cal. 47; McGirr v. Hunter, 13 Ill. App. 195; Horgan v. Lyons, 59 Minn. 217, 60 N. W. 1099. See Bennett v. McGrade, 15 Minn. 132 Gil. 99.

[6] Horgan v. Lyons, 59 Minn. 217, 60 N. W. 1099; Holcomb v. C. N. Nelson Lumber Co. 39 Minn. 342, 40 N. W. 354; Easton v. Goodwin, 22 Minn. 426.

Personal property not capable of immediate removal—statute.

§ 1500. "When an execution is levied upon articles of personal estate which, by reason of their bulk or other cause, cannot be immediately removed, a certified copy of the execution and return may, within three days thereafter, be deposited in the office of the clerk or recorder of the city, village, or town in which said articles are; and such levy shall be as valid and effectual as if the articles had been retained in the possession and custody of the officer. The clerk shall receive and file all such copies, noting thereon the time when received, and keep them safely in his office, and also enter a note thereof, in the order in which they are received, in the books kept for making entries of mortgages of personal property; which entry shall contain the names of the parties to the suit and the date of the entry. The clerk's fee for this service shall be twenty-five cents, to be paid by the officer, and included in his charge for the service of the execution."

[G. S. 1894 §§ 5452, 5453]

§ 1501. This section does not obviate the necessity of a formal levy. As regards this form of property it is sufficient if the officer goes to where it is situated, and having it in his immediate view, publicly proclaims that he levies upon it under his writ.[1] Witnesses are not essential,[2] but if the owner is near he should be notified and it is always advisable for the officer to have a witness to his levy.[3] An

Digitized by Google

inventory of the property, or at least a rough memorandum of the levy, should be made at the time; but this is not indispensable.[4] A wrongful levy under this section constitutes a conversion for which an action will lie against the officer.[5]

[1] Roth v. Wells, 29 N. Y. 471.
[2] Minor v. Smith, 13 Ohio St. 79; Cornell v. Cook, 7 Cowen (N. Y.) 310.
[3] Davidson v. Waldron, 31 Ill. 120.
[4] Roth v. Wells, 29 N. Y. 471.
[5] Hossfeldt v. Dill, 28 Minn. 469, 10 N. W. 781; Howard v. Rugland, 35 Minn. 388, 29 N. W. 63.

Other property—debts—stocks, etc.—statute.

§ 1502. "Other personal property shall be levied on by leaving a certified copy of the execution, and a notice specifying the property levied on, with a person holding the same; or if a debt, with the debtor; or if stock or interest in stock of a corporation, with the president or other head of the same, or the secretary, cashier, or managing agent thereof."

[G. S. 1894 § 5454]

§ 1503. This section provides the mode of levying on all debts except those which pass by delivery of the instruments upon which they rest, such as promissory notes, bills of exchange and negotiable bonds. Book accounts cannot be levied upon by the officer merely taking the books in which they are entered into his custody. For the purpose of a levy they stand just as debts of which there is no written evidence and must be levied on under this section.[1] A judgment may be levied on without serving a copy of the execution with the clerk of the court where the judgment is docketed.[2]

[1] Swart v. Thomas, 26 Minn. 141, 1 N. W. 830; Lesher v. Getman, 30 Minn. 321, 15 N. W. 309; Ide v. Harwood, 30 Minn. 191, 14 N. W. 884; Tullis v. Brawley, 3 Minn. 277 Gil. 191.
[2] Wheaton v. Spooner, 52 Minn. 417, 54 N. W. 372; Henry v. Traynor, 42 Minn. 234, 44 N. W. 11.

Partnership property.

§ 1504. In levying on the interest of one partner in partnership property the officer may take actual possession of the property to the exclusion of the other partners and retain the same while the levy continues. But the purchaser at the sale does not acquire a right of possession; he acquires only the right to call the partnership to an accounting.

See cases under § 1490 (9).

Property owned jointly.

§ 1505. Where an officer has an execution against one part owner of a chattel, he must seize the whole chattel, though he can sell only the interest of the judgment debtor.

Caldwell v. Auger, 4 Minn. 217 Gil. 156.

Digitized by Google

On coin or other forms of money—statute.

§ 1506. "Whenever any gold, silver or copper coin, or any bills or other evidence of debt issued by any moneyed corporation, or by the government of the United States, and circulated as money, is seized upon execution, the officer shall pay and return the same as so much money collected; but if the same does not, at the time and place of such seizure, circulate at par, the officer shall make sale thereof as in other cases."

[G. S. 1894 § 5457]

Inventory—statute.

§ 1507. "The officer shall make a full inventory of the property levied on and return the same with the execution."

[G. S. 1894 § 5456]

§ 1508. This is directory merely. A failure to make an inventory does not invalidate the levy or sale,[1] although it may render the officer liable for any resulting damage.[2] It is important that the inventory, or a rough draft thereof, should be made at the time of the levy, for the object is to afford evidence of the property seized and held for the satisfaction of the judgment.

[1] Roth v. Wells, 29 N. Y. 471.

[2] Toulmin v. Lesesne, 2 Ala. 361.

Use of force in making levy.

§ 1509. For the purpose of making a levy an officer is not authorized to break open the outer door of the debtor's dwelling house. Nor can he enter against the will of the debtor even without the use of force.[1] But after entering peaceably and without opposition he may break open inner doors, chests, closets, etc.; and he may break open the outer door for egress.[2] And after having made a proper entry and levy he may, upon returning for the purpose of carrying away the property levied upon, break open the outer door.[3] He may always break into a store, warehouse, shop, or barn disconnected from the dwelling house.[4] He cannot break into a store if it consists of one room occupied by the debtor both as a store and a dwelling room,[5] but where a store and dwelling room in the same building are distinct except that they have a common outer door entrance may be forced into the store.[6]

[1] Curtis v. Hubbard, 4 Hill (N. Y.) 437; Stearns v. Vincent, 50 Mich. 209; Welsh v. Wilson, 34 Minn. 92, 24 N. W. 327.

[2] Williams v. Spencer, 5 Johns. (N. Y.) 352; Snydacker v. Brosse, 51 Ill. 357.

[3] Glover v. Whittenhall, 6 Hill (N. Y.) 597.

[4] Haggerty v. Wilber, 16 Johns. (N. Y.) 287.

[5] Welsh v. Wilson, 34 Minn. 92, 24 N. W. 327.

[6] Stearns v. Vincent, 50 Mich. 209.

Levy on property in excess of exemption—appraisal—statute.

§ 1510. "When the officer holding an execution against any person is of the opinion that such person has more property of the classes specified in section two-hundred and seventy-nine [§ 1542

Digitized by Google

infra] than is by law exempt, he may levy on the whole of any one class, and forthwith make an inventory thereof, and cause the same to be appraised at its cash value by two disinterested freeholders of the precinct where such property may be, on oath to be administered by him to such appraisers. If such appraisal exceeds the amount by law exempt of that class, the debtor may thereupon forthwith select of such property an amount not exceeding in value, as so appraised, the amount exempt, and the balance shall be held and applied by said officer as in other cases. If neither the debtor nor his agent appears and makes such selection, the officer shall make the same. If one or more indivisible articles of any such class is of greater value than the whole amount exempt of that class, the officer shall sell the same, and, after paying to the debtor the amount exempt of that class, shall apply the residue in discharge of his said process."

[G. S. 1894 § 5463]

§ 1511. Where all the property which a debtor has, of a kind which is exempted with a limit as to quantity or amount, and not with a limit as to value, does not exceed the quantity or amount which the statute exempts, there is no occasion for the debtor to choose or select the same as exempt. In such case the statute operates to choose and select for him and consequently this section has no application.[1] Where the statute exempts a specified amount of a designated class or species of property, the sheriff may levy upon the whole property of that class or species and he cannot be sued in replevin before an appraisement, a selection by the owner and a demand for the articles so selected. No time is specified within which the inventory and appraisal are to be made, but the officer has undoubtedly a reasonable time within which to discharge the duty; and until this is done, the defendant has no right to make his selection.[2] A mere failure to claim a right of exemption at the time of a levy will not preclude a party from asserting the right afterwards and before the sale if no one is prejudiced thereby.[3] The owner of a horse levied upon may avail himself of the right to select that horse for exemption, without bringing his other horses from another county, so that the officer may levy on them.[4] A levy made without the inventory and appraisal provided in this section is invalid and the officer is liable. It is no defence that the debtor did not claim the exemption or that he had other property of the same class to the full amount of the exemption.[5] The inventory must be made when the property is found.[6] The appraisers must be disinterested.[7]

[1] Howard v. Rugland, 35 Minn. 388, 29 N. W. 63.
[2] Tullis v. Orthwein, 5 Minn. 377 Gil. 305.
[3] McAbe v. Thompson, 27 Minn. 134, 6 N. W. 479.
[4] Anderson v. Ege, 44 Minn. 216, 46 N. W. 216.
[5] Town v. Elmore, 38 Mich. 305; Vanderhorst v. Bacon, 38 Mich. 669.
[6] Vanderhorst v. Bacon, 38 Mich. 669.
[7] Bayne v. Patterson, 40 Mich. 658.

Digitized by Google

SALE OF PROPERTY

Sale of property—collection of debts—authority and remedies of sheriff—statute.

§ 1512. "The sheriff shall execute the writ against the property of the judgment debtor, by levying on the property, collecting the things in action, or selling the same, if the court so orders, selling the other property, and paying to the plaintiff the proceeds, or so much thereof as will satisfy the execution."

[G. S. 1894 § 5465]

§ 1513. A sheriff may bring an action in his own name for the collection of things in action upon which he has levied.[1] In an action on a promissory note he must allege and prove not only the execution, but a valid judgment upon which it issued.[2] A sheriff selling real estate on execution may maintain an action in his individual name against the purchaser for the amount bid at the sale.[3] Where a satisfaction of judgment has been improperly entered of record the sheriff may have the same vacated on motion.[4] Upon a levy good as against an assignee in insolvency under Laws 1881 it was held that the sheriff might bring an action against the assignee to recover money or property in his hands.[5] If a person unlawfully interferes with property in the custody of the sheriff or a receiptor under him an action by the sheriff will lie.[6] Things in action can only be sold if the court so orders. A judgment is a thing in action within the meaning of this rule.[7] Within reasonable limits the sheriff has discretionary power to put personal property into shape for a sale, as, for example, to cause grain to be threshed.[8] A sheriff may bring an action against a receiptor with whom he has left property levied upon and who refuses to deliver it.[9]

[1] Rohrer v. Turrill, 4 Minn. 407 Gil. 309; Robertson v. Sibley, 10 Minn. 323 Gil. 253; Mower v. Stickney, 5 Minn. 397 Gil. 321.

[2] Mower v. Stickney, 5 Minn. 397 Gil. 321.

[3] Armstrong v. Vroman, 11 Minn. 220 Gil. 142; Hokanson v. Gunderson, 54 Minn. 499, 56 N. W. 172; Blexrud v. Kuster, 62 Minn. 455, 64 N. W. 1140.

[4] Henry v. Traynor, 42 Minn. 234, 44 N. W. 11.

[5] Bean v. Schmidt, 43 Minn. 505, 46 N. W. 72.

[6] Horgan v. Lyons, 59 Minn. 217, 60 N. W. 1099.

[7] Thomas v. Sutton, 23 Minn. 50; Henry v. Traynor, 43 Minn. 234, 44 N. W. 11.

[8] Ladd v. Newell, 34 Minn. 107, 24 N. W. 366.

[9] Holcomb v. C. N. Nelson Lumber Co. 39 Minn. 342, 40 N. W. 354.

Notice of sale—posting and publication.

§ 1514. "Before the sale of personal property on execution, notice thereof shall be given as follows:

(1) By posting written or printed notice of the time and place of sale, in three public places of the county where the sale is to take place, ten days successively.

Digitized by Google

(2) When real property is sold upon judgment, decree or execution, a similar notice describing the property with sufficient certainty to enable a person of common understanding to identify it, shall be posted for six weeks successively in three public places of the county where the property or some part thereof is situated, and a copy thereof shall be published once a week for the same period in a newspaper printed and published in the county, if there is one, or if there is none, then in a newspaper printed and published in an adjoining county, and if there is no such newspaper, then in a newspaper printed and published at the capital of the state."

[G. S. 1894 § 5466]

§ 1515. No advantage can be taken of a defective notice except in an action against the sheriff.[1] A description of the property as: "Lot 5, block 39, in the county of Morrison and state of Minnesota," is insufficient.[2] The property should be so described that those who are invited by the notice to attend and bid will be able to identify it and know exactly what is being sold.[3] The designation of the place of sale is an essential requisite of the notice. A notice specifying as the place of sale "the front door of the court-house" in a village named, when, in fact, there was no court-house, nor place known as the court-house, nor front door of the court-house in such village, is insufficient.[4] An officer must strictly pursue a statute by which he is authorized to divest the title to property and transfer it to another without the consent of the owner. A statute requiring a specified number of days notice before sale is mandatory and if the sheriff sells on a shorter notice he is liable.[5] The provision respecting the posting of notices is applicable to cities.[6] The first publication must be full six weeks—42 days—before the sale.[7] Where the first publication was June 9 and the last July 21, the day of sale, the notice was held sufficient.[8] The execution under which the sale is made need not be described in the notice; it is sufficient to state that the sale is to be made pursuant to an execution or executions.[9] It is unnecessary to give the names of the parties.[10] It is probably not necessary to state the hour of the sale,[11] but it is customary and proper to do so. It is proper to state that the sale will take place between certain specified hours.[12]

[1] See § 1519.

[2] Herrick v. Ammerman, 32 Minn. 545, 21 N. W. 836.

[3] Herrick v. Morrill, 37 Minn. 250, 33 N. W. 849. See Hutchins v. County Com'rs, 16 Minn. 13 Gil. 1.

[4] Bottineau v. Aetna Ins. Co. 31 Minn. 125, 16 N. W 849.

[5] Bowman v. Knott, 8 S. D. 330; Morey v. Hoyt, 65 Conn. 516.

[6] Kopmeier v. O'Neil, 47 Wis. 593.

[7] Collins v. Smith, 57 Wis. 284. See Wood v. Morehouse, 45 N. Y. 368.

[8] Herrick v. Graves, 16 Wis. 157.

[9] Husted v. Dakin, 17 Abb. Pr. (N. Y.) 137.

[10] Chapman v. Morrill, 19 Hun (N. Y.) 318.

Digitized by Google

[11] Burr v. Borden, 61 Ill. 389.
[12] Id. See Coxe v. Halsted, 2 N. J. Eq. 311.

Place and manner of sale—statute.

§ 1516. "A sale shall be made by auction, between nine o'clock in the morning and sunset, in the county where the premises or some part thereof is situate; after sufficient property has been sold to satisfy the execution, no more shall be sold; neither the officer holding the execution nor his deputy can purchase; when the sale is of personal property capable of manual delivery, it shall be within view of those who attend the sale, and be sold in such parcels as are likely to bring the highest price; and when the sale is of real property, and consisting of several known tracts or parcels, they shall be sold separately; or when a portion of such real property is claimed by a third party, and he requires it to be sold separately, such portion shall be thus sold."
[G. S. 1894 § 5468]

§ 1517. A sale after sunset has been held void,[1] but it is probable that it would be held merely voidable in this state. If more property is sold than enough to satisfy the execution a bona fide purchaser gets a good title; the sale can only be set aside for fraud.[2] A sale to the officer is void even as to strangers.[3] It matters not that others besides the officer are interested in the purchase.[4] Although there are many cases to the contrary it would seem the better view that a sale of personal property capable of manual delivery out of the view of those who attend the sale is not void but merely voidable.[5] Ordinarily separate items of personal property should be sold separately, except in the case of mortgaged or pledged property, but much must be left to the discretion of the officer in determining the most effective mode of sale.[6] A sale in gross is voidable only for fraud.[7] The property to be sold should be pointed out when it is offered for sale, so that those in attendance may readily identify it and distinguish it from other property which is present of the same class, without the necessity of weighing, counting or measuring to ascertain the property offered.[8] But in this state a failure of the officer to discharge his duty in this regard would probably not render the sale void but merely voidable. The provision requiring real property consisting of several known tracts or parcels to be sold separately is directory merely. An improper sale in gross is not void but only voidable on a showing of actual fraud or material prejudice.[9] The provision for sale in parcels is for the benefit of the debtor and can be waived by him. If the sale is attacked on that ground his waiver may be proved by parol.[10] Objection to a sale in gross cannot be raised after the period for redemption has expired.[11] Government subdivisions do not alone determine whether a body of land consists of separate tracts.[12] The judgment debtor cannot arbitrarily divide his land into lots with the execution sale in view and then demand that they be sold separately.[13] The sale must be for cash [14] and to the highest bidder.[15] An attorney of the debtor has no implied authority to stipulate that

Digitized by Google

property levied upon shall be sold at private sale and by a person other than the sheriff.[16] The execution creditor may bid off the property and so may his assignee.[17] If one of two joint judgment creditors bids off the property he will be held a trustee for the other.[18] A sale of real property will not be set aside because the price realized was far below the real value of the property.[19]

[1] Carnrick v. Myers, 14 Barb. (N. Y.) 9.
[2] Groff v. Jones, 6 Wend. (N. Y.) 524.
[3] Woodbury v. Parker, 19 Vt. 353; G. S. 1894 § 791.
[4] Wickliff v. Robinson, 18 Ill. 145.
[5] Eads v. Stephens, 63 Mo. 90; Foster v. Mabe, 4 Ala. 402.
[6] Bergin v. Hayward, 102 Mass. 414.
[7] Tillman v. Jackson, 1 Minn. 183 Gil. 157; Gunz v. Heffner, 33 Minn. 215, 22 N. W. 386.
[8] Warring v. Loomis, 4 Barb. (N. Y.) 484.
[9] Tillman v. Jackson, 1 Minn. 183 Gil. 157; Lamberton v. Merchants' Nat. Bank, 24 Minn. 281; Willard v. Finnegan, 42 Minn. 476, 44 N. W. 985; Duford v. Lewis, 43 Minn. 26, 44 N. W. 522; Clark v. Kraker, 51 Minn. 444, 53 N. W. 706; Ryder v. Hulett, 44 Minn. 353, 46 N. W. 559; Merrill v. Nelson, 18 Minn. 366 Gil. 335; Worley v. Naylor, 6 Minn. 192 Gil. 123; Paquin v. Braley, 10 Minn. 379 Gil. 304; Abbott v. Peck, 35 Minn. 499, 29 N. W. 194; Coolbaugh v. Roemer, 32 Minn. 445, 21 N. W. 472. See § 2065.
[10] Vilas v. Reynolds, 6 Wis. 214.
[11] Raymond v. Holborn, 23 Wis. 57.
[12] Bunker v. Rand, 19 Wis. 253; Worley v. Naylor, 6 Minn. 192 Gil. 123.
[13] Van Gelder v. Van Gelder, 26 Hun (N. Y.) 356.
[14] Kumler v. Brandenberg, 39 Minn. 59, 38 N. W. 704; Hokanson v. Gunderson, 54 Minn. 499, 56 N. W. 172.
[15] Tillman v. Jackson, 1 Minn. 183 Gil. 157.
[16] Kronschnabel v. Knoblauch, 21 Minn. 56.
[17] Holmes v. Campbell, 10 Minn. 401 Gil. 320.
[18] Id.
[19] Coolbaugh v. Roemer, 32 Minn. 445, 21 N. W. 472.

Effect of want of notice—penalty—statute.

§ 1518. "An officer selling without the notice prescribed by the last section [§ 1514 supra] shall forfeit one hundred dollars to the aggrieved party, in addition to his actual damages; and a person taking down or defacing the notice posted, if done before the sale, or the satisfaction of the execution, and without the consent of the parties, shall forfeit fifty dollars; but the validity of the sale is not affected by either act, either as to third persons, or parties to the action."

[G. S. 1894 § 5467]

§ 1519. Under this section the failure of the sheriff to give the proper notice of sale does not affect the validity of the sale either as to third parties or parties to the action.[1] Under a former statute

Digitized by Google

it was held that a judgment creditor purchasing at the sale was charged with notice of defects in the notice of sale.[2] The purchaser at the sale cannot be regarded as the "aggrieved party" within the meaning of this section.[3]

[1] McNair v. Toler, 21 Minn. 175; White v. Leeds Importing Co. 72 Minn. 352, 75 N. W. 761, 595; Bigelow v. Chatterton, 51 Fed. 614.

[2] Pettingill v. Moss, 3 Minn. 222 Gil. 151.

[3] Kelley v. Desmond, 63 Cal. 517.

Service of copy of execution and inventory on debtor—statute.

§ 1520. "The officer shall, at or before the time of posting of notices of sale, serve a copy of the execution and inventory, certified by him, upon the judgment debtor, if he can be found within the county. If he is a resident thereof, but cannot be found therein, the said officer shall leave such copy at the usual place of abode of the said judgment debtor, with some person of suitable age and discretion then resident therein."

[G. S. 1894 § 5455]

§ 1521. The failure of the sheriff to comply with this provision does not affect the title of the purchaser at the sale.[1] Such a failure has been held to relieve a judgment debtor from making a demand on a sheriff before bringing suit to recover money collected on an exempt judgment.[2]

[1] Duford v. Lewis, 43 Minn. 26, 44 N. W. 522.

[2] Wylie v. Grundysen, 51 Minn. 360, 53 N. W. 805.

Sheriff's certificate—contents—statute.

§ 1522. "Whenever any sale of real property is made upon any execution, or pursuant to any judgment, decree, or order of a court, except when otherwise specified in such judgment, decree or order, the officer shall make and deliver to the purchaser a certificate, under his hand and seal, containing—

(1) A description of the execution, judgment, decree or order under which such sale is made.

(2) A description of the real property sold.

(3) The price paid for each parcel sold separately.

(4) The date of the sale, and the name of the purchaser.

(5) When subject to redemption, it shall be so stated.

Said certificate shall be executed, proved or acknowledged, and recorded, as required by law for the conveyance of real estate, and shall be prima facie evidence of the facts therein stated."

[G. S. 1894 § 5470 (in part)] See § 2170.

§ 1523. A description which fairly identifies the execution is sufficient. A false particular in such description may be disregarded as in case of deeds and other instruments.[1] While it is the better practice to describe the debtor's interest accurately, it is not absolutely essential, in ordinary execution sales, that the sheriff should specify in his certificate the precise quantum of the debtor's estate. A certificate merely describing the land sold will convey the entire

Digitized by Google

interest of the debtor.[2] But the officer must not, in his certificate, describe a different interest or estate than the one which he was specifically directed to levy upon.[3] The property sold must be described with sufficient certainty to enable a person of common understanding to identify it. A certificate takes effect only as the execution of a statutory power and hence should be construed with some strictness, so as to enable the purchaser to identify the land he is bidding on, and the owner to ascertain what to redeem. A description sufficient to convey land between man and man, or which, if contained in an agreement to convey, would authorize a decree of specific performance, might not be sufficient in proceedings to sell land on an execution. Extrinsic evidence is admissible to identify the property.[4] If there is any descrepancy between the return and the certificate the latter controls, at least, as to the purchaser.[5] Although not expressly required by our statute the whole amount of the purchase price should be stated in order that the debtor or creditor, coming to redeem, may know the amount of principal and interest he is to pay, and the purchaser, on the other hand be secure of receiving the amount which he has paid.[6] When a sale is regularly made its validity is not affected by the omission of the sheriff to make a certificate.[7] Under an early statute it was held that the certificate need not be attested by witnesses or be under seal.[8] The right to apply for and have a second certificate of sale upon execution from the officer making such sale in certain cases, which was given by Laws 1862 ch. 19, survived the repeal of that chapter, and was saved to the purchaser by G. S. 1866 ch. 121 § 4.[9] It is frequently impossible to take advantage of defects in certificates because of curative acts.[10] A certificate may be amended on motion.[11] If the sale is made by a deputy sheriff the certificate should be executed and acknowledged by him rather than by the sheriff.[12] The proper evidence of a sale on execution is the certificate prescribed by this section and no other note or memorandum is required by the statute of frauds to make it a valid contract.[13] If the certificate contains other facts than those required by the statute it is not evidence as to them.[14] A certificate is essential to the passage of the legal title.[15] A certificate executed by the sheriff as such is good although it does not state that he made the sale as sheriff.[16] The provision requiring the certificate to state that the property is subject to redemption is directory merely. A recital that "the above described premises are subject to redemption within the time and according to the statute in such case made and provided" is sufficient.[17] The sheriff may be compelled to execute a certificate.[18] The requirement of a seal is abolished by Laws 1899 ch. 86.

[1] Bartleson v. Thompson, 30 Minn. 161, 14 N. W. 795.

[2] Reynolds v. Fleming, 43 Minn. 513, 45 N. W. 1099.

[3] Smith v. Lytle, 27 Minn. 184, 6 N. W. 625.

[4] Herrick v. Ammerman, 32 Minn. 544, 21 N. W. 836; Herrick v. Morrill, 37 Minn. 250, 33 N. W. 849; Lowry v. Tilleny, 31 Minn. 500, 18 N. W. 452; Smith v. Buse, 35 Minn. 234, 28 N. W. 220.

Digitized by Google

[5] Spencer v. Haug, 45 Minn. 231, 47 N. W. 794.
[6] Mascraft v. Van Antwerp, 3 Cow. (N. Y.) 334.
[7] Barnes v. Kerlinger, 7 Minn. 82 Gil. 55. See Smith v. Buse, 35 Minn. 234, 28 N. W. 220; Hokanson v. Gunderson, 54 Minn. 499, 56 N. W. 172.
[8] Bidwell v. Coleman, 11 Minn. 78 Gil. 45.
[9] Olsen v. Peterson, 53 Minn. 522, 55 N. W. 815.
[10] See Laws 1897 ch. 42.
[11] Richards v. Varnum, 8 How. Pr. (N. Y.) 79.
[12] Herrick v. Morrill, 37 Minn. 250, 33 N. W. 849.
[13] Armstrong v. Vroman, 11 Minn. 220 Gil. 142.
[14] Overing v. Foote, 43 N. Y. 290. See Messerschmidt v. Baker, 22 Minn. 81.
[15] Smith v. Buse, 35 Minn. 234, 28 N. W. 220.
[16] Merrill v. Nelson, 18 Minn. 366 Gil. 335.
[17] Wells v. Atkinson, 24 Minn. 161.
[18] Hokanson v. Gunderson, 54 Minn. 499, 56 N. W. 172.

Sheriff's certificate—operates as conveyance—statute.

§ 1524. Such certificate [§ 1522 supra], so proved or acknowledged and recorded, shall, upon the expiration of the time for redemption, operate as a conveyance, to the purchaser or his assigns, of all the right, title and interest of the person whose property is sold, in and to the same, at the date of the lien upon which the same was sold, without any other conveyance whatever."

[G. S. 1894 § 5471] See § 2173a.

§ 1525. Under a former statute all the interest of the execution debtor passed to the purchaser at once upon the sale subject to the right of redemption.[1] Under the present statute the rule is otherwise.[2] Now, the title of the debtor does not pass until the time to redeem expires, yet the purchaser acquires by the incomplete sale a right which, by whatever name it may be called, is assignable; and if such right is assigned, the title, when it passes by lapse of time and non-redemption, vests, by virtue of the statute, in the assignee of such right. This right will pass by a deed of the purchaser whereby he "grants, bargains, sells, releases and quitclaims all right, title, interest, claim, or demand" in or to the land; and when the time to redeem expires without redemption, the title under the execution sale will vest in the grantee in the deed.[3] If the execution debtor is a married person the purchaser acquires the land free from the statutory interest of the other spouse.[4] Title by execution was "unknown to the common law and seems to be of American origin. It has grown out of the system of judgment liens adopted by many, and probably by most of the American states, and out of the enforcement of the purposes of such liens, by process of execution. The lien of the judgment and process of execution, appear to have been substituted for the old common law writ of eligit."[5] The title acquired by the purchaser cannot be defeated or impaired by the subsequent acts or omissions of the sheriff.[6] It is unaffected by defects or informalities in the return of the sheriff.[7]

Digitized by Google

The purchaser succeeds to all the interest of the execution debtor although such interest is not described in the notice of sale or certificate of the sheriff.[8] If the interest of a vendee in a contract for the sale of land is sold on execution the purchaser succeeds to the interest subject to its being defeated by laches on the part of the vendee.[9] Where a sale and transfer of property is void as to a creditor it is also void as to the purchaser upon an execution sale based on a judgment recovered by such creditor.[10] The purchaser acquires the interest of the debtor not only in the land but also in buildings and trees on the land.[11] When the period of redemption has expired without redemption the execution debtor is a mere stranger to the property and cannot raise objection to subsequent proceedings.[12] The purchaser at an execution sale stands in the shoes of the judgment debtor and acquires his title as it stood at the time the execution creditor's lien was acquired.[13]

[1] Dickinson v. Kinney, 5 Minn. 409 Gil. 332; Messerschmidt v. Baker, 22 Minn. 81; James v. Wildner, 25 Minn. 305; Curriden v. St. Paul etc. Ry. Co. 50 Minn. 454, 52 N. W. 966.

[2] Parke v. Hush, 29 Minn. 434, 13 N. W. 668; Whitney v. Huntington, 34 Minn. 458, 26 N. W. 636.

[3] Lindley v. Crombie, 31 Minn. 232, 17 N. W. 372; Cooper v. Finke, 38 Minn. 2, 35 N. W. 469; Buchanan v. Reid, 43 Minn. 172, 45 N. W. 11; Holmes v. State Bank, 53 Minn. 350, 55 N. W. 555. See Messerschmidt v. Baker, 22 Minn. 81; James v. Wilder, 25 Minn. 305.

[4] Laws 1901 ch. 33. Overruling, Dayton v. Corser, 51 Minn. 406, 53 N. W. 717; Johnson v. Minnesota Loan & Trust Co. 75 Minn. 4, 77 N. W. 421.

[5] Steele v. Taylor, 1 Minn. 275 Gil. 210. See also, Whitney v. Huntington, 34 Minn. 458, 464, 26 N. W. 636.

[6] Millis v. Lombard, 32 Minn. 259, 20 N. W. 187; Hokanson v. Gunderson, 54 Minn. 499, 56 N. W. 172.

[7] Millis v. Lombard, 32 Minn. 259, 20 N. W. 187.

[8] Reynolds v. Fleming, 43 Minn. 513, 45 N. W. 1099.

[9] Id.; Smith v. Lytle, 27 Minn. 184, 6 N. W. 625.

[10] Millis v. Lombard, 32 Minn. 259, 20 N. W. 187.

[11] Whitney v. Huntington, 34 Minn. 458, 26 N. W. 636.

[12] Messerschmidt v. Baker, 22 Minn. 81.

[13] Steele v. Taylor, 1 Minn. 275 Gil. 210; Banning v. Edes, 6 Minn. 402 Gil. 270.

Remedies of purchaser to obtain possession.

§ 1526. The purchaser at an execution sale of real property may recover possession in an action in the nature of ejectment.[1] He has a more summary remedy under the unlawful detainer act.[2]

[1] Herrick v. Ammerman, 32 Minn. 544, 21 N. W. 836; Fisher v. Utendorfer, 68 Minn. 226, 71 N. W. 29.

[2] Ferguson v. Kumler, 25 Minn. 183.

Digitized by Google

Sale with conditions.

§ 1527. Upon a sale of personal property the sheriff made the sale in terms, but without authority, "subject" to a certain mortgage. The execution creditor having purchased the property under that condition he was held bound by it. The conditions or terms of sale announced at the opening of a public sale affect a purchaser, although he did not hear them.

Cable v. Byrne, 38 Minn. 534, 38 N. W. 620.

Sale of realty when there is leviable personalty.

§ 1528. An execution sale of real property is not void although there is personal property subject to levy within the knowledge of the execution creditor. But where the property sold has not passed to innocent purchasers the sale may be set aside, if prejudicial and especially if fraudulent or unconscionable.[1] Upon a sale of real property it will be presumed that there was no leviable personal property.[2]

[1] Jakobsen v. Wigen, 52 Minn. 6, 53 N. W. 1016; Cunningham v. Water-Power Sandstone Co. 74 Minn. 282, 77 N. W. 137.

[2] Knox v. Randall, 24 Minn. 479.

Sale for inadequate price.

§ 1529. An execution sale of real property will not be set aside merely because the price for which the property was sold was far below it real value.

Coolbaugh v. Roemer, 32 Minn. 445, 21 N. W. 472; White v. Leeds Importing Co. 72 Minn. 352, 75 N. W. 595, 761.

Sale of property subject to liens—duty of sheriff.

§ 1530. When property levied on is subject to lien claims it is the duty of the officer, when notice has been duly served on him in accordance with G. S. 1894 § 6255, to pay over to such lien-holders the amount found to be due each from the proceeds of the sale, not exceeding the statutory limit. Until a sale, the property levied on remains subject to such liens. The officer's right to possession and power to sell is derived from the writ only, and prior to a sale he is not liable to the lien-holder, except for some wrongful act or omission in the disposition or care of the property.

Liljengren v. Ege, 46 Minn. 488, 49 N. W. 250.

REDEMPTION FROM SALE

In what cases allowed—statute.

§ 1531. "Upon the sale of real property where the estate sold is less than a leasehold of two years unexpired term, the sale is absolute; in all other cases the property sold is subject to redemption as provided by law."

[G. S. 1894 § 5469]

§ 1532. This section is applicable to all sales upon execution regardless of whether the action is legal or equitable in nature.[1] No

Digitized by Google

redemption is allowed from sales of personal property.[2] A receiver's sale is absolute, at least as to judgment creditors subsequent to the appointment of the receiver.[3]

[1] Stone v. Bassett, 4 Minn. 298 Gil. 215. See London & N. W. Am. Mort. Co. v. McMillan, 78 Minn. 53, 80 N. W. 841.

[2] See Dickinson v. Kinney, 5 Minn. 409 Gil. 332.

[3] Watkins v. Minnesota Thresher Mfg. Co. 41 Minn. 150, 42 N. W. 862.

By whom—order of—statute.

§ 1533. "Real estate sold upon execution, judgment or decree, may be redeemed,

(1) By the judgment debtor, his heirs or assigns;

(2) By a creditor having a lien, legal or equitable, on the real estate or some part thereof, subsequent to that on which the same was sold. Creditors shall redeem in the order of their respective liens."

[G. S. 1894 § 5472] See §§ 2184, 2186.

§ 1534. The right of redemption is a strict legal right, to be exercised, if at all, in accordance with the terms of statute by which the right is conferred, unless waived or extended by the party whose interests are to be affected. The exercise of this right is not a proceeding in the action, nor is it a proceeding in court, but wholly independent of either, for the rights of the redemptioner, as well as those of the party from whom redemption is to be made, are dependent upon, and in all respects governed by, the statute.[1] The statutes regulating redemptions, being remedial in their nature, should be liberally construed in the interest of redemptioners.[2] It has been said, however, that the right of redemption "is purely a creature of statute, and therefore, if a party would avail himself of this right, he must follow the statute strictly and bring himself fully within its provisions."[3] The object of the provisions giving lien creditors the right of redemption in case the debtor fails to redeem was to make the land bring its utmost value, by means of what might be termed an auction sale among creditors, preserving to each his right according to the seniority of his lien. The aim is to conduct this sale for the benefit of both the creditors and the debtor, the creditors being interested in realizing out of the property as much as possible towards payment of their claims, and the debtor being interested in having as much as possible of his debts paid out of it. The mode of conducting this sale, so far as it has been plainly prescribed by the statute, must be followed whether it be reasonable or unreasonable, unless the parties who have the right to insist upon performance choose to dispense with it. When the statute is doubtful, that construction should be adopted which will protect the interest of the debtor, secure the rights of all the creditors according to the seniority of their liens, and keep up the auction until the best price has been obtained. The statute provides that this competitive sale among creditors, under the form of successive redemptions, shall be conducted as follows: First, all bidders or proposed redemptioners must reg-

Digitized by Google

jster by filing notice of their intention to redeem within one year after the sale; secondly, they must present to the party from whom they redeem evidence of their right to do so, and an affidavit showing the amount claimed as due on the lien under which they claim the right of redemption; thirdly, a certificate of redemption must be made and recorded, which shall, among other things, state the amount paid by the redemptioner, upon what claim the redemption was made, and, if a lien, the amount claimed to be due thereon. These provisions are designed not merely for the information of the party from whom the redemption is made, but also, and perhaps mainly, for the information and security of every creditor having a lien, and who may desire to redeem. The object is to inform them who their competitors will be, when their time for redemption will begin and end, and how much they will be called on to pay in order to redeem.[4] The right of creditors to redeem does not begin until the right of the debtor to redeem has expired.[5] The right of redemption when once vested is a property right which cannot be divested against the consent of the creditor without due process of law.[6] A redemptioner is a purchaser for value within the meaning of the recording acts.[7] A grantee or successor in interest of the execution debtor redeems on the same terms as the execution debtor himself.[8] To entitle a creditor to redeem he must have something more than the general right common to all creditors to have the general property of the debtor applied to the payment of his debts; he must have a right, either in law or in equity, to have the specific property appropriated to the satisfaction of his claim in exclusion of other claims subsequent in date to his.[9] It is not necessary that the creditor should have a personal claim against the debtor; it is sufficient if he has a special claim on the specific land sold. The statute has in view the party's relation and interest in respect to the land, and not in respect to any particular person. The right of redemption is given to a creditor, because the land is security for his debt, and without such right the security and perhaps the debt, might be wholly lost.[10] One who has brought an action on contract against the execution debtor and attached his property may redeem.[11] So may a subsequent judgment creditor.[12] A general creditor of a deceased person, although his claim has been allowed against the estate, has no such lien upon the real estate of the deceased as to entitle him to redeem.[13] One having a lien on "an undivided interest" in the land may redeem.[14] Mortgagees whose liens are subsequent may of course redeem.[15] A creditor obtaining a judgment after the property of the debtor has passed into the hands of a receiver cannot redeem from a sale made by the receiver under direction of the court.[16] A person having a lien on a part of the land sold may redeem the whole.[17] A judgment creditor who has levied on sufficient personal property to satisfy his judgment cannot redeem.[18]

[1] State v. Kerr, 51 Minn. 417, 53 N. W. 219. See also, Pamperin v. Scanlan, 28 Minn. 345, 9 N. W. 868; Dickerson v. Hayes, 26 Minn. 100, 1 N. W. 834.

[2] Williams v. Lash, 8 Minn. 496 Gil. 441; Tinkcom v. Lewis, 21 Minn. 132; Willis v. Jelineck, 27 Minn. 18, 6 N. W. 373.

Digitized by Google

[3] Pamperin v. Scanlan, 28 Minn. 345, 9 N. W. 868.
[4] Id.; Sprague v. Martin, 29 Minn. 226, 13 N. W. 34.
[5] Cuilerier v. Brunelle, 37 Minn. 71, 33 N. W. 123; Pamperin v. Scanlan, 28 Minn. 345, 9 N. W. 868.
[6] Willis v. Jelineck, 27 Minn. 18, 6 N. W. 373; O'Brien v. Krenz, 36 Minn. 136, 30 N. W. 458.
[7] Ahern v. Freeman, 46 Minn. 156, 48 N. W. 677. See Merchant v. Woods, 27 Minn. 396, 7 N. W. 826; White v. Leeds Importing Co. 72 Minn. 352, 75 N. W. 595, 761.
[8] Warren v. Fish, 7 Minn. 432 Gil. 347; Rutherford v. Newman, 8 Minn. 47 Gil. 28.
[9] Whitney v. Burd, 29 Minn. 203, 12 N. W. 530; Nelson v. Rogers, 65 Minn. 246, 68 N. W. 18.
[10] Hospes v. Sanborn, 28 Minn. 48, 8 N. W. 905; Buchanan v. Reid, 43 Minn. 172, 45 N. W. 172.
[11] Atwater v. Manchester Savings Bank, 45 Minn. 341, 48 N. W. 187.
[12] Parke v. Hush, 29 Minn. 434, 13 N. W. 668. See Sprague v. Martin, 29 Minn. 226, 13 N. W. 34.
[13] Whitney v. Burd, 29 Minn. 203, 12 N. W. 530; Nelson v. Rogers, 65 Minn. 246, 68 N. W. 18.
[14] Willis v. Jelineck, 27 Minn. 18, 6 N. W. 373.
[15] See Nopson v. Horton, 20 Minn. 268 Gil. 239; Tinkcom v. Lewis, 21 Minn. 132; Culierier v. Brunelle, 37 Minn. 71, 33 N. W. 71; Bovey De Laittre Lumber Co. v. Tucker, 48 Minn. 223, 50 N. W. 1038; Scheibel v. Anderson, 77 Minn. 54, 79 N. W. 594.
[16] Watkins v. Minnesota Thresher Mfg. Co. 41 Minn. 150, 42 N. W. 862.
[17] O'Brien v. Krenz, 36 Minn. 136, 30 N. W. 458.
[18] First Nat. Bank v. Rogers, 13 Minn. 407 Gil. 376.

In what order—statute.

§ 1535. "The judgment debtor, his heirs and assigns, may redeem within one year after the day of sale, by paying to the purchaser the amount of his bid, with interest thereon at the rate of seven per cent. per annum, and if the purchaser is a creditor having a prior lien, the amount thereof with interest. If no such redemption is made the senior creditor may redeem within five days after the expiration of said year, and each subsequent creditor within five days after the time allowed all prior lien holders as aforesaid, by paying the amount aforesaid, and all liens prior to his own held by the party from whom such redemption is made: provided, that no creditor can redeem unless, within the year aforesaid, he files notice of his intention to redeem in the office of the clerk of the court where the judgment is entered."

[G. S. 1894 § 5473] See § 2186.

§ 1536. Under a former statute it was held that the owner or his successor might redeem without paying other liens of the purchaser.[1] The present statute prescribes a different rule. If the judg-

Digitized by Google

ment creditor bids off the property for less than the amount of the judgment the remainder of the judgment probably does not constitute a "lien" which subsequent redemptioners must pay in order to redeem.[2] The holder of the purchaser's interest at an execution sale, in order to tack a subsequent lien to it for the purposes of redemption, must place himself in the line of redemptioners with respect to such subsequent lien, by complying with the statute, that is, by redeeming from himself.[3] But he may put himself in the line of redemptioners by filing in the proper office a notice of intention to redeem from his own sale and by filing at the proper time an affidavit of the amount due on each of his subsequent liens; and this will amount to a constructive redemption, thereby applying the property so redeemed to the payment of his subsequent liens, and also giving notice to subsequent lien holders of his rights, and his action on these rights. But it is not necessary for such creditor redeeming from himself to go through the idle ceremony of paying money to himself or issuing to himself any certificate of redemption, whether he redeems from himself directly, or from himself through the sheriff.[4] The sale on a second lien, whether made before or after that on a first lien, has the effect, unless it is itself cut off by the first sale, or unless it is redeemed from, to cut off all liens and interests subject to it.[5] While there are still rights of redemption outstanding, the lien upon which a redemption is made is not merged and extinguished in the title of the purchaser at the sale redeemed from, but it passes by subrogation to any subsequent redemptioner. The lien on which a redemption is made is not extinguished by the fact that the value of the property is equal to the amount of the lien with the amount paid for redemption added.[6] Two successive judgment liens were secured upon the same land. Execution sales were had, first under the junior judgment, and a few days later under the senior judgment, the judgment creditors being the purchasers. The judgment debtor did not redeem. The purchaser at the sale under the junior judgment purchased the certificate of sale under the senior judgment. After the year of redemption had run on this certificate without redemption by the debtor a subsequent creditor attempted to redeem from the sale under the junior judgment without paying the senior judgment. It was held that he might do so because the right under the certificate of the sale under the senior judgment had ceased to be a mere "lien" at the time.[7] Three judgments having been docketed against the owner of certain land; the land was sold under execution on the first judgment. The holder of the third judgment redeemed one day earlier than he was entitled to. No other redemption was made or attempted. It was held that the redemptioner acquired the title, and the holder of the second judgment lost his lien and right to enforce the same by execution against that land. The holder of the second judgment not having attempted to redeem was not prejudiced by the fact that the third judgment creditor redeemed prematurely; and, the person from whom redemption was made having acquiesced, the redemption was valid.[8] Where a second or junior redemptioner, having a lien, seasonably redeemed

Digitized by Google

from a senior creditor who had previously redeemed from the purchaser and received a certificate of redemption and the purchaser had accepted the redemption money, it was held that such second redemption was valid although the senior creditor did not in fact have a valid lien. And the fact that such purchaser was ignorant at the time of certain irregularities in the proceedings was held no defence as against the superior rights of the second redemptioner.[9] The fact that a certificate of redemption upon a lien does not state the amount claimed to be due on the lien will not, as between the purchaser and a subsequent redemptioner, affect a redemption on a subsequent lien, made on the assumption that the prior redemption was regular. Though a purchaser cannot, so far as concerns the passing of the legal title by redemption, waive by parol the existence of a lien giving a right to redeem, nor a proper certificate of redemption, he may waive any irregularity in the intermediate steps to effect redemption. Thus he may waive any defect in the filed notice of intention to redeem, and he will be held to have done so where he accepts and retains the money paid on the redemption.[10] It is competent for a creditor who has purchased the land of his debtor upon execution sale to waive his strict legal rights in respect to the time for redemption; and, if his acts relied on by the debtor to constitute such waiver are equivalent to an estoppel in pais he is bound by them, and a reasonable time after notice must be allowed the debtor in which to redeem.[11] But a purchaser cannot affect the right of redemption in subsequent creditors by granting an extension to the owner.[12] The court cannot extend the time to redeem. The right of redemption is a strict legal right, to be exercised if at all, in accordance with the terms of the statute by which the right is conferred, unless waived or extended by the party whose interests are to be affected.[13] If the last day of the year from the sale falls on Sunday the owner may redeem on Monday.[14] Where a mortgagee who has filed notice of intention to redeem assigns the mortgage, the assignee may redeem under the notice so filed.[15] A redeeming creditor cannot attack a subsequent lien. Thus the purchaser at a foreclosure sale is not in a position to question the good faith of a mortgage subsequently executed by the owner.[16] A creditor having a "prior" lien, means a creditor having a lien prior to the lien of the judgment under which the sale is had and not merely prior to the lien of the creditor seeking to redeem.[17] The words, "within five days after the time allowed all prior lien holders" are not to be taken strictly to mean that under no circumstances can a party redeem prior to the beginning of the five-day period. As between the parties seeking to redeem, each will be limited to the actual number of days, if their interests conflict. But this provision was enacted for the benefit of parties seeking to redeem, and the party holding the rights acquired at the foreclosure sale can take no advantage of the fact that a subsequent creditor redeems within the time open to a prior lienholder.[18]

[1] Warren v. Fish, 7 Minn. 432 Gil. 347; Rutherford v. Newman, 8 Minn. 47 Gil. 28.

Digitized by Google

[2] See cases under (3) and (5).
[3] Pamperin v. Scanlan, 28 Minn. 345, 9 N. W. 868; Parke v. Hush, 29 Minn. 434, 13 N. W. 668; Buchanan v. Reid, 43 Minn. 172, 45 N. W. 1; Ritchie v. Ege, 58 Minn. 291, 59 N. W. 1020; Lowry v. Akers, 50 Minn. 508, 52 N. W. 922.
[4] Ritchie v. Ege, 58 Minn. 291, 59 N. W. 1020.
[5] Bartleson v. Thompson, 30 Minn. 161, 14 N. W. 795; Lowry v. Akers, 50 Minn. 508, 52 N. W. 922; Sprandel v. Houde, 54 Minn. 308, 56 N. W. 34; Connecticut Mutual Life Ins. Co. v. King, 72 Minn. 287, 75 N. W. 287; White v. Rathbone, 73 Minn. 236, 75 N. W. 1046.
[6] Lowry v. Akers, 50 Minn. 508, 52 N. W. 922.
[7] Abraham v. Holloway, 41 Minn. 156, 42 N. W. 867; Id. 41 Minn. 163, 42 N. W. 870.
[8] Sprandel v. Houde, 54 Minn. 308, 56 N. W. 34.
[9] Todd v. Johnson, 56 Minn. 60, 57 N. W. 320.
[10] Todd v. Johnson, 50 Minn. 310, 52 N. W. 864.
[11] Tice v. Russell, 43 Minn. 66, 44 N. W. 886. See Hoover v. Johnson, 47 Minn. 434, 50 N. W. 475; State v. Kerr, 51 Minn. 417, 53 N. W. 719; Steele v. Bond, 28 Minn. 267, 9 N. W. 772.
[12] Swanson v. Realization & Debenture Corporation, 70 Minn. 380, 73 N. W. 165.
[13] State v. Kerr, 51 Minn. 417, 53 N. W. 719; Davidson v. Gaston, 16 Minn. 230 Gil. 202.
[14] Bovey De Laittre Lumber Co. v. Tucker, 48 Minn. 223, 50 N. W. 1038.
[15] Id.
[16] Id.
[17] Parke v. Hush, 29 Minn. 434, 13 N. W. 668.
[18] Connecticut Mut. Life Ins. Co. v. King, 80 Minn. 76, 82 N. W. 1103.

How made—statute.

§ 1537. "The person desiring to redeem shall pay to the person holding the right acquired under such sale, or for him to the sheriff or clerk of the district court of the county in which such real property is situated, the amount required by law for such redemption, and shall produce to such person or officer:

(1) A certified copy of the docket of the judgment, or deed of conveyance or mortgage, or of the record or files evidencing any other lien, under which he claims the right to redeem, certified by the officer in whose custody such docket, record, file or files shall be;

(2) Any assignment necessary to establish his claim, verified by the affidavit of himself, or of a subscribing witness thereto, or of some person acquainted with the signature of the assignor;

(3) An affidavit of himself or his agent, showing the amount then actually due on his lien."

[G. S. 1894 § 5474] See § 2188.

§ 1537a. "The object of this provision is to furnish evidence to the officer or purchaser that the party proposing to redeem has the

Digitized by Google

right to do so under the statute and to provide the evidence whereby a second or other redemptioner may know the amount to be paid to a previous one. The provision is to be liberally construed in favor of redemptioners.[1] Our statutes are exceedingly defective in not providing for some record in the clerk's office of the fact of a redemption having been made. A party who redeems and files with the sheriff the papers required by this section is not required to give any formal notice of his redemption.[2] The sheriff, in receiving money paid on redemption, acts as the officer of the law, not as the agent of the party. If he receives too much or too little, or from one not entitled to redeem, that cannot prejudice the party holding the certificate of sale. It is the business of the party redeeming to see that he deposits with the sheriff the proper amount, and if the amount is not correct he must bear the consequences.[3] A mere tender to the sheriff by a redemptioner of the amount necessary to redeem and a refusal of the sheriff to receive it, will not discharge the lien of the holder of the certificate of sale. The sheriff, in such case, is not the agent of either party, but the officer of the law, and the rights of the holder of the certificate of sale can be neither waived nor prejudiced by his acts. The only office and effect of such tender and refusal is to preserve and protect the right of the redemptioner, if seasonably and properly asserted, to have the redemption perfected by application to the holder of the certificate, or by proceedings against the sheriff to compel him to perform his official duty.[4] The refusal of the clerk to recognize a party's right to redeem will not be allowed to prejudice him.[5] Where the redemptioner pays to the sheriff a gross sum for the redemption and sheriff's fees, and it is accepted by the sheriff as sufficient, and the sum is sufficient to satisfy the purchaser's claim, it is a good redemption; the shortage, if any, must be deducted from the sheriff's fees.[6] For the purpose of redemption, a payment or tender of the money to the deputy sheriff in charge of the office at the time, is equivalent to payment or tender to the sheriff himself.[7] A computation made by the sheriff and the lien-holding creditor, of the amount due on the latter's lien, is not a compliance with the statute requiring such creditor, desiring to redeem, to produce to the sheriff an affidavit of himself or his agent, showing the amount then actually due on his lien. Without the production of such affidavit the attempted redemption is invalid.[8] The original instrument evidencing the lien, with the certificate of record indorsed thereon, is a sufficient compliance with the statute which requires the production of a certified copy of such instrument.[9] The redemptioner need not produce all the deeds constituting his claim of title from the mortgagor.[10] Where a mortgagee sells the note, but executes no assignment of the mortgage securing the same, and subsequently repurchases the note, the equitable transfers of the beneficial interest in the mortgage, effected by the sale and repurchase of the debt, are not assignments within the meaning of the statute which the mortgagee is bound to produce to the person from whom he seeks to redeem.[11] If the sheriff accepts without objection United States treasury notes or current national bank notes the

Digitized by Google

payment is good.[12] Payment in a check on a solvent bank has also been held good.[13] A tender of the amount required to redeem must be kept good in order to be effectual as the basis of a subsequent action to compel a redemption, brought after the time for redemption has expired.[14] A redemption cannot be made by a tender of less than the amount for which the property was sold, with interest, even where the foreclosure was for more than was actually due on the mortgage.[15] There is no affirmative duty imposed on the sheriff by positive law to hunt up the mortgagor and notify him that the redemption money is in his hands.[16] Failure to present the papers required by this section is waived by accepting the redemption money.[17] An attorney employed to foreclose a mortgage has no implied authority to receive redemption money.[18] Only a subsequent redemptioner can complain that redemption papers are not filed within the time required.[19] When the redemption is made by the mortgagor or owner it is not necessary to produce and file certified copies of the documents showing his title and right to redeem. The production of the original records to the officer is sufficient.[20]

[1] Williams v. Lash, 8 Minn. 496 Gil. 441; Tinkcom v. Lewis, 21 Minn. 132; Pamperin v. Scanlan, 28 Minn. 345, 9 N. W. 868.

[2] Warren v. Fish, 7 Minn. 432 Gil. 347.

[3] Horton v. Maffitt, 14 Minn. 289 Gil. 216; Davis v. Seymour, 16 Minn. 210 Gil. 184; Tinkcom v. Lewis, 21 Minn. 132; Schroeder v. Lahrman, 28 Minn. 75, 9 N. W. 173; Hall v. Swensen, 65 Minn. 391, 67 N. W. 1024; Nopson v. Horton, 20 Minn. 268 Gil. 239; In re Grundysen, 53 Minn. 346, 55 N. W. 557; Gesner v. Burdett, 18 Minn. 497 Gil. 444.

[4] Schroeder v. Lahrman, 28 Minn. 75, 9 N. W. 173; Abraham v. Holloway, 41 Minn. 156, 42 N. W. 867. See Dunn v. Hunt, 63 Minn. 484, 65 N. W. 948.

[5] Abraham v. Holloway, 41 Minn. 156, 42 N. W. 867.

[6] Bovey De Laittre Lumber Co. v. Tucker, 48 Minn. 223, 50 N. W. 1038.

[7] Williams v. Lash, 8 Minn. 496 Gil. 441; Willis v. Jelineck, 27 Minn. 18, 6 N. W. 373.

[8] Tinkcom v. Lewis, 21 Minn. 132.

[9] Id.; Sardeson v. Menage, 41 Minn. 314, 43 N. W. 66.

[10] Nopson v. Horton, 20 Minn. 268 Gil. 239.

[11] Wilson v. Hayes, 40 Minn. 531, 42 N. W. 467.

[12] Nopson v. Horton, 20 Minn. 268 Gil. 239.

[13] Sardeson v. Menage, 41 Minn. 314, 43 N. W. 66.

[14] Dunn v. Hunt, 63 Minn. 484, 65 N. W. 948. See Schroeder v. Lahrman, 28 Minn. 75, 9 N. W. 173; Abraham v. Holloway, 41 Minn. 156, 42 N. W. 867; Dunn v. Hunt, 76 Minn. 196, 78 N. W. 1110.

[15] Dickerson v. Hayes, 26 Minn. 100, 1 N. W. 834.

[16] Hall v. Swensen, 65 Minn. 391, 67 N. W. 1024.

[17] Clark v. Butts, 73 Minn. 361, 76 N. W. 199.

[18] In re Grundysen, 53 Minn. 346, 55 N. W. 557.

[19] Wilson v. Hayes, 40 Minn. 531, 42 N. W. 467.

[20] Sardeson v. Menage, 41 Minn. 314, 43 N. W. 66.

Digitized by Google

Insurance and taxes paid included in redemption.

§ 1538. "In all cases where mortgages have been heretofore or shall be hereafter foreclosed on real estate or execution or judicial sales made thereof, the purchaser at such sale may, during the year of redemption, in case of the expiration during such year of redemption of any insurance policy on the premises sold, pay the premium on such policy, and in case of any taxes or assessments being delinquent or otherwise payable during said year of redemption, may pay the same, and in all such cases the amount so paid, with interest thereon, shall be and constitute a part of the sum necessary to be paid for the redemption from such sale; the party making such payment, his attorney or agent, shall make affidavit stating the items thereof in full, and describing the real property affected sufficiently to identify the same, and file such affidavit for record in the office of the register of deeds, and furnish a copy thereof to the sheriff or other officer making such sale at least ten days prior to the expiration of the year of redemption. Provided, this act shall not apply to taxes or assessments to which no penalty, costs or interest would by law be added during said year of redemption."

[Laws 1897 ch. 193] See §§ 2154, 2176.

EFFECT OF REDEMPTION

Certificate of redemption—contents—statute.

§ 1539. "The person or officer from whom such redemption is made, shall make, and deliver to the person redeeming, a certificate under his hand and seal, containing:

(1) The name of the person redeeming, and the amount paid by him on such redemption.

(2) A description of the sale from which such redemption is made, and of the property redeemed.

(3) Stating upon what claim such redemption is made, and if upon a lien the amount claimed to be due thereon at the date of redemption.

Such certificate shall be executed, proved or acknowledged and recorded as provided by law for conveyances of real estate; and if not so recorded within four days after such redemption, such redemption and certificate is void as against any person in good faith making redemption from the same person or lien. Provided, the owner of the property redeemed or his assigns may record the certificate of redemption within four days after the expiration of the year allowed him for redemption. If such redemption is made by the owner of the property sold, his heirs or assigns, such redemption annuls such sale; if by a creditor holding a lien on the property, or some part thereof, said certificate, so executed, proved or acknowledged and recorded, operates as an assignment to him of the right acquired under such sale, subject to such right of any other person to redeem as is or may be provided by law."

[G. S. 1894, § 5475 as amended by Laws 1901 ch. 39] See § 2189.

Digitized by Google

§ 1540. The requirement of a seal is of course abolished by Laws 1899 ch. 86. A certificate of redemption substantially conforming to this section is essential to the passing of the legal title although the redemptioner may perhaps acquire equitable rights without it. The fact that a certificate of redemption upon a lien does not state the amount claimed to be due on the lien will not, as between the purchaser and a subsequent redemptioner, affect a redemption on a subsequent lien, made on the assumption that the prior redemption was regular.[1] The payment for the purpose of redemption having been made to the person from whom the redemption is to be made, the redemption is not invalid by reason of the fact that the certificate of such redemption is made by the sheriff.[2] The certificate operates as an assignment to a lien-holding creditor of the right acquired by the purchaser under the sale.[3] A redemption by the owner or his successor in interest does not have the effect of transferring to him the rights of the purchaser, subject to be defeated by other redemptions; it terminates the sale and restores to him his estate exactly as it was before the sale took place, except that the judgment is satisfied.[4] A redemption by a creditor from a foreclosure sale does not annul the sale.[5] Where the owner assumes to redeem as a creditor under a judgment against a former owner, in law the redemption will be one by an owner, and its legal effect will be to annul the sale from which the redemption is made.[6] A certificate is prima facie evidence of the fact of redemption and of the truth of its recitals so far as they relate to matters required to be stated therein.[7] Its recitals may be impeached by oral evidence.[8] A certificate issued to one not entitled to redeem is a nullity.[9] If the owner of an undivided half of a tract redeems the effect is to annul the sale as to the whole tract.[10]

[1] Todd v. Johnson, 50 Minn. 310, 52 N. W. 864.
[2] Sprandel v. Houde, 54 Minn. 308, 56 N. W. 34.
[3] Sprague v. Martin, 29 Minn. 226, 13 N. W. 34; Abraham v. Holloway, 41 Minn. 156, 42 N. W. 867; Swanson v. Realization & Debenture Corporation, 70 Minn. 380, 73 N. W. 165; O'Brien v. Krenz, 36 Minn. 136, 30 N. W. 458; Willis v. Jelineck, 27 Minn. 18, 6 N. W. 373.
[4] Warren v. Fish, 7 Minn. 432 Gil. 347; Rutherford v. Newman, 8 Minn. 47 Gil. 28.
[5] Darelius v. Davis, 74 Minn. 345, 77 N. W. 214.
[6] Clark v. Butts, 78 Minn. 373, 81 N. W. 11.
[7] Willis v. Jelineck, 27 Minn. 18, 6 N. W. 373.
[8] Cooper v. Finke, 8 Minn. 2, 35 N. W. 469.
[9] Gesner v. Burdell, 18 Minn. 497 Gil. 444.
[10] Buettel v. Harmount, 46 Minn. 481, 49 N. W. 250.

Deposit to save redemption rights pending action to set aside sale.

§ 1541. "In all cases where an action has been or may hereafter be brought wherein it is claimed that a sale of any land on execution should for any reason be set aside and canceled and the time for redemption from such sale may expire before the final determination of said action, any person having the right to redeem from such sale,

Digitized by Google

may, before the time for redemption expires, for the purpose of saving such right, deposit with the sheriff of the county in which said premises are situated the amount that would be necessary to redeem said premises upon such sale at the date after the expiration of the time for redemption and execute a bond with sureties to be prescribed and approved by such sheriff conditioned to pay such additional interest as may accrue on the amount so deposited until the final redemption as hereinafter provided. Such deposit and bond so executed shall extend the time for redemption from such execution for the period of thirty days after the final determination of said action during which time any person entitled to by law may redeem said premises from such sale by paying to said sheriff in addition to the amount so deposited the interest accrued at the time of such redemption. And thereupon said sheriff shall receive, hold and retain such redemption money and bond until such action is finally determined and final judgment entered therein. No such redemption so made shall in any case be held or construed to be a voluntary redemption nor in any case be or construed to be a waiver of any of the grounds or causes of action in any case nor shall the rights of the plaintiff or plaintiffs or those for whose benefit such action is brought be in any way prejudiced or impaired thereby. The judgment in such actions shall, among other things determine the rights of the parties in and to the moneys so deposited and the interest thereon, and the validity of said execution sale and to such bond, and the said moneys and bond shall be paid over and delivered by such sheriff as directed by such judgment upon delivery to him of a certified copy thereof. The remedy herein provided shall be deemed cumulative and in addition to other remedies now existing."

[Laws 1895 ch. 326]

EXEMPTION OF PERSONAL PROPERTY

The statute.

§ 1542. "No property hereinafter mentioned or represented shall be liable to attachment, or sale on any final process, issued from any court in this state.

(1) The family Bible.

(2) Family pictures, school books or library, and musical instruments, for use of family.

(3) A seat or pew in any house or place of public worship.

(4) A lot in any burial ground.

(5) All wearing apparel of the debtor and his family; all beds, bedsteads, and bedding, kept and used by the debtor and his family; all stoves and appendages put up or kept for the use of the debtor and his family; all cooking utensils; and all other household furniture not herein enumerated, not exceeding five hundred dollars in value; also all moneys arising from insurance of any property exempted from sale on execution, when such property has been destroyed by fire.

Digitized by Google

(6) Three cows, ten swine, one yoke of oxen and a horse, or, in lieu of one yoke of oxen and a horse, a span of horses or mules, twenty sheep, and the wool from the same, either in the raw material or manufactured into yarn or cloth; the necessary food for all the stock mentioned in this section for one year's support, either provided or growing, or both, as the debtor may choose; also, one wagon, cart, or dray, one sleigh, two plows, one drag, and other farming utensils, including tackle for teams, not exceeding three hundred dollars in value.

(7) The provisions for the debtor and his family necessary for one year's support, either provided or growing, or both, and fuel necessary for one year.

(8) One watch, the tools and instruments of any mechanic, miner or other person used and kept for the purpose of carrying on his trade, and, in addition thereto, stock in trade, including goods manufactured in whole or in part by him, not exceeding four hundred dollars in value; the library and implements of any professional man; all of which articles hereinbefore intended to be exempt shall be chosen by the debtor, his agent, clerk or legal representative, as the case may be. In addition to the articles enumerated in this section, all the presses, stones, type, cases and other tools and implements used by any co-partnership, or by any printer, publisher, or editor of any newspaper, and in the printing and publishing of the same, whether used personally by said co-partnership or by any such printer, publisher or editor, or by any person hired by him to use them, not to exceed in value the sum of two thousand dollars; together with stock in trade not exceeding four hundred dollars in value.[1]

(9) One sewing machine, one bicycle and one typewriting machine.[2]

(10) Necessary seed grain for the actual personal use of the debtor for one season, to be selected by him; not, however, in any case to exceed the following kinds and amounts respectively, viz.: one hundred bushels of wheat, fifty bushels of oats, one hundred bushels of potatoes, ten bushels of corn and one hundred bushels of barley, and binding material sufficient for use in harvesting the crop raised from the seed grain above specified.[3]

(11) The wages of any person or of the minor children of any person in any sum not exceeding twenty-five dollars due for any services rendered by any such person or the minor children of any such person for any other person during thirty days preceding the issue of any process of attachment, garnishment or execution in any action against any such person or persons.[4]

(12) The library, philosophical and chemical or other apparatus used in instruction, belonging to and used in any university, college, seminary of learning or school for the instruction of youth in this state, indiscriminately open to the public.[5]

(13) All moneys derived or received by any surviving wife or child from any form of life insurance upon the life of any deceased husband or father not exceeding ten thousand dollars.[6] Provided, how-

Digitized by Google

ever, that the exemptions provided for and embraced in subdivisions six, seven, eight, nine, ten, and eleven shall extend only to debtors having an actual residence in this state."

[G. S. 1894 § 5459 as amended by laws cited below]

[1] Laws 1899 ch. 267. [2] Laws 1899 ch. 24. [3] Laws 1897 ch. 15.
[4] Laws 1889 ch. 204. See G. S. 1894 § 5461.
[5] Laws 1897 ch. 126.
[6] Laws 1897 ch. 354. See Laws 1901 ch. 178 § 36.

Subdivision (5)—wearing apparel and household goods.

§ 1543. That an article may be worn does not make it wearing apparel within the meaning of the statute. The words of the statute are to be construed according to the common and approved usage of the language, namely, as referring to garments or clothing generally designed for wear of the debtor and his family.[1] A watch is not wearing apparel.[2] Whether all the property exempt under this subdivision is limited so that its value shall not exceed five hundred dollars, or whether it is only that included in the phrase "all other property not herein enumerated," is still an open question.[3] A cooking stove and its fixtures are exempt.[4] In claiming that insurance money is exempt under this subdivision the debtor has the burden of proof.[5]

[1] Rothschild v. Boelter, 18 Minn. 361 Gil. 331.
[2] Id. See § 1542 (8).
[3] Fletcher v. Staples, 62 Minn. 471, 64 N. W. 1150.
[4] Harlev v. Davis, 16 Minn. 487 Gil. 441.
[5] Fletcher v. Staples, 62 Minn. 471, 64 N. W. 1150.

Subdivision (6)—farm stock and implements.

§ 1544. A buggy or carriage is exempt as coming within the term "wagon." [1] A bicycle is not exempt as a "wagon." [2] Whether a horse kept for racing purposes is exempt, is an open question.[3] Two year old steers are exempt.[4] In order to have the benefit of the exemption of food for stock it is not necessary that the debtor should own all of the stock.[5] The question how much food is "necessary" is for the jury.[6] A horse delivered to the keeper of a livery or boarding stable is subject to a lien for his keep.[7]

[1] Allen v. Coates, 29 Minn. 46, 11 N. W. 132; Kimball v. Jones, 41 Minn. 318, 43 N. W. 74.
[2] Shadewald v. Phillips, 72 Minn. 520, 75 N. W. 717. See § 1542.
[3] Anderson v. Ege, 44 Minn. 216, 46 N. W. 362.
[4] Berg v. Baldwin, 31 Minn. 541, 18 N. W. 821.
[5] Olin v. Fox, 79 Minn. 459, 82 N. W. 858.
[6] Howard v. Rugland, 35 Minn. 388, 29 N. W. 63; Haugen v. Younggren, 57 Minn. 170, 58 N. W. 988.
[7] Flint v. Luhrs, 66 Minn. 57, 68 N. W. 514.

Subdivision (7)—provisions and fuel for family.

§ 1545. This exemption is not in favor of the head of the family, but in favor of the debtor, and is intended to protect the family, and must be liberally construed, so as to effectuate its humane purpose.

Digitized by Google

Where husband and wife are living together, and both have provisions which may be appropriated for the support of the family, the wife is not entitled to the exemption, nor in a case where the husband alone is supporting the family, for in such case there would be no necessity to appropriate any provisions owned by her to the support of the family. But in a case where husband and wife were living together with their children on her farm and were supporting the family by their joint labors in cultivating the farm and caring for the household, and neither had any other farm or grain except such as was raised thereon it was held that the wife was entitled to an exemption under this subdivision.

Boelter v. Klossner, 74 Minn. 272, 77 N. W. 4.

Subdivision (8)—stock and instruments of trade or profession.

§ 1546. One carrying on the trade of tailor may be entitled to the exemption of two sewing machines, if kept and personally used for the purposes of his trade and if reasonably necessary therefor.[1] The ordinary stock in trade of a merchant is not exempt under this subdivision.[2] The phrase "stock in trade" as here used means the stock of materials belonging to the owner of the tools and implements, and which he has provided and holds for the purpose of enabling him to make their use a beneficial or profitable one as a means of support. It includes all the materials got and held for that purpose, in whatever condition or state of preparation for use they may be, so that they are suitable and adapted to the end in view, and to the particular business in which he is engaged, wherein the use of such tools is necessary.[3] Unfinished burial caskets have been held exempt.[4] The stock in trade of a partnership is not exempt.[5] The "tools" of a mechanic or other person, in order to be exempt, must be held for the purpose of carrying on his trade.[6]

[1] Cronfeldt v. Arrol, 50 Minn. 327, 52 N. W. 857.

[2] Grimes v. Bryne, 2 Minn. 90 Gil. 72; Hillyer v. Remore, 42 Minn. 254, 44 N. W. 116.

[3] McAbe v. Thompson, 27 Minn. 134, 6 N. W. 479; Prosser v. Hartley, 35 Minn. 340, 29 N. W. 156.

[4] McAbe v. Thompson, 27 Minn. 134, 6 N. W. 479.

[5] Baker v. Sheehan, 29 Minn. 235, 12 N. W. 704; Prosser v. Hartley, 35 Minn. 340, 29 N. W. 156.

[6] Prosser v. Hartley, 35 Minn. 340, 29 N. W. 156.

Subdivision (10)—seed grain.

§ 1547. An owner of a farm may claim the exemption of seed grain under this subdivision, when renting the farm on shares and furnishing the seed.[1] Whether grain is exempt is ordinarily a question for the jury.[2]

[1] Matteson v. Munro, 80 Minn. 340, 83 N. W. 153.

[2] Haugen v. Younggren, 57 Minn. 170, 58 N. W. 988; Howard v. Rugland, 35 Minn. 388, 29 N. W. 63.

Subdivision (11)—wages.

§ 1548. Under a former statute the exemption was limited to those engaged in manual labor.[1] The present statute was designed

Digitized by Google

to extend the exemption to all who work for wages—to servants, employes, clerks, etc., as well as to laboring men.[2] The thirty days are to be computed from the levy and not from the issuance of the writ from the clerk's office.[3]

[1] Wildner v. Ferguson, 42 Minn. 112, 43 N. W. 794.

[2] Boyle v. Vanderhoof, 45 Minn. 31, 47 N. W. 396. See Sheehan v. Newpick, 77 Minn. 426, 80 N. W. 356; Rustad v. Bishop, 80 Minn. 497, 83 N. W. 449.

[3] Bean v. Germania Life Ins. Co. 54 Minn. 366, 56 N. W. 368.

Public property of municipal corporations exempt.

§ 1549. The public property of a municipal corporation is not subject to levy and sale on execution. A judgment against such a corporation is enforced by mandamus to compel payment or the levy of a tax for that purpose.

Jordan v. Board of Education, 39 Minn. 298, 39 N. W. 801.

Wages of municipal officers and employes.

§ 1550. The wages and salaries of municipal employes and officers are no longer exempt from execution.[1] Formerly the rule was otherwise.[2]

[1] Laws 1901 ch. 96.

[2] Roeller v. Ames, 33 Minn. 132, 22 N. W. 177.

Miscellaneous exemptions.

§ 1551. The following are exempt from execution by special statutory provision: seal and official register of notary public;[1] property of cemetery associations;[2] uniforms, arms, and equipments of member of National Guard;[3] funds of benevolent associations or societies.[4]

[1] G. S. 1894 § 2270.

[2] G. S. 1894 §§ 3107, 3134; State v. City of St. Paul, 36 Minn. 529, 32 N. W. 781.

[3] G. S. 1894 § 1749.

[4] G. S. 1894 §§ 3295, 3312; Brown v. Balfour, 46 Minn. 68, 48 N. W. 604; Lake v. Minnesota Masonic Relief Assoc. 61 Minn. 107, 63 N. W. 263; First Nat. Bank v. How, 65 Minn. 187, 67 N. W. 994.

Mortgage on exempt personal property—wife must join.

§ 1552. "No mortgage, pledge or other incumbrance of personal property which may be held exempt from execution or attachment under any of the provisions contained in the first, second, fifth or ninth subdivisions of section three hundred and ten of chapter sixty-six of the statutes of the state of Minnesota of eighteen hundred and seventy-eight [§ 1542 supra], given or made by a married man or woman, shall be of any validity whatever as to such exempt property unless the same be by written instrument executed and acknowledged as hereinbefore provided, and unless the husband and wife, if both are living, concur in, and sign and acknowledge the same joint instrument."

Digitized by Google

[Laws 1901 ch. 12. Amending Laws 1897 ch. 292 § 5] See Barker v. Kelderhouse, 8 Minn. 207 Gil. 178.

Judgment for taking exempt property exempt—statute.

§ 1553. "Whenever any personal property, exempt as aforesaid, is levied upon, seized or sold by virtue of any execution, or wrongfully and unlawfully taken or detained by any person, the damages sustained by the owner thereof, by reason of such levy, seizure or sale, or such unlawful detention or taking, and any judgment recovered therefor, shall be exempt from attachment, execution, or other proceeding whereby any creditor of such owner seeks to apply the same to the payment of his debts."

[G. S. 1894 § 5462]

§ 1554. This statute overrules an early case [1] and is declaratory of what is regarded as a common law rule in most of the states.[2] A judgment that represents the proceeds of exempt property cannot be set off on a judgment against such judgment creditor.[3] A judgment recovered by a debtor against his creditor for an unlawful levy upon and sale of exempt property cannot be reached by the creditor through supplementary proceedings. The proceeds of the judgment will be protected as exempt property until sufficient time has elapsed to afford the debtor a reasonable opportunity to purchase other exempt property.[4] The exemption extends to costs recovered,[5] but it probably does not extend to exemplary damages.[6] A building which is exempt from levy and sale as an appurtenant of an exempt homestead does not lose its exempt character by the wrongful severance thereof from the realty by a trespasser; but after a severance the owner may sue for its conversion as personal property. And a judgment recovered will be treated as exempt under this section.[7]

[1] Temple v. Scott, 3 Minn. 419 Gil. 306 (this is a thoroughly discredited case aside from the statute).
[2] Tillotson v. Walcott, 48 N. Y. 188; Below v. Robbins, 76 Wis. 600.
[3] Cleveland v. McCanna (N. D.) 75 N. W. 908.
[4] Tillotson v. Walcott, 48 N. Y. 188.
[5] Below v. Robbins, 76 Wis. 600.
[6] Knabb v. Drake, 23 Pa. St. 489.
[7] Wylie v. Grundysen, 51 Minn. 360, 53 N. W. 805.

No exemption in action for purchase money—statute.

§ 1555. "The property hereinbefore mentioned is not exempt from any attachment issued in an action for the purchase money of the same property, or from an execution issued upon any judgment rendered therein."

[G. S. 1894 § 5460]

§ 1556. This provision is constitutional. An action by the vendor of personal property upon the vendee's note, received in full payment and satisfaction of the price of the property is within this section.[1] The transferee of a note given for the purchase money of property is entitled to levy on the property, though otherwise

Digitized by Google

exempt, the same as the vendor might have done.[2] The theory of this statute is that the buyer ought not, as against the seller, to hold the property as exempt, until he has paid for it, and that the property passes to the buyer subject to this quasi vendor's lien; that is subject to the paramount right of the seller to make the purchase money out of it.[3] But this quasi lien does not affect purchasers from the vendee.[4] The statute is not applicable to a surety on a note given for the purchase price.[5] The exception applies only to the specific property for the purchase price of which the action is brought; the vendor cannot satisfy his purchase money judgment out of other exempt property.[6] A debt due for a loan expressly made for the purchase of exempt property has been held within a similar statute in Wisconsin.[7]

[1] Rogers v. Brackett, 34 Minn. 279, 25 N. W. 601. See Harley v. Davis, 16 Minn. 487 Gil. 441.
[2] Langevin v. Bloom, 69 Minn. 22, 71 N. W. 697.
[3] Id.
[4] Norris v. Brunswick, 73 Mo. 256; Straus v. Pothan, 102 Mo. 261.
[5] Davis v. Peabody, 10 Barb. (N. Y.) 91.
[6] Hickox v. Fay, 36 Barb. (N. Y.) 9.
[7] Houlehan v. Rassler, 73 Wis. 557.

General principles.

§ 1558. Exemption laws are not intended to aid debtors in defeating the just demands of their creditors but are passed in that humane and enlightened spirit of legislation which considers the preservation of the family, and the means of supporting and educating the children, and maintaining the decencies and proprieties of life, as paramount to the temporary inconvenience of the creditor.[1] Such laws are to be liberally construed.[2] The exemption of certain kinds or classes of property from levy and sale on execution is not an incident inseparably attached to the property itself, but a personal privilege conferred upon debtors happening to own the same, which they may insist upon or waive at pleasure.[3] The exemption is a personal privilege which the debtor alone can assert; his vendee cannot claim the exemption.[4] An absconding debtor who has departed from the state without any intent of returning and has become a resident of another jurisdiction, cannot avail himself of our exemption laws in respect to personal property left behind him and subsequently seized and sold on execution.[5] The exemption laws are not applicable to partnership property.[6] A voluntary transfer of exempt property vests a good title in the donee as against the creditors of the donor.[7]

[1] Grimes v. Bryne, 2 Minn. 90 Gil. 72. See also, Berg v. Baldwin, 31 Minn. 541, 18 N. W. 821; Boelter v. Klossner, 74 Minn. 272, 77 N. W. 4.
[2] Berg v. Baldwin, 31 Minn. 541, 18 N. W. 821; Boelter v. Klossner, 74 Minn. 272, 77 N. W. 4; Rothschild v. Boelter, 18 Minn. 361 Gil. 331; Olin v. Fox, 79 Minn. 459, 82 N. W. 858; Shadewald v. Phillips, 72 Minn. 520, 75 N. W. 717.

Digitized by Google

[3] Orr v. Box, 22 Minn. 485.
[4] Howland v. Fuller, 8 Minn. 50 Gil. 30. See Langevin v. Bloom, 69 Minn. 22, 71 N. W. 697.
[5] Orr v. Box, 22 Minn. 485.
[6] Baker v. Sheehan, 29 Minn. 235, 12 N. W. 704; Prosser v. Hartley, 35 Minn. 340, 29 N. W. 156; Security Bank v. Beede, 37 N. W. 527, 35 N. W. 435.
[7] Furman v. Tenny, 28 Minn. 77, 9 N. W. 172.

Province of court and jury.

§ 1559. The construction of exemption laws is for the court.[1] Where the levy is on food for stock, provisions for a family or seed grain the question of what and how much is "necessary" is for the jury.[2] And generally the question of exemption is for the jury under proper instructions.[3]

[1] Wildner v. Ferguson, 42 Minn. 112, 43 N. W. 794.
[2] Howard v. Rugland, 35 Minn. 388, 29 N. W. 63; Haugen v. Younggreen, 57 Minn. 170, 58 N. W. 988.
[3] Cronfeldt v. Arrol, 50 Minn. 327, 52 N. W. 857.

Burden of proof.

§ 1560. The burden always rests on the debtor to prove that property levied upon is exempt.

Fletcher v. Staples, 62 Minn. 471, 64 N. W. 1150.

EXEMPTION OF HOMESTEAD

The statute.

§ 1561. "A homestead, consisting of any quantity of land not exceeding eighty acres, and the dwelling-house thereon and its appurtenances, to be selected by the owner thereof, and not included in the laid-out or platted portion of any incorporated town, city or village, or, instead thereof, at the option of the owner, a quantity of land not exceeding in amount one lot of the original plat or any rearrangement or subdivision of such plat, or of any part thereof, as the same shall exist at the date of the commencement of the action or proceeding in which the execution or other process hereinafter mentioned shall issue, or of the death under which the homestead is claimed, or, in case the buildings occupy parts of two or more lots as legally platted at the time the exemption is claimed, a quantity of land not exceeding in area one of the original lots in the same block, if within the laid-out or platted portion of any incorporated town, city or village having over five thousand inhabitants, or one half acre, if within the laid-out or platted portion of any incorporated town, city or village having less than five thousand inhabitants, and the dwelling-house thereon and its appurtenances, owned and occupied by any resident of this state, shall not be subject to attachment, levy or sale upon execution, or any other process issuing out of any court within this state. This section shall be deemed and construed to exempt such homestead, in the manner aforesaid, during the time it shall be occupied by the widow or minor

Digitized by Google

child or children of any deceased person who was, when living, entitled to the benefits of this act. And whenever a married man shall abscond from the state, or desert his wife or minor children, the wife or minor children may continue to occupy such homestead, with the same right therein as any other owner of a homestead under the laws of the state; and that the same shall not be subject to levy or sale upon attachment, execution, or other final process issued against the said husband, or against the said wife, or against the said husband and wife: provided, they shall not have the right to sell or convey the said homestead."

[G. S. 1894 § 5521]

§ 1562. The statute does not exempt any particular interest in the land. Its protection is not confined to the particular title or interest of the claimant. It exempts the homestead—that is, the land and the dwelling-house thereon and the appurtenances.

Kaser v. Haas, 27 Minn. 406, 7 N. W. 824.

Definition—nature.

§ 1563. A homestead is the place of residence or dwelling of its owner. It includes the house in which the owner lives and the customary appurtenances of a home.

Kelly v. Baker, 10 Minn. 154 Gil. 124; Kresin v. Mau, 15 Minn. 116 Gil. 87; Wilder v. Haughey, 21 Minn. 101; Ferguson v. Kumler, 27 Minn. 156, 6 N. W. 618; Donald v. Lamprey, 29 Minn. 18, 11 N. W. 119; Kaser v. Haas, 27 Minn. 406, 7 N. W. 824.

Object and general policy of law.

§ 1564. "The law originated in the wise and humane policy of securing to the citizen, against all the misfortunes and uncertainties of life, the benefits of a home, not in the interest of himself, or, if a married man, of himself and family alone, but likewise in the interest of the state, whose welfare and prosperity so largely depend upon the growth and cultivation among its citizens of feelings of personal independence, together with love of country and kindred—sentiments that find their deepest root where the home life is spent and enjoyed. Its leading purpose is to exempt from forced sale a homestead—the place made such by the choice, residence, use and occupancy of the owner as a home, including as its necessary incidents, the dwelling house and its appurtenances, and the land thereto belonging."

Ferguson v. Kumler, 27 Minn. 156, 6 N. W. 618. See also, Grimes v. Bryne, 2 Minn. 90 Gil. 72; Tillotson v. Millard, 7 Minn. 513 Gil. 419; Wilder v. Haughey, 21 Minn. 101; Ferguson v. Kumler, 25 Minn. 183.

Unmarried man may claim.

§ 1565. In this state an unmarried man is entitled to a homestead upon the same conditions and to the same extent as a married man.[1] This is clearly implied in the statutory provision that a conveyance of a homestead by the owner, "if a married man," shall be void with-

Digitized by Google

out the signature of the wife. It is so held in Wisconsin under a statute identical with our own in this regard.[2]

[1] See Wilder v. Haughey, 21 Minn. 101; Ferguson v. Kumler, 25 Minn. 183; Id. 27 Minn. 156, 6 N. W. 618.

[2] Myers v. Ford, 22 Wis. 139.

Essential elements of homestead.

§ 1566. Ownership and actual occupancy as a home are the two essential elements of a homestead.

See cases under §§ 1563, 1567, 1568.

Actual occupancy necessary.

§ 1567. Actual occupancy of the premises as a home is essential to constitute a homestead. There may, of course, be temporary absences, but the homestead must always be regarded and treated as the home of the claimant.

Folsom v. Carli, 5 Minn. 333 Gil. 264; Tillotson v. Millard, 7 Minn. 513 Gil. 419; Sumner v. Sawtelle, 8 Minn. 309 Gil. 272; Kresin v. Mau, 15 Minn. 116 Gil. 87; Kelly v. Dill, 23 Minn. 435; Barton v. Drake, 21 Minn. 299; Wilson v. Proctor, 28 Minn. 13, 8 N. W. 830; Jelinek v. Stepan, 41 Minn. 412, 43 N. W. 90; Kelly v. Baker, 10 Minn. 154 Gil. 124; Quehl v. Peterson, 47 Minn. 13, 49 N. W. 390.

Title essential to support exemption.

§ 1568. A party must be the owner of property to hold it exempt as a homestead.[1] But it is not necessary that he should be the owner in fee. An equitable title is sufficient.[2] So is an undivided interest.[3] A tenant for years is an owner within the meaning of the statute.[4] Where a party pays the consideration for a purchase of land, but has the deed made to another, he cannot claim a homestead exemption in the land.[5] Where a husband pays the consideration for a conveyance of land to his wife the title of the wife is void as to his creditors and she cannot claim a homestead exemption in the land.[6] But where a debtor owns a homestead and conveys it to his wife through a third party the wife may hold it free from the claims of his creditors.[7] No change in the title of the claimant will affect the exemption so long as he retains the ownership.[8]

[1] Sumner v. Sawtelle, 8 Minn. 309 Gil. 272; Rogers v. McCauley, 22 Minn. 384; Secombe v. Borland, 34 Minn. 258, 25 N. W. 452.

[2] Wilder v. Haughey, 21 Minn. 101; Hartman v. Munch, 21 Minn. 107; Smith v. Lackor, 23 Minn. 454; Jelinek v. Stepan, 41 Minn. 412, 43 N. W. 90; Law v. Butler, 44 Minn. 482, 47 N. W. 53; Ferguson v. Kumler, 27 Minn. 156.

[3] Kaser v. Haas, 27 Minn. 406, 7 N. W. 824. See O'Brien v. Krenz, 36 Minn. 136, 30 N. W. 458.

[4] In re Emerson's Homestead, 58 Minn. 450, 60 N. W. 23.

[5] Sumner v. Sawtelle, 8 Minn. 309 Gil. 272; Rogers v. McCauley, 22 Minn. 384.

[6] Id.

Digitized by Google

[7] Morrison v. Abbott, 27 Minn. 116, 6 N. W. 455; Ferguson v. Kumler, 27 Minn. 156, 6 N. W. 618.
[8] Kaser v. Haas, 27 Minn. 406, 7 N. W. 824.

No limit to value.

§ 1569. Our statute places no limitation on the value of the exempted property.

Cogel v. Mickow, 11 Minn. 475 Gil. 354; Barton v. Drake, 21 Minn. 299; Baldwin v. Robinson, 39 Minn. 244, 39 N. W. 321; In re How, 59 Minn. 415, 61 N. W. 456; Nat. Bank of the Republic v. Banholzer, 69 Minn. 24, 71 N. W. 919; Jacoby v. Parkland Distilling Co., 41 Minn. 227, 43 N. W. 52.

No limitation on use except occupancy as home.

§ 1570. Our statute places no limitation on the use of the exempted property except that it must be actually occupied by the owner as a home.[1] The owner may use a part of the building for business purposes.[2] He is at liberty to lease a part;[3] and a receiver cannot be appointed to collect the rents for the benefit of creditors.[4]

[1] Kelly v. Baker, 10 Minn. 154 Gil. 124; Umland v. Holcombe, 26 Minn. 286, 3 N. W. 341; Jacoby v. Parkland Distilling Co. 41 Minn. 227, 43 N. W. 52; Nat. Bank v. Banholzer, 69 Minn. 24, 71 N. W. 919; In re Emerson's Homestead, 58 Minn. 450, 60 N. W. 23; Spalding Hotel Co. v. Emerson, 69 Minn. 292, 72 N. W. 119.
[2] Kelly v. Baker, 10 Minn. 154 Gil. 124.
[3] Id.; Umland v. Holcombe, 26 Minn. 286, 3 N. W. 341; Jacoby v. Parkland Distilling Co. 41 Minn. 227, 43 N. W. 52.
[4] Umland v. Holcombe, 26 Minn. 286, 3 N. W. 341.

Constitutional questions.

§ 1571. Our state constitution provides that "A reasonable amount of property shall be exempt from seizure or sale, for the payment of any debt or liability; the amount of such exemption shall be determined by law. Provided, however, that all property so exempted shall be liable to seizure and sale for any debts incurred to any person for work done or materials furnished in the construction, repair, or improvement of the same: and provided, further, that such liability to seizure and sale shall also extend to all real property for any debt incurred to any laborer or servant for labor or service performed."[1] Prior to the provisos in this provision, which were added in 1888, it was held that the legislature could not enact an exemption law discriminating between different classes of creditors or debts.[2] The legislature may provide for a homestead limited in area but not in value.[3] The legislature may change exemption laws,[4] but not so as to impair vested rights.[5] The statute making property otherwise exempt liable for the purchase money is constitutional.[6] The constitutional provision for exemptions is not self-executing; there can be no exemption until the legislature determines what it shall be.[7] Exemption laws which lessen the remedies of a creditor are invalid as to existing contracts and claims.[8]

Digitized by Google

[1] Const. Art. 1 § 12.

[2] Tuttle v. Strout, 7 Minn. 465 Gil. 374; Cogel v. Mickow, 11 Minn. 475 Gil. 354; Coleman v. Ballandi, 22 Minn. 144; Keller v. Struck, 31 Minn. 446, 18 N. W. 280; Meyer v. Berlandi, 39 Minn. 438, 40 N. W. 513; Rogers v. Brackett, 34 Minn. 279, 25 N. W. 601.

[3] Cogel v. Mickow, 11 Minn. 475 Gil. 354; Barton v. Drake, 21 Minn. 299; In re How, 59 Minn. 415, 61 N. W. 456.

[4] Coleman v. Ballandi, 22 Minn. 144.

[5] Tillotson v. Millard, 7 Minn. 513 Gil. 419; Gunn v. Barry, 15 Wall. (U. S.) 610.

[6] Rogers v. Brackett, 34 Minn. 279, 25 N. W. 601.

[7] Kelly v. Dill, 23 Minn. 435. See Ward v. Huhn, 16 Minn. 159 Gil. 142.

[8] Gunn v. Barry, 15 Wall. (U. S.) 610; Dunn v. Stevens, 62 Minn. 380, 64 N. W. 924, 65 N. W. 348. See Grimes v. Bryne, 2 Minn. 90 Gil. 72.

Construction of statutes.

§ 1572. In one of our early cases it was said that exemption laws were in derogation of common law and should be construed strictly.[1] It is now well established that such laws are to be construed liberally in the interest of debtors.[2] It is difficult to see why they should be either strictly or liberally construed. It seems more reasonable to hold that they should be fairly construed with reference to the object which they are designed to effectuate.[3] They should not be so construed as to render the right valueless when its protection is most needed.[4]

[1] Olson v. Nelson, 3 Minn. 53 Gil. 22. See also, Grimes v. Bryne, 2 Minn. 90 Gil. 72.

[2] Kiewert v. Anderson, 65 Minn. 491, 67 N. W. 1031; Ferguson v. Kumler, 27 Minn. 156, 6 N. W. 618.

[3] See Wilder v. Haughey, 21 Minn. 101; Ward v. Huhn, 16 Minn. 159 Gil. 142.

[4] Jacoby v. Parkland Distilling Co. 41 Minn. 227, 43 N. W. 52; Neumaier v. Vincent, 41 Minn. 481, 43 N. W. 376.

Burden of proof.

§ 1573. The general rule is that all the property of a debtor is applicable to the payment of his debts. The effect of the exemption laws is to create exceptions to this general rule, so that a debtor claiming an exemption of any portion of his property must bring himself strictly within the terms of the law allowing exemptions, otherwise the general rule must take its course. In other words it is for the debtor to put his finger upon the provision of statute, which by its terms withdraws the property claimed from the operation of the general rule.

Ward v. Huhn, 16 Minn. 159 Gil. 142.

Extent of exemption in cities and villages.

§ 1574. Prior to the amendment of 1891 there was nothing in the statute to aid in determining the size of a lot in a city which may be

Digitized by Google

held exempt. No judicial construction has yet been placed on the language of the amendment. It has been held that the word "lot" as used in the statute prior to 1891 must be construed in accordance with the following rules. (1) The mere fact that a tract of land is designated as a "lot" on the plat is not conclusive. (2) The homestead must be measured by the ordinary, prevailing or standard size of lots in the plat in which the particular tract may be located. (3) The tract designated as a lot on the plat must be materially and substantially larger than the ordinary, prevailing, or standard lots in the same plat, in order to justify a court in holding that it is not all within the spirit and intent of the exemption statute and wholly exempt. (4) What are ordinary, prevailing, or standard lots in size, in any particular plat, is not to be determined by ascertaining the average size of all lots, but by taking into consideration such lots as fairly represent, in area, a majority of the entire number, excluding fractions or small lots, as well as lots excessively and unreasonably large when compared with the great bulk.[1] What rules govern if the majority of the lots in the particular plat are excessively large compared with the ordinary, prevailing or standard lots in cities, towns and villages is undetermined.[2] An undivided half of two city lots cannot be claimed as a homestead.[3]

[1] Ford v. Clement, 68 Minn. 484, 71 N. W. 672; Mead v. Marsh, 74 Minn. 268, 77 N. W. 138; Heidel v. Benedict, 61 Minn. 170, 63 N. W. 490; Wilson v. Proctor, 28 Minn. 13, 8 N. W. 830; Lundberg v. Sharvey, 46 Minn. 350, 49 N. W. 60; In re Smith, 51 Minn. 316, 53 N. W. 711; Baldwin v. Robinson, 39 Minn. 244, 39 N. W. 321; National Bank v. Banholzer, 69 Minn. 24, 71 N. W. 919.

[2] Ford v. Clement, 68 Minn. 484, 71 N. W. 672.

[3] Ward v. Huhn, 16 Minn. 159 Gil. 142.

What is within laid out or platted portion of city.

§ 1575. In determining what is "not included in the laid-out or platted portion of any incorporated town, city or village" the following rules are established: (1) The fact that the land is platted is not decisive. (2) The fact that the land is not platted is not decisive. (3) The fact that the land though platted is not divided into lots is not decisive. (4) The fact that the land is not platted and is surrounded by platted land is not decisive. (5) A city whose limits extend into the country so far as to include land generally devoted to agriculture must be regarded, for the purposes of the statute, as divisible into urban and rural portions. (6) The urban portion of such a city is that which, as a mass, is platted and divided into lots and generally devoted not to agriculture but municipal life. (7) The rural portion of such a city is that which lies outside the urban portion and is generally devoted to agriculture. (8) If land lies within the urban portion of such a city it is within "the laid-out or platted portion" although it is itself not platted or divided into lots. (9) If land lies within the rural portion of such a city it is without "the laid-out or platted portion" thereof regardless of whether it is platted or not, or surrounded by platted lots or not.

Digitized by Google

National Bank v. Banholzer, 69 Minn. 24, 71 N. W. 919; Mead v. Marsh, 74 Minn. 268, 77 N. W. 138; In re Smith's Estate, 51 Minn. 316, 53 N. W. 711; Heidel v. Benedict, 61 Minn. 170, 63 N. W. 490; Kiewert v. Anderson, 65 Minn. 491, 67 N. W. 1031; Mintzer v. St. Paul Trust Co. 45 Minn. 323, 47 N. W. 973; Baldwin v. Robinson, 39 Minn. 244, 39 N. W. 321; Phelps v. Northern Trust Co. 70 Minn. 546, 73 N. W. 842.

Rural homestead—effect of platting.

§ 1576. The mere fact that the owner of a rural homestead plats it, or any part thereof, into lots, without dedicating the streets shown on the plat to the public, does not affect his homestead rights in any part thereof. Nor does the sale of a part of such lots affect such rights in any part of the original tract remaining unsold, provided the contiguity of what remains is preserved.

Phelps v. Northern Trust Co. 70 Minn. 546, 73 N. W. 842.

Selection of homestead—generally.

§ 1577. When the owner of a tract or lot, within the statutory limit of a homestead, actually occupies the same as his sole place of residence, such tract or lot becomes his homestead without further selection.

Barton v. Drake, 21 Minn. 299; Wilson v. Proctor, 28 Minn. 13, 8 N. W. 830.

Selection of homestead upon levy—statute.

§ 1578. "Whenever a levy shall be made upon the lands or tenements of a householder whose homestead has not been selected or set apart by metes and bounds, such householder shall notify the officer at the time of making such levy of what he regards as his homestead, with a description thereof, within the limits above prescribed, and the remainder alone shall be subject to sale under such levy: provided, that in case such householder shall refuse or neglect to make such selection within twenty days after notice of such levy, the officer making such levy shall cause to be surveyed and set off to such person entitled to such exemption in a compact form, including the dwelling-house and its appurtenances, the amount specified in the first section of this act [§ 1561]; and the expenses of such survey shall be chargeable on the execution, and collected thereupon. If the plaintiff in the execution shall be dissatisfied with the quantity of land selected and set apart by such householder, as aforesaid, the officer making such levy shall cause the same to be surveyed, beginning at a point to be designated by the owner, and set off in a compact form, including the dwelling-house and its appurtenances, the amount specified in the first section of this act [§ 1561]; and the expenses of such survey shall be chargeable on the execution, and collected thereon. After the selection or survey shall have been made, the officer making the levy may sell the property levied upon, and not included in such homestead, in the same manner as provided in other cases for the sale of real estate on execution, and in giving a deed or certificate of the same may describe it according to his original

Digitized by Google

levy, excepting therefrom by metes and bounds, according to the certificate of the survey, the quantity set off as such homestead, as aforesaid."

[G. S. 1894 § 5523, 5524, 5525]

§ 1579. The statute gives the homestead exemption absolutely, without making the right to it depend upon any affirmative action, upon the part of the person claiming, towards the officer levying upon it or about to levy upon it. If the person claiming an exemption fails or refuses to make a selection the officer is bound to make one for him. A sale as a whole of a tract including a homestead is void as to the whole if no selection was made either by the officer or the homesteader.[1] In selecting a homestead the dwelling house and appurtenances must be included. The selection must be reasonable and the tract carved out regular and compact in shape.[2] A selection is conclusive if voluntarily made by the homesteader.[3]

[1] Ferguson v. Kumler, 25 Minn. 183; Id. 27 Minn. 156, 6 N. W. 618; Kipp v. Bullard, 30 Minn. 84, 14 N. W. 364; Coles v. Yorks, 31 Minn. 213, 17 N. W. 213; Id. 36 Minn. 388, 31 N. W. 353; Talbot v. Barager, 37 Minn. 208, 34 N. W. 23; Mohan v. Smith, 30 Minn. 259, 15 N. W. 259.

[2] First Nat. Bank v. How, 61 Minn. 238, 61 N. W. 238. See Phelps v. Northern Trust Co., 70 Minn. 546, 73 N. W. 842.

[3] See Osmand v. Wisted, 78 Minn. 295, 80 N. W. 1127.

Purchase money mortgage—signature of wife when essential—statute.

§ 1580. "Such exemption [§ 1561] shall not extend to any mortgage thereon lawfully obtained; but such mortgage or other alienation of such land by the owner thereof, if a married man, shall not be valid without the signature of the wife to the same, unless such mortgage shall be given to secure the payment of the purchase money, or some portion thereof. And such exemption shall not extend to any contract for a lien, or upon which a lien would arise under the lien laws of this state for work done or material furnished in the erection or repair of a dwelling house or other building on said land."

[G. S. 1894 § 5522]

§ 1581. A deed,[1] or a contract for a deed,[2] or a mortgage[3] other than for the purchase money, of a homestead, without the signature of the wife is absolutely void. It cannot be made the foundation of an action for damages against the husband.[4] Its covenants are not binding.[5] It does not become valid upon the premises ceasing to be a homestead,[6] nor by reason of a subsequent divorce.[7] A husband cannot by any means waive a homestead exemption if his wife does not join in the waiver.[8] A material alteration made in a mortgage by the husband after the wife has signed and without her consent renders the mortgage void.[9] The signature of the wife is alone sufficient to satisfy the statute; it is not necessary that the instrument be acknowledged and attested.[10] A conveyance without the signature of the wife is void and no title can be acquired under it even by subsequent bona fide purchasers, in the absence of acts of the

Digitized by Google

wife constituting an estoppel.[11] The consent of a wife is not essential to the assignment of a mortgage given by the husband prior to his marriage.[12] The signature of the wife is not essential to the validity of a purchase money mortgage.[13] A conveyance of a homestead and other lands without the signature of the wife is not void as to the other lands.[14] The wife may be estopped by her conduct from asserting her want of assent to a conveyance.[15] After an abandonment of a homestead the husband may mortgage it without his wife joining.[16] By another statute it is provided that a conveyance by a wife of her real property without her husband joining is void.[17] Where a husband and wife had resided on the wife's property as their homestead and he had thereby acquired a homestead right in the property it was held that a judgment of absolute divorce obtained by her against him terminated his homestead right and authorized her to dispose of the property without his consent.[18] Where a third person lends to the vendee of land money with which to pay the purchase money to the vendor, and as security therefor obtains from the latter a conveyance of the title to the land, the lender is subrogated to the rights of the vendor, and the rights of the vendee, homestead or otherwise, in the land, are subject to his lien for the money thus advanced.[19] If part of a homestead is taken under the power of eminent domain the husband may dispose of the award without the consent of his wife.[20] Where the signature of one of the spouses is obtained by fraud the conveyance may be set aside, unless the grantee is innocent.[21] In an action for specific performance the defence that the wife did not join in the contract must be specially pleaded.[22] Where A. mortgaged his homestead to B., his wife not joining, and later, after a divorce, deeded the same to C. who agreed to assume the mortgage, it was held that C. was estopped to question the validity of the mortgage.[23] Where a wife joins her husband in the execution of a deed which is put in escrow to be delivered on the performance of certain conditions by the grantee she waives her homestead rights.[24] It is not necessary for the wife to join in the covenants of her husband's deed in order to bar her statutory homestead interest.[25]

[1] Barton v. Drake, 21 Minn. 299; Jelinek v. Stepan, 41 Minn. 412, 43 N. W. 90; Wilder v. Haughey, 21 Minn. 101; Hartman v. Munch, 21 Minn. 101. See Kern v. Field, 68 Minn. 317, 71 N. W. 393.

[2] Barton v. Drake, 21 Minn. 299; Weitzner v. Thingstad, 55 Minn. 244, 56 N. W. 817.

[3] Smith v. Lackor, 23 Minn. 454; Coles v. Yorks, 28 Minn. 464, 10 N. W. 775; Coles v. Yorks, 31 Minn. 213, 17 N. W. 341; Conway v. Elgin, 38 Minn. 469, 38 N. W. 370; Alt v. Banholzer, 39 Minn. 511, 40 N. W. 830; Law v. Butler, 44 Minn. 482, 47 N. W. 53; Jelinek v. Stepan, 41 Minn. 412, 43 N. W. 90; Williams v. Moody, 35 Minn. 281, 28 N. W. 510. Overruling Olson v. Nelson, 3 Minn. 53 Gil. 22.

[4] Weitzner v. Thingstad, 55 Minn. 244, 56 N. W. 817.

Digitized by Google

[6] Alt v. Banholzer, 39 Minn. 511, 40 N. W. 830.
[7] Barton v. Drake, 21 Minn. 299; Alt v. Banholzer, 39 Minn. 511, 40 N. W. 830; Law v. Butler, 44 Minn. 482, 47 N. W. 53.
[8] Alt v. Banholzer, 39 Minn. 511, 40 N. W. 830; Id. 36 Minn. 57, 29 N. W. 674.
[9] Ferguson v. Kumler, 25 Minn. 183. See Williams v. Moody, 35 Minn. 280, 28 N. W. 510; Kern v. Field, 68 Minn. 317, 71 N. W. 393.
[10] Coles v. Yorks, 28 Minn. 464, 10 N. W. 775.
[11] Id.
[12] Lawver v. Slingerland, 11 Minn. 447 Gil. 330.
[13] Spalti v. Blumer, 63 Minn. 269, 65 N. W. 454.
[14] Jones v. Tainter, 15 Minn. 512 Gil. 423; Smith v. Lackor, 23 Minn. 454.
[15] Coles v. Yorks, 31 Minn. 213, 17 N. W. 341; Weitzner v. Thingstad, 55 Minn. 244, 56 N. W. 817.
[16] Coles v. Yorks, 28 Minn. 464, 10 N. W. 775; Law v. Butler, 44 Minn. 482, 47 N. W. 53; Esty v. Cummings, 75 Minn. 549, 78 N. W. 242; Osmand v. Wisted, 78 Minn. 295, 80 N. W. 1127.
[17] Williams v. Moody, 35 Minn. 280, 28 N. W. 510.
[18] G. S. 1894 § 5532; Place v. Johnson, 20 Minn. 219 Gil. 198; Yager v. Merkle, 26 Minn. 429, 4 N. W. 819; Tatge v. Tatge, 34 Minn. 272, 25 N. W. 596, 26 N. W. 121; Gregg v. Owens, 37 Minn. 61, 33 N. W. 216; Farr v. Dunsmoor, 36 Minn. 437, 31 N. W. 858; Lowe v. Lowe, 83 Minn. 206, 86 N. W. 11; Merrill v. Nelson, 18 Minn. 366 Gil. 335.
[19] Kern v. Field, 68 Minn. 317, 71 N. W. 393.
[20] Heyderstadt v. Whalen, 54 Minn. 199, 55 N. W. 958.
[21] Canty v. Latterner, 31 Minn. 239, 17 N. W. 385.
[22] Farr v. Dunsmoor, 36 Minn. 437, 31 N. W. 858; First Nat. Bank v. Flynn, 75 Minn. 279, 77 N. W. 961.
[23] Brown v. Eaton, 21 Minn. 409.
[24] Alt v. Banholzer, 36 Minn. 57, 29 N. W. 674.
[25] Knopf v. Hansen, 37 Minn. 215, 33 N. W. 781. See Esty v. Cummings, 75 Minn. 549, 78 N. W. 242.
[26] Sandwich Mfg. Co. v. Zellmer, 48 Minn. 408, 51 N. W. 379.

Exemption not lost by sale or removal—statute.

§ 1582. "The owner of a homestead under the laws of this state may remove therefrom, or sell and convey the same; and such removal, or sale and conveyance, shall not render such homestead liable or subject to forced sale on execution or other process hereafter issued on any judgment or decree of any court of this state, or of the district court of the United States for the state of Minnesota against such owner; nor shall any judgment or decree of any such court be a lien on such homestead for any purpose whatever: provided, that this act shall not be so construed as in any manner to relate to judgments or decrees rendered on the foreclosure of mortgages, either equitable or legal."

[G. S. 1894 § 5528]

Digitized by Google

§ 1583. Prior to the enactment of this statute it was held that the sale of a homestead rendered it liable to sale on execution.[1] Under the statute, as it then stood, a homestead was only exempt when owned and occupied by the claimant. This was liable to the construction that the homestead right would be lost by a continued omission to occupy it, although only with a temporary purpose, and with an intention to return. One of the objects of this statute was to remove the possibility of such a construction.[2] This statute does not have the effect of rendering actual occupancy as a home unnecessary; it simply authorizes temporary removals after a homestead has been acquired by actual occupancy as a home.[3] A conveyance of a homestead vests a good title in the grantee,[4] even though it was made with a fraudulent intent.[5] This statute was not repealed by Laws 1875 ch. 65 § 1,[6] but it was modified and restricted by Laws 1868 ch. 58 § 1, as to removals.[7] A testamentary disposition of the statutory homestead, assented to in writing by a surviving spouse, will not render the property liable to the satisfaction of the debts of the testator.[8]

[1] Folsom v. Carli, 5 Minn. 333 Gil. 264; Piper v. Johnston, 12 Minn. 60 Gil. 27.

[2] Donaldson v. Lamprey, 29 Minn. 18, 11 N. W. 119.

[3] Kresin v. Mau, 15 Minn. 116 Gil. 87; Donaldson v. Lamprey, 29 Minn. 18, 11 N. W. 119; Quehl v. Peterson, 47 Minn. 13, 49 N. W. 390; Williams v. Moody, 35 Minn. 280, 28 N. W. 510.

[4] James v. Wilder, 25 Minn. 305; Clark v. Dewey, 71 Minn. 108, 73 N. W. 639.

[5] Morrison v. Abbott, 27 Minn. 116, 6 N. W. 455; Ferguson v. Kumler, 27 Minn. 156, 6 N. W. 618; Furman v. Tenny, 28 Minn. 77, 9 N. W. 172; Baldwin v. Rogers, 28 Minn. 544, 11 N. W. 77;

[6] Kaser v. Haas, 27 Minn. 406, 7 N. W. 824.

[7] Donaldson v. Lamprey, 29 Minn. 18, 11 N. W. 119.

[8] Eckstein v. Radl, 72 Minn. 95, 75 N. W. 112.

Abandonment—notice of claim—statute.

§ 1584. "Whenever the owner of a homestead under the laws of this state shall remove therefrom, and cease to occupy the same as such homestead for a period of more than six consecutive months, his right to claim the same as such shall cease and determine on the expiration of such period of six months, unless, prior thereto, he shall file in the office of the register of deeds of the county wherein such homestead is situate, a notice by him subscribed, and acknowledged in the manner deeds are required by law to be acknowledged, particularly designating such homestead, and that he claims the same as such; and in no case shall his right to claim the same as a homestead continue for a longer period than five years from the filing of such notice, unless it has been accompanied, during some portion of said period, by an actual occupancy and residence thereon by him or his family."

[G. S. 1894 § 5529]

Digitized by Google

§ 1585. The terms "occupancy" and "residence," as used in the homestead exemption laws, refer to an actual occupancy of the premises, and an actual residence thereon as a home or dwelling-place. Hence, if the owner removes from and ceases actually to occupy the premises for more than six months, without filing the notice required by this section, his right to claim the same as a homestead ceases, although he may have removed therefrom with the intention of returning and resuming his occupancy at some future time. Neither will this right be regained by his mere intention and preparation to return, unaccompanied by an actual resumption of his occupancy. Filing notice is effective to preserve the right only when there is an intention to return and occupy as a home.[1] This section does not preserve the right for six months absolutely. If a party leaves his homestead with an intention of never returning his exemption right ceases at once regardless of whether he has filed a claim or not.[2] A party may remove from his homestead for a period of six months with impunity, although he does not file the statutory notice, if he intends to return.[3] Where a homestead right has been lost by removal and failure to file the statutory notice the premises do not pass to the surviving husband or wife under § 1561.[4] Evidence of an abandonment must be clear and convincing.[5] The burden of proving a filing of notice rests on the claimant.[6] As head of the family, it is for the husband to determine and fix the domicil of the family, including that of the wife. His domicil is therefore her domicil; so that when he and his wife remove from a homestead, he having no intention of returning, that fixes the character of the removal as an abandonment, for the intent of the husband as head of the family controls, and he has a right to determine whether there shall be a return or not.[7] To constitute an abandonment there must be an actual removal from the premises; an intention to remove is insufficient.[8] The acquisition of a new homestead works a forfeiture of the old one.[9] Where there has been a loss of exemption by abandonment a resumption of occupancy as a home does not have a retroactive effect, but merely gives a new right as of the date of the resumption.[10] An outstanding interest is not a thing separate and apart from the land so that its acquisition by the claimant may affect the exemption.[11]

[1] Quehl v. Peterson, 47 Minn. 13, 49 N. W. 390; Baillif v. Gerhard, 40 Minn. 172, 41 N. W. 1059; Russell v. Speedy, 38 Minn. 303, 37 N. W. 340; Gowan v. Fountain, 50 Minn. 264, 52 N. W. 862.

[2] Williams v. Moody, 35 Minn. 280, 28 N. W. 510; Clark v. Dewey, 71 Minn. 108, 73 N. W. 639; Donaldson v. Lamprey, 29 Minn. 18, 11 N. W. 119; Kramer v. Lamb, 84 Minn. 468, 87 N. W. 1024.

[3] Russell v. Speedy, 38 Minn. 303, 37 N. W. 340.

[4] Baillif v. Gerhard, 40 Minn. 172, 41 N. W. 1059.

[5] Stewart v. Rhoads, 39 Minn. 193, 39 N. W. 141; Robertson v. Sullivan, 31 Minn. 197, 17 N. W. 336; Clark v. Dewey, 71 Minn. 108, 73 N. W. 639.

Digitized by Google

[6] Gowan v. Fountain, 50 Minn. 264, 52 N. W. 862.
[7] Williams v. Moody, 35 Minn. 280, 28 N. W. 510; Kramer v. Lamb, 84 Minn. 468, 87 N. W. 1024. See Baillif v. Gerhard, 40 Minn. 172, 41 N. W. 1059; Ferguson v. Kumler, 25 Minn. 183.
[8] Robertson v. Sullivan, 31 Minn. 197, 17 N. W. 336.
[9] Donaldson v. Lamprey, 29 Minn. 18, 11 N. W. 119.
[10] Clark v. Dewey, 71 Minn. 108, 73 N. W. 639.
[11] Kaser v. Haas, 27 Minn. 406, 7 N. W. 824.

Right of surviving spouse in homestead.

§ 1586. The provisions of the homestead law[1] respecting the rights of a surviving wife in the homestead of her husband are superseded by our law of descent which provides that a surviving spouse shall have an estate in fee in the homestead "free from all debts or claims upon the estate of the deceased," if there are no children, and if there are children, then an absolute life estate equally free from liability for the debts of the deceased.[2] The homestead rights of the widow are limited to the land which her husband had actually devoted to homestead purposes, and was occupying at the time of his decease.[3] The exemption of the homestead from the debts of the deceased is absolute, that is, it does not depend upon the occupancy of the land by the surviving spouse as a home.[4] But it is not exempt from the debts of the surviving spouse unless it is actually occupied as a home.[5] Where a homestead has been lost by removal and failure to file the statutory notice it does not descend to the surviving spouse as such.[6] The rights of the surviving spouse do not depend upon any formal selection of the homestead.[7] A contract of separation inequitable in its terms and not performed by the husband has been held not to constitute a waiver of the wife's homestead right.[8] A surviving spouse cannot be allowed to waive a claim to the homestead fixed by law, and take a part thereof, to the injury of other parties interested in the distribution of the decedent's estate.[9] The assent in writing of the surviving spouse to a testamentary disposition of a homestead may, at least if there are children, be executed after the decease of the testator. The statutory right of a surviving spouse to renounce the terms of a will within six months apply to a testamentary disposition of a homestead.[10] A testamentary disposition of a homestead, assented to by the surviving spouse, does not render the property liable to the satisfaction of the debts of the testator.[11] A failure to exercise the right of election on the part of a surviving spouse within six months after the will has been probated has the same effect on a testamentary disposition of a homestead as a written assent, and it has this effect although the result is to cut off the rights of surviving children in the homestead.[12] The requirements of the statute as to making and filing a written instrument of election to renounce the terms of a will are not applicable where there is no child, nor the issue of a deceased child, surviving the testator.[13] The clause "free from any testamentary devise or other disposition

Digitized by Google

to which the surviving husband or wife shall not have assented in writing" in the statute relating to the descent of homesteads, refers only to cases where the testator leaves a surviving spouse. The word surviving in the statute refers to the time of the death of the testator and not to the time the will was executed.[14] If the surviving spouse renounces the will the homestead descends to such spouse and the children unaffected by the will.[15]

[1] See § 1561.
[2] G. S. 1894 § 4470; McCarthy v. Van Der Mey, 42 Minn. 189, 44 N. W. 53; Tracy v. Tracy, 79 Minn. 267, 82 N. W. 635.
[3] King v. McCarthy, 54 Minn. 190, 55 N. W. 960.
[4] Gowan v. Fountain, 50 Minn. 264, 52 N. W. 862. See Dunn v. Stevens, 62 Minn. 380, 64 N. W. 924, 65 N. W. 348; Holbrook v. Wightman, 31 Minn. 168, 17 N. W. 280; McCarthy v. Van Der Mey, 42 Minn. 189, 44 N. W. 53; Eaton v. Robbins, 29 Minn. 327, 13 N. W. 143; McGowen v. Baldwin, 46 Minn. 477, 49 N. W. 251.
[5] Gowan v. Fountain, 50 Minn. 264, 52 N. W. 862.
[6] Baillif v. Gerhard, 40 Minn. 172, 41 N. W. 1059.
[7] Wilson v. Proctor, 28 Minn. 13, 8 N. W. 830.
[8] Culbertson v. Cox, 29 Minn. 309, 13 N. W. 177.
[9] Mintzer v. St. Paul Trust Co., 45 Minn. 323, 47 N. W. 973.
[10] Radl v. Radl, 72 Minn. 81, 75 N. W. 111.
[11] Eckstein v. Radl, 72 Minn. 95, 75 N. W. 112.
[12] Jones v. Jones, 75 Minn. 53, 77 N. W. 551.
[13] Tracy v. Tracy, 79 Minn. 267, 82 N. W. 635.
[14] Penstock v. Wentworth, 75 Minn. 2, 77 N. W. 420.
[15] Schacht v. Schacht (Minn.) 90 N. W. 127.

Exemption of dwelling-house on land of another.

§ 1587. "Any person owning and occupying any house on land not his own, and claiming said house as a homestead, shall be entitled to the exemption aforesaid."

[G. S. 1894 § 5526] See Wylie v. Grundysen, 51 Minn. 360, 53 N. W. 805; Hamlin v. Parsons, 12 Minn. 108 Gil. 59; Franklin v. Coffee, 18 Tex. 417; Cullers v. James, 66 Tex. 494.

No exemption from taxes.

§ 1588. "Nothing in this act shall be considered as exempting any real estate from taxation, or sale for taxes."

[G. S. 1894 § 5527]

Insurance on homestead—right to money on loss.

§ 1589. The proceeds of an insurance on a house occupied as a homestead belong, in case of a loss after the death of the insured, to the surviving spouse, where the policy is made payable to the insured and his personal representatives.

Culbertson v. Cox, 29 Minn. 309, 13 N. W. 177.

Insolvent debtor may buy a homestead.

§ 1590. A debtor, in securing a homestead for himself and family by purchasing a house with non-exempt assets, or by moving into

Digitized by Google

a house which he already owns, takes nothing from his creditors which the law secures to them, or in which they have any vested right. He merely puts his property into a shape in which it will be the subject of a beneficial provision for himself, which the law recognizes and allows. Even if he disposes of his property subject to execution, for the very purpose of converting the proceeds into exempt property, this will not constitute legal fraud. This he may do at any time before the creditors acquire a lien on the property.[1] But a mere intent to occupy property as a homestead will not defeat a creditor's lien attaching prior to actual occupancy.[2]

[1] Jacoby v. Parkland Distilling Co. 41 Minn. 227, 43 N. W. 52; Neumaier v. Vincent, 41 Minn. 481, 43 N. W. 376.

[2] Kelly v. Dill, 23 Minn. 435; Liebetrau v. Goodsell, 26 Minn. 417, 4 N. W. 813; Neumaier v. Vincent, 41 Minn. 481, 43 N. W. 376; Quehl v. Peterson, 47 Minn. 13, 49 N. W. 390.

Crops growing on homestead.

§ 1591. Whether crops growing on the homestead are exempt is as yet undetermined in this state.

See Sparrow v. Pond, 49 Minn. 412, 52 N. W. 36; Erickson v. Paterson, 47 Minn. 525, 50 N. W. 699.

Severance of building from homestead.

§ 1592. A building which is exempt from levy and sale as an appurtenant of an exempt homestead does not lose its exempt character if wrongfully severed by a trespasser.

Wylie v. Grundysen, 51 Minn. 360, 53 N. W. 805.

Divorce—homestead granted to wife on.

§ 1593. In making an adjustment or division of the property of the husband upon divorce the court may set off to the wife the whole or a part of the homestead, or may, in lieu thereof, allow her alimony, and make it a specific lien on the homestead.

Mahoney v. Mahoney, 59 Minn. 347, 61 N. W. 334.

Mortgage on homestead—foreclosure.

§ 1594. Where a mortgage covers an exempt homestead and additional lands, the mortgagor is entitled, upon foreclosure by action, to have the non-exempt property first sold and applied to the satisfaction of the mortgage debt.[1] The homestead rights of mortgagors in the mortgaged property are subject to the ordinary legal and equitable rights of the mortgagees as such, including the appointment of a receiver.[2] A foreclosure sale of premises including a homestead right is void unless the homestead right is set off or selected.[3] Where a married man and his wife executed a mortgage on their homestead and other lands, and subsequently united in a conveyance with covenants of warranty of the other lands, it was held that the land remaining in the mortgagors, although their homestead was the primary fund for the payment of the mortgage.[4] Where a mortgage covers both exempt and non-exempt property, the mortgagor has a right, both as against the mortgagee and as

Digitized by Google

against a creditor having a lien by judgment on the levy of an execution upon the non-exempt property alone, to demand that the mortgagee first exhaust the non-exempt property before resorting to the exempt. But this is a right which the mortgagor must seasonably assert for himself. The mortgagee is not bound to assert it for him, or to institute proceedings to protect it. The right will not be enforced where, from the acts or omissions of the mortgagor it would be inequitable to do so.[5]

[1] Horton v. Kelly, 40 Minn. 193, 41 N. W. 1031.
[2] Lowell v. Doe, 44 Minn. 144, 46 N. W. 297; Marshall & Ilsley Bank v. Cady, 75 Minn. 241, 77 N. W. 831; Id. 76 Minn. 112, 78 N. W. 112.
[3] Coles v. Yorks, 31 Minn. 213, 17 N. W. 341. See Talbot v. Barager, 37 Minn. 208, 34 N. W. 23.
[4] Merchants' Nat. Bank v. Stanton, 55 Minn. 211, 56 N. W. 223.
[5] Miller v. McCarty, 47 Minn. 321, 50 N. W. 235.

Liens of mechanics and material men.

§ 1595. Prior to the amendment of the state constitution in 1888 it was held that a mechanic or material-man could not acquire a lien on a homestead except by special contract amounting to a waiver of the exemption.[1] It is now provided by the constitution "that all property so exempted shall be liable to seizure and sale for any debts incurred to any person for work done or materials furnished in the construction, repair or improvement of the same."[2] This has been held self-executing.[3] The lien may be acquired either by levying an attachment or docketing a judgment.[4] An assignee of the debt has the same rights as the original creditor.[5]

[1] Cogel v. Mickow, 11 Minn. 475 Gil. 354; Coleman v. Ballandi, 22 Minn. 144; Keller v. Struck, 31 Minn. 446, 18 N. W. 280; Meyer v. Berlandi, 39 Minn. 438, 40 N. W. 513; Bergsma v. Dewey, 46 Minn. 357, 49 N. W. 57.
[2] See § 1571.
[3] Nickerson v. Crawford, 74 Minn. 366, 77 N. W. 292.
[4] Bagley v. Pennington, 76 Minn. 226, 78 N. W. 1113.
[5] Nickerson v. Crawford, 74 Minn. 366, 77 N. W. 292.

Exception in favor of laborers and servants.

§ 1596. It is provided by our constitution that a homestead is not exempt "for any debt incurred to any laborer or servant for labor or service performed."[1] It is to be observed that this language is general and does not require the labor or service to be performed on the homestead. The provision is self-executing.[2]

[1] See § 1571.
[2] Nickerson v. Crawford, 74 Minn. 366, 77 N. W. 292; Bagley v. Pennington, 76 Minn. 226, 78 N. W. 1113.

Marshaling securities.

§ 1597. Where A. holds security upon two tracts of land, one of which is a homestead, and B. holds security only upon the tract not

Digitized by Google

a homestead, A. will not be compelled to resort to the homestead tract first, in order to leave the other tract, as far as may be, to B.

McArthur v. Martin, 23 Minn. 74. See Horton v. Kelly, 40 Minn. 193, 41 N. W. 1031; Miller v. McCarty, 47 Minn. 321, 50 N. W. 235; Blake v. Boisjoli, 51 Minn. 296, 53 N. W. 637; Merchants' Nat. Bank v. Stanton, 55 Minn. 211, 56 N. W. 821; Franklin v. Warden, 9 Minn. 124 Gil. 114.

Digitized by Google

CHAPTER XVII

PROCEEDINGS SUPPLEMENTARY TO EXECUTION

The statute.

§ 1598. "When an execution against property of the judgment debtor or of any of several judgment debtors in the same judgment is issued to the sheriff of the county where said judgment debtor resides, or if he does not reside in this state, to the sheriff of the county where the judgment roll or a transcript of a justice's judgment is filed, is returned unsatisfied, in whole or in part, the judgment creditor is entitled to an order from the judge of the district court of the judicial district where the debtor resides, or, if the debtor is not a resident of the state, then from the judge of the judicial district where the judgment roll or a transcript of a justice's judgment is filed requiring said judgment debtor, or, if a corporation, any officer thereof, to appear and answer concerning his or its property before the judge of the district in which such judgment debtor resides, or where such corporation has an officer, or, if the judgment debtor is a non-resident of the state, then before the judge of the district in which said judgment roll or transcript of a justice's judgment is filed or before a referee appointed by such judge at a time and place specified in said order: Provided, that if the judgment debtor or other person required to attend and be examined as prescribed in this title, or officer of a corporation required to attend in its behalf, is at the time of the service of the order upon him a resident of the state or then has an office within the state for the regular transaction of business in person, he cannot be compelled to attend pursuant to the order, or to any adjournment, at any place without the county wherein his residence or place of business is situated."

[G. S. 1894 § 5486]

Court commissioners.

§ 1599. Court commissioners are authorized to order the examination of parties in supplementary proceedings and "all orders for the examination of judgment debtors in proceedings supplementary to execution may be made returnable before the court commissioner of the county in which the order has been issued, and the examination of such judgment debtors may be conducted before such court commissioner."

[Laws 1897 ch. 311]

General nature and object of proceeding.

§ 1600. The proceedings authorized by these sections were intended to furnish a speedy, inexpensive and adequate remedy for discovering and reaching all equitable interests of the debtor not liable to seizure and sale on execution, and also all property so liable

Digitized by Google

which an officer holding such process has been unable to find, and to compel the application of the same towards the satisfaction of the judgment. They not only perform the office of a creditors' bill, but have a somewhat enlarged scope and purpose.[1] A judgment creditor has alternative remedies by which to reach equitable assets. He may either proceed by motion under these sections of the statutes or he may bring an action in the nature of a creditors' bill.[2] Proceedings supplementary to execution are proceedings in the action; they are not special proceedings. An action is pending, though judgment has been recovered, so long as the judgment remains unsatisfied.[3] The remedy afforded by the statute is in the nature of an equitable execution.[4]

[1] Flint v. Webb, 25 Minn. 263; Kay v. Vischers, 9 Minn. 270 Gil. 254; Towne v. Campbell, 35 Minn. 231, 28 N. W. 254; Bean v. Heron, 65 Minn. 64, 67 N. W. 805; David Bradley & Co. v. Burk, 81 Minn. 368, 84 N. W. 123.

[2] Dunnell, Minn. Pl. § 1230; Feldenheimer v. Tressel, 6 Dak. 265, 43 N. W. 94; Monroe v. Reid, 46 Neb. 316, 64 N. W. 983.

[3] Weyman v. Childs, 41 N. Y. 159; Barker v. Dayton, 28 Wis. 367.

[4] Bean v. Heron, 65 Minn. 64, 67 N. W. 805.

Showing necessary—order a matter of right.

§ 1601. A judgment creditor is entitled, as a matter of right, to an order requiring his debtor to appear and make disclosure concerning his property, whenever it appears that an execution against the property of such debtor has been issued to the sheriff of the proper county and the same has been returned unsatisfied in whole or in part. These facts alone are sufficient to sustain the jurisdiction to issue the order for a disclosure, and to take such subsequent proceedings as the statute allows, and as may become necessary upon the disclosure. It is unnecessary to prove, in addition to these facts, that any personal demand was ever made upon the debtor to pay the judgment, or to turn out property upon the execution.[1] Nor is it necessary to show that the debtor has property subject to execution or facts making it reasonably probable that property might be discovered.[2] It is held in California under a statute identical with our own that no affidavit is necessary to secure the order.[3] It is customary practice here to make the facts appear by affidavit.[4] The affidavit need not state the nature of the relief sought.[5]

[1] Flint v. Webb, 25 Minn. 263; Kay v. Vischers, 9 Minn. 270 Gil. 270; Tomlinson etc. Mfg. Co. v. Shatto, 34 Fed. 380 (not necessary to await the expiration of the 60 days within which officer may make return).

[2] Kay v. Vischers, 9 Minn. 270 Gil. 270.

[3] Collins v. Angell, 72 Cal. 513.

[4] See Knight v. Nash, 22 Minn. 452.

[5] Id.

Nature of judgment basis of proceedings.

§ 1602. The proceedings must be based on a valid subsisting judgment to the satisfaction of which all the real and personal

Digitized by Google

property of the debtor not exempt is liable.[1] A money decree in the federal court sitting in this state may be the basis of supplementary proceedings.[2] If the judgment is absolutely void or has ceased to be operative the proceedings must be dismissed,[3] but objection that the judgment is irregular or erroneous cannot be raised.[4]

[1] Importers' etc. Nat. Bank v. Quackenbush, 143 N. Y. 567; Newell v. Dart, 28 Minn. 248, 9 N. W. 732; Merchants' Nat. Bank v. Braithwaite, 7 N. D. 358.

[2] Sage v. St. Paul etc. Ry. Co. 47 Fed. 3.

[3] Williams v. Carroll, 2 Hilton (N. Y.) 438; Merchants' Nat. Bank v. Braithwaite, 7 N. D. 358.

[4] Lederer v. Ehrenfeld, 49 How. Pr. (N. Y.) 404.

Effect of as a lien—priority.

§ 1603. The commencement of supplementary proceedings by the service of the order on the judgment debtor gives the moving creditor an equitable lien on the assets subsequently discovered, if he proceeds with proper diligence to discover and apply the same to the payment of his judgment; that is, it gives him priority over other creditors. If the judgment debtor cannot be found within the state, so that service cannot be had on him, the lien may be acquired in some other way, as by the ex parte appointment of a receiver and the commencement of a suit by him against the third person in possession or control of the judgment debtor's assets, or by charging such third person in the supplementary proceedings and ordering him to appear and disclose.[1] The lien is dissolved by an assignment for the benefit of creditors.[2]

[1] Billson v. Linderberg, 66 Minn. 66, 68 N. W. 771; Wolf v. McKinley, 65 Minn. 156, 68 N. W. 2; Kellogg v. Coller, 47 Wis. 649; Tomlinson etc. Mfg. Co. v. Shatto, 34 Fed. 380.

[2] Wolf v. McKinley, 65 Minn. 156, 68 N. W. 2; Billson v. Lardner, 67 Minn. 35, 69 N. W. 477.

Second execution—concurrent remedies.

§ 1604. The institution of supplementary proceedings, after return of execution against property, does not preclude the issuing of another execution upon the same judgment. The two proceedings having the same object in view—the collection of the judgment—may be pursued concurrently. Nor will the proceedings be superseded by the issue of a second execution unless it clearly appears that the property levied upon indisputably belongs to the debtor and is abundantly sufficient to satisfy the debt, and then the creditor may be compelled to elect between the execution and the proceedings.

Smith v. Davis, 63 Hun (N. Y.) 100.

Officer's return conclusive.

§ 1605. That the sheriff, in the execution and return of process has done his duty, is to be presumed and hence a return of nulla bona is itself evidence that the officer has made all reasonable search and inquiry after the debtor's property, necessary under the circum-

Digitized by Google

stances to justify his return. If, however, through the wrongful procurement of the plaintiff in the execution, the sheriff improperly returns it unsatisfied, where there is sufficient property upon which the officer ought to have levied to satisfy the debt, the defendant should apply directly to the court, on motion, to set aside the return, and to vacate the order and proceedings had thereon, on these grounds. So long as the return is suffered to remain of record in force and unimpeached, the jurisdiction dependent thereon to institute and prosecute supplementary proceedings, in the manner prescribed by statute, cannot be affected by any inquiries into the conduct of the sheriff in executing the writ, or into the existence of any property which he might and ought to have taken by virtue of the execution, but did not. No question of this character can be raised after the commencement of the proceedings, and upon the disclosure of the defendant, on his examination under the order.

Flint v. Webb, 25 Minn. 263. See also Sherburne v. Rippe, 35 Minn. 540, 29 N. W. 322; Spooner v. Bay St. Louis Syndicate, 44 Minn. 401, 46 N. W. 848.

Who may initiate proceedings.

§ 1606. Proceedings under the statute may be instituted by an assignee of the judgment;[1] an attorney of the judgment creditor;[2] personal representatives of the judgment creditor, substitution not being necessary;[3] a duly authorized agent of the judgment creditor.[4]

[1] Orr's Case, 2 Abb. Pr. (N. Y.) 457; Crill v. Kornmeyer, 56 How. Pr. (N. Y.) 278.

[2] Ward v. Roy, 69 N. Y. 96.

[3] Walker v. Donovan, 6 Daly (N. Y.) 552.

[4] Hawes v. Barr, 7 Robt. (N. Y.) 452.

Against whom allowable.

§ 1607. Proceedings may be instituted against any judgment creditor, as, for example, against a married woman;[1] an infant;[2] persons sued in a representative capacity;[3] one of several joint defendants.[4]

[1] Thompson v. Sargent, 15 Abb. Pr. (N. Y.) 452.

[2] Lederer v. Ehrenfeld, 49 How. Pr. (N. Y.) 403.

[3] Matter of Gough, 31 N. Y. App. Div. 307 (trustee).

[4] Emery v. Emery, 9 How. Pr. (N. Y.) 130; Crossitt v. Niles, 13 Civ. Pro. (N. Y.) 327.

Service of order.

§ 1608. The order must in all cases be personally served on the party to be examined. Service on his attorney is insufficient. Service should be made by exhibiting the original and leaving a copy. Copies of the affidavits on which the order is based should also be served. It is not necessary that the service should be made by an officer.[1] Proof of service is regulated by rule of court.[2] If the sheriff makes the service his affidavit should follow the rule of court; an ordinary certificate is insufficient.[3]

[1] G. S. 1894 § 5218; 4 Wait, Pr. 142; Billson v. Linderberg, 66 Minn. 66, 68 N. W. 771.

Digitized by Google

[2] See § 2091.
[3] Utica City Bank v. Buell, 17 How. Pr. (N. Y.) 498.

Filing order.

§ 1609. Proper practice requires that the order should always be filed prior to the examination and the rules require that it shall be filed within five days after the service.

See § 2088.

Scope of examination.

§ 1610. The order and scope of the examination of a judgment debtor necessarily lies almost wholly in the discretion of the court or referee. If the debtor has concealed property he will of course give his testimony reluctantly and evasively. A comprehensive and searching examination is therefore proper. To apply to such an examination the strict technical rules governing the examination of a witness on the trial of a cause or even the less strict rules applicable to a cross-examination would seriously impair the efficiency of the remedy and defeat the object of the statute.[1] The examination, however, should be strictly limited to the discovery of property and should not be permitted to uncover private family affairs needlessly.[2]

[1] Forbes v. Willard, 54 Barb. (N. Y.) 520; Heilbronner v. Levy, 64 Wis. 636; Lathrop v. Clapp, 40 N. Y. 328.
[2] David Bradley & Co. v. Burk, 81 Minn. 368, 84 N. W. 123.

Successive examinations.

§ 1611. The judgment debtor should not be needlessly harassed by successive examinations. When the creditor has had one full examination of the debtor and the examination has been closed, a second order for an examination is not a matter of right and should only be granted when the moving affidavit shows that the debtor has acquired property since the first order, or an alias execution has issued and been returned unsatisfied, or that new and material information has been obtained concerning the property of the debtor.[1] An affidavit which states facts merely upon information and belief is insufficient to warrant a second order. The newly acquired property should be described and it should be shown that it can be applied to the judgment. If the affidavit states facts on information and belief the sources of information and grounds of belief must be fully stated.[2]

[1] Weiss v. Ashman, 11 Misc. (N. Y.) 379; Clark v. Londrigan, 40 N. J. L. 312; Canavan v. McAndrews, 20 Hun (N. Y.) 47.
[2] Rallings v. Pittman, 17 J. & S. (N. Y.) 307; McGuire v. Schroeder, 31 Misc. (N. Y.) 179.

Referees.

§ 1612. A reference ought not to be ordered unless the court is preoccupied by a great stress of business. Judges are paid to attend to all the judicial business of their respective districts and they have no right to impose on litigants the unnecessary expenses of a reference. Parties summoned in supplementary proceedings have

Digitized by Google

a right to have the examination take place before the judge so that they may be assured that it will be conducted impartially and according to law although they are not represented by counsel.[1] If a referee is appointed the court should be careful to appoint an impartial person. No person connected in business with the attorney for the plaintiff or occupying the same office or suite of offices should be appointed.[2] A referee may be appointed ex parte.[3] He need not reside in the same county as the party to be examined.[4] He may adjourn the examination from time to time[5] and even to a different place in the same county,[6] but when the examination is once closed it cannot be re-opened without a special order.[7] Appearance and submission to examination before a referee without objection is a waiver of any irregularity in his appointment.[8] Before entering upon the discharge of his duties the referee must "take and subscribe" the following oath: "You do solemnly swear that you will faithfully and fairly hear and examine this action, wherein ——— is plaintiff and ——— defendant, and make a just and true report thereon, according to the best of your understanding and ability. So help you God."[9] Objection that the referee has not taken the oath is waived unless made before the examination begins.[10] The referee must be impartial between the parties and not direct the investigation except to keep it within proper limits. He is appointed to take the testimony and not to prosecute the inquiry.[11] The scope of the examination and the procedure generally is the same before a referee as before a judge. But the referee cannot punish for contempt, appoint a receiver, order property to be turned over or make any order determining the rights of the parties on the disclosure. His office is simply to take and certify the testimony. He should not proceed to the discharge of his trust without having in his possession either the original or a certified copy of the order appointing him. The referee should file his report with the clerk as soon as possible after the examination is closed. An irregular but apparently harmless practice prevails of making no report if no order is desired on the disclosure. The expenses of the reference, if they are to be added to the judgment must be regularly settled and allowed by the judge on motion and with notice to the judgment creditor.

[1] See Hollister v. Spafford, 3 Sandf. (N. Y.) 742.
[2] Provided by rule of court in New York. Gilbert v. Frothingham, 13 Civ. Pro. (N. Y.) 288.
[3] Conway v. Hitchins, 9 Barb. (N. Y.) 378.
[4] Bingham v. Disbrow, 37 Barb. (N. Y.) 24.
[5] Kaufman v. Thrasher, 10 Hun (N. Y.) 438.
[6] Weaver v. Brydges, 85 Hun (N. Y.) 503.
[7] Orr's Case, 2 Abb. Pr. (N. Y.) 457.
[8] Bingham v. Disbrow, 37 Barb. (N. Y.) 24.
[9] See G. S. 1894 §§ 5634, 5641.
[10] See Garrity v. Hamburger Co. 136 Ill. 499.
[11] People v. Leipsig, 52 How. Pr. (N. Y.) 410.

Digitized by Google

§ 1613. "If the examination is before a referee, the testimony and proceedings shall be certified by him to the judge; all examinations and answers before a judge or referee, under this chapter, shall be on oath, except that when a corporation answers, the answer shall be on the oath of an officer thereof."

[G. S. 1894 § 5490]

Witnesses—counsel—appeal—statute.

§ 1614. "Witnesses may be required to appear and testify on any proceedings under this title in the same manner and subject to the rules governing the trial of actions and such debtors may be represented by counsel. An appeal may be taken to the supreme court by any aggrieved party in such proceedings from any order or judgment made or rendered in the proceedings under said title and chapter."

[G. S. 1894 § 5489]

§ 1615. This provision gives both the judgment creditor and judgment debtor just the same rights, in respect to enforcing the attendance and conducting the examination of witnesses in their behalf as on the regular trial of an action, including the right to compel the production of books and papers by subpœna duces tecum.[1] The fact that the creditor has brought an action in the nature of a creditors' bill does not preclude him from summoning and examining witnesses under this section and they cannot refuse to answer questions on the ground that the answers would tend to show a fraudulent transfer of the debtor and afford evidence for use in the action.[2] Witnesses may be examined although the judgment debtor does not appear if he was served with the order or has received notice,[3] but the service of the original order for the examination of the debtor is essential to the jurisdiction of the judge or referee to examine witnesses.[4] A witness may be summoned regardless of the county of his residence.[5] Witnesses are not entitled to counsel as of right, but the privilege is rarely withheld.[6] They need not attend unless their mileage and fees for one day's attendance are paid in advance.[7] The wife of the judgment debtor may be summoned and compelled to testify against her husband as if unmarried.[8] An attorney cannot be compelled to disclose any communication made to him by his client or his advice thereon.[9] If a witness claims an interest in property disclosed he may be compelled to state the nature of his interest.[10]

[1] Matter of Sickle, 52 Hun (N. Y.) 529; Wainwright v. Tiffany, 13 Civ. Pro. (N. Y.) 223; McCullough v. Clark, 41 Cal. 303; Pendergast v. Dempsey, 18 Civ. Pro. (N. Y.) 198.

[2] Matter of Sickle, 52 Hun (N. Y.) 529.

[3] Colton v. Bigelow, 41 N. J. L. 266.

[4] People v. Warner, 51 Hun (N. Y.) 53.

[5] Foster v. Wilkinson, 37 Hun (N. Y.) 242.

[6] Schwab v. Cohen, 13 St. Rep. (N. Y.) 709.

[7] G. S. 1894 § 5548; Davis v. Turner, 4 How. Pr. (N. Y.) 190.

[8] G. S. 1894 § 5662; O'Brien's Petition, 24 Wis. 547.

Digitized by Google

[9] Bacon v. Frisbie, 80 N. Y. 399.
[10] Baculows v. Protection Co. 2 Code Rep. (N. Y.) 72.

§ 1616. "No person shall, on examination pursuant to this chapter, be excused from answering any question on the ground that his examination will tend to convict him of the commission of a fraud; but his answer shall not be used as evidence against him in any criminal proceeding or prosecution."
[G. S. 1894 § 5495]

§ 1617. This statute is unconstitutional[1] and in consequence a person examined in supplementary proceedings cannot be compelled to answer any question if the answer might tend to convict him of the commission of a criminal fraud.[2]
[1] See § 763.
[2] See § 757.

Orders for application of property—statute.

§ 1618. "The judge may order any property of the judgment debtor not exempt from execution, in the hands either of himself or any other person, or due to the judgment debtor, to be applied toward the satisfaction of the judgment, except that the earnings of the debtor for his personal services, at any time within thirty days next preceding the order, cannot be so applied, when it appears, by the debtor's affidavit, that such earnings are necessary for the use of a family supported wholly or partly by his labor."
[G. S. 1894 § 5491]

§ 1619. An order under this section is discretionary. Where property is disclosed on an examination which may be reached by execution the court is not required to make an order for its application to the judgment. Ordinarily the creditor should be left to his simple remedy of another execution. An order should be resorted to only when it is the only effective remedy available.[1] To justify an order under this section the evidence must be direct, clear and convincing.[2] The court may order the judgment debtor to convey to a receiver an interest in real property situate in another state.[3] The judgment debtor may be ordered to assign to a receiver a claim against a municipal corporation although the latter denies the indebtedness.[4] In an early case—since overruled by statute[5]—an order directing a judgment debtor to turn over his watch was sustained.[6] It has been held that an officer of a municipal corporation cannot be compelled to assign to a receiver his salary.[7] Where a judgment creditor let a portion of a building occupied by him as a homestead it was held that he could not be ordered to assign the lease to a receiver.[8] The judgment debtor cannot be ordered to pay over a specific sum of money received by him after the service of the order for examination, but paid out by him before the disclosure.[9] It has been held that a city treasurer cannot be compelled to pay over the salary of a city fireman.[10]
[1] Kay v. Vischers, 9 Minn. 270 Gil. 254; Reardon v. Henry, 82 Iowa 134.
[2] David Bradley & Co. v. Burk, 81 Minn. 368, 84 N. W. 123.

Digitized by Google

[6] Towne v. Campbell, 35 Minn. 231, 28 N. W. 254; Tomlinson etc. Mfg. Co. v. Shatto, 34 Fed. 380.
[4] Knight v. Nash, 22 Minn. 453.
[5] Laws 1899 ch. 267.
[6] Rothschild v. Boelter, 18 Minn. 361 Gil. 331.
[7] Roeller v. Ames, 33 Minn. 132, 22 N. W. 177. See Laws 1901 ch. 96.
[8] Umland v. Holcombe, 26 Minn. 286, 3 N. W. 341.
[9] Christensen v. Tostevin, 51 Minn. 230, 53 N. W. 461. See Benbow v. Kellom, 52 Minn. 433, 54 N. W. 482.
[10] Sandwich Mfg. Co. v. Krake, 66 Minn. 110, 68 N. W. 606. See Laws 1901 ch. 96.

Appointment of receiver—statute.

§ 1620. "The judge may, in accordance with and subject to the rules of courts of equity, appoint a receiver of the property of the judgment debtor not exempt from execution, or forbid a transfer or other disposition thereof, or any interference therewith until his further order therein."

[G. S. 1894 § 5492]

§ 1621. The mere fact that the examination discloses property which may be subjected to the satisfaction of the judgment does not make the appointment of a receiver a matter of right. Whether a receiver shall be appointed rests in the discretion of the court. It is a discretion to be exercised cautiously and with reference to the facts of the particular case. Placing a person's property in the hands of a receiver is, at best, a drastic proceeding, usually very expensive, and frequently resulting in absorbing the greater part of the estate in expenses; and it is against the general policy of the law to permit a creditor to resort to it where he has other adequate remedies.[1] While to require or warrant the appointment of a receiver it is not necessary that it should appear with certainty that the debtor has property which should be applied on the judgment, it should appear that there is a reasonable ground to believe that he has. Mere suspicion or surmise falls far short of what is required to justify the exercise of a power which should be sparingly used.[2] A receiver should not be appointed where the creditor has a mortgage amply sufficient to satisfy the whole debt.[3] A receiver may be appointed although the only property disclosed is an interest in real estate situate in another state, and the debtor may be required to convey such interest to the receiver.[4] It is discretionary with the court to appoint a receiver immediately upon granting an order for the examination of the debtor.[5] Under our statute a receiver may be appointed without notice to the judgment debtor.[6] But as a court is always reluctant to appoint a receiver without giving the judgment creditor a hearing it is customary practice to serve him with notice or order to show cause. The application is made on affidavits stating facts from which the court can see that there is reasonable ground to believe that there is property which can be reached, or upon the disclosure.

Digitized by Google

[1] Poppitz v. Rognes, 76 Minn. 109, 78 N. W. 964; Flint v. Webb, 25 Minn. 263; Bean v. Heron, 65 Minn. 64, 67 N. W. 805; Towne v. Campbell, 35 Minn. 231, 28 N. W. 254; Flint v. Zimmerman, 70 Minn. 346, 73 N. W. 175; Billson v. Linderberg, 66 Minn. 66, 68 N. W. 771; Knight v. Nash, 22 Minn. 452; Benbow v. Kellom, 52 Minn. 433, 54 N. W. 482; Dunham v. Byrnes, 36 Minn. 106, 30 N. W. 402; Holcomb v. Johnson, 27 Minn. 353, 7 N. W. 364.

[2] Flint v. Zimmerman, 70 Minn. 346, 73 N. W. 175.

[3] Bean v. Heron, 65 Minn. 64, 67 N. W. 805.

[4] Towne v. Campbell, 35 Minn. 231, 28 N. W. 254.

[5] Flint v. Webb, 25 Minn. 266.

[6] Terry v. Bange, 18 Civ. Pro. (N. Y.) 288.

Powers and duties of receiver.

§ 1622. The rights and duties of a receiver in supplementary proceedings are substantially the same as a receiver appointed by a court of chancery upon a creditors' bill.[1] He may sue in his own name without joining the judgment creditors.[2] In bringing an action he must allege his appointment with sufficient fulness to show that he has authority to bring the particular action.[3] He may maintain an action to avoid a fraudulent conveyance of real estate by the judgment debtor although there has been no transfer of the title to him.[4]

[1] Petition of Inglehart, 1 Sheldon (N. Y.) 514; Mandeville v. Avery, 124 N. Y. 376; Stephens v. Perrine, 143 N. Y. 481; Ward v. Petrie, 157 N. Y. 301.

[2] See Dunnell, Minn. Pl. § 49.

[3] Tvedt v. Mackel, 67 Minn. 24, 69 N. W. 475; Walsh v. Byrnes, 39 Minn. 527, 40 N. W. 831; Rossman v. Mitchell, 73 Minn. 198, 76 N. W. 48, 1053.

[4] Dunham v. Byrnes, 36 Minn. 106, 30 N. W. 402; Farmers' Loan & Trust Co. v. Minneapolis Engine & Machine Works, 35 Minn. 543, 29 N. W. 349.

Examination of persons owing the judgment debtor or having property belonging to him—statute.

§ 1623. "After the issuing or return of an execution against property of the judgment debtor, or of any one of several debtors in the same judgment, and upon proof by affidavit or otherwise, to the satisfaction of the judge, that any person or corporation has property of the judgment debtor, or is indebted to him in an amount exceeding ten dollars, the judge may by an order require such person or corporation, or any officer or member thereof, to appear at a specified time and place, and answer concerning the same; the judge may also, in his discretion, require notice of such proceeding to be given to any party in the action, in such manner as may seem to him proper."

[G. S. 1894 § 5496]

§ 1624. Proceedings under §§ 1598 and 1623, are wholly independent of one another and one may be instituted and maintained without the other.[1] Whether the judgment debtor shall have notice of the proceedings against his debtor is discretionary with the court.[2]

Digitized by Google

The appointment of a receiver under § 1620 does not prevent proceedings under this section.[2] The service of the order on the debtor of the judgment debtor has the effect of the commencement of a creditors' suit under the old system and gives the creditor a prior lien. A final order under this section requiring the debtor to pay his debt to the judgment creditor renders this lien effectual and payment, or liability to pay, in pursuance of such order, is a defence to the debtor in an action against him by his creditor or by an assignee of the claim who was not a bona fide purchaser for value of the claim prior to the accruing of the lien.[4] The debtor cannot attack the judgment.[5] A debtor owing a debt not yet payable may be summoned.[6]

[1] Gibson v. Haggerty, 37 N. Y. 555.
[2] Id.
[3] Smith v. Cutler, 64 N. Y. App. Div. 412.
[4] Lynch v. Johnson, 48 N. Y. 27; Billson v. Linderberg, 66 Minn. 66, 68 N. W. 771.
[5] Bucki v. Bucki, 26 Misc. (N. Y.) 69.
[6] Davis v. Hereig, 65 How. Pr. (N. Y.) 290.

§ 1625. A debtor examined under this section is in effect a party to the proceeding. He is not entitled to a cross-examination, but he may have the advice of counsel in framing his answers. In its nature and effect the examination is an answer to a complaint, and as it is taken orally, the party should be allowed to make such corrections or explanations to his statement after it has been signed by him as he may desire. These corrections should be in a supplemental statement, leaving the original unaltered. The examination is in effect a cross-examination and leading questions are allowable.[1] But a third party cannot be subjected to any such comprehensive and searching examination as the judgment creditor. If he admits the possession of property but claims an adverse interest in it or denies the alleged debt unequivocally the examination must be terminated forthwith and resort be had to an action by a receiver.[2] He cannot be required to answer questions put with a view to eliciting evidence tending to show that transfers of property made by the judgment debtor were made in fraud of creditors.[3]

[1] Corning v. Tooker, 5 How. Pr. (N. Y.) 16.
[2] See § 1627.
[3] Town v. Safeguard Ins. Co. 4 Bosw. (N. Y.) 683; Hartman v. Olvera, 51 Cal. 503.

§ 1626. An affidavit to secure an order under § 1623 stating facts upon information and belief without giving the sources of information or the grounds of belief is insufficient.[1] Otherwise if it gives the sources of information or grounds of belief so that the court may judge of their sufficiency.[2] An affidavit which simply states that a certain person is indebted to the judgment debtor in an amount exceeding ten dollars and has property of his[3] is sufficient. An affidavit in the alternative, that is, that a certain person has property or is indebted is insufficient.[4] The affidavit may be by the attorney of the

Digitized by Google

moving party.[5] The proof need not be positive.[6] Proof to the satisfaction of the judge—that is, evidence tending to establish the requisite facts and calling for the exercise of his judgment thereon—is the basis of his authority to issue the order.[7] It seems that the order may be based in part on affidavits and in part on the disclosure of the judgment debtor.[8] An order based on an insufficient affidavit is not void and must be obeyed until set aside in a direct proceeding.[9] The affidavit need not state that the property exceeds ten dollars in value.[10]

[1] Matter of Parrish, 28 N. Y. App. Div. 22.
[2] Carley v. Tod, 56 N. Y. App. Div. 170.
[3] Bruen v. Nickels, 30 N. Y. App. Div. 396; Seeley v. Garrison, 10 Abb. Pr. (N. Y.) 460.
[4] Smith v. Cutler, 64 N. Y. App. Div. 412.
[5] Bucki v. Bucki, 26 Misc. (N. Y.) 69.
[6] Carley v. Tod, 56 N. Y. App. Div. 170.
[7] Menage v. Lustfield, 30 Minn. 487, 16 N. W. 398.
[8] Id.
[9] Matter of Parrish, 28 N. Y. App. Div. 22.
[10] Brett v. Browne, 1 Abb. Pr. (N. S.) 155.

§ 1627. "If it appears that a person or corporation alleged to have property of the judgment debtor, or to be indebted to him, claims an interest in the property adverse to him, or denies the debt, such interest or debt is recoverable only in an action against such person or corporation, by the receiver;[1] but the judge may, by order, forbid a transfer or other disposition of such property or interest, till a sufficient opportunity is given to the receiver to commence the action, and prosecute the same to judgment and execution; such order may be modified or vacated by the judge granting the same, at any time, on such security as he may direct."

[G. S. 1894 § 5493]

[1] Thompson & Sons Mfg. Co. v. Guenthner, 5 S. D. 507; Hartman v. Olvera, 51 Cal. 503; West Side Bank v. Pugsley, 47 N. Y. 368; Rodman v. Henry, 17 N. Y. 482.

Contempt of court.

§ 1628. "If any person, party or witness disobeys an order of the judge or referee, duly served, such person, party or witness may be punished by the judge, as for a contempt; the proceedings therefor are prescribed in chapter eighty-seven of these statutes, respecting the punishment of contempt."

[G. S. 1894 § 5494] See State v. Becht, 23 Minn. 411; Christensen v. Tostevin, 51 Minn. 230, 53 N. W. 461.

Arrest of judgment debtor—statute.

§ 1629. "Instead of the order requiring the attendance of the judgment debtor, as provided in the last section, the judge may, upon proof by affidavit that there is danger that the debtor will leave the state, or conceal himself, issue a warrant requiring the sheriff of any county where such debtor is, to arrest him and bring him before

Digitized by Google

such judge; upon being brought before the judge, he may be examined on oath, and ordered to give bond, with sureties, that he will attend from time to time before the judge or referee, as he shall direct, during the pendency of the proceeding, and until the final determination thereof, and will not in the meantime dispose of any portion of his property not exempt from execution; in default of giving such bond, he may be committed to jail, by warrant of the judge, as for a contempt."

[G. S. 1894 § 5487]

§ 1630. This harsh remedy should only be allowed in exceptional cases. It is to be observed that it is not an order that issues as of right. The judge may exercise a discretion. Our statute, unlike that of most of the states, does not require a showing that the debtor has property which he unjustly refuses to apply to the satisfaction of the judgment, but a judge, in view of his large discretionary powers in the matter, should never grant an order under this section in the absence of such a showing. The affidavit should not merely follow the language of the statute but should give the grounds for the belief of the affiant that there is danger of the debtor leaving the state or concealing himself and that he has property. It should not be in the alternative. The proceedings under this section are entirely independent of those under § 1598.

See Netzel v. Mulford, 59 How Pr. (N. Y.) 452; Frost v. Craig, 18 Civ. Pro. (N. Y.) 296.

Proceedings supplementary to judgment.

§ 1631. Our statutes with reference to "proceedings supplementary to judgment" have been repealed, so far as § 5436 is concerned, by Laws 1897 ch. 303.[1] Proceedings under § 5437 are extremely rare as they cannot be taken until after administration and then an ordinary action is quite as satisfactory.[2]

[1] See Ingwaldson v. Olson, 79 Minn. 252, 82 N. W. 579; First Nat. Bank v. Ames, 39 Minn. 179, 39 N. W. 308; 6 Wait, Pr. 337.

[2] Byrnes v. Sexton, 62 Minn. 135, 64 N. W. 155, 6 Wait, Pr. 339.

Digitized by Google

CHAPTER XVIII

APPELLATE PROCEDURE

GENERAL PRINCIPLES

The supreme court—constitutional provisions.

§ 1632. "The judicial power of the state shall be vested in a supreme court, district courts, courts of probate, justices of the peace, and such other courts, inferior to the supreme court, as the legislature may from time to time establish by a two-thirds vote." * * * "The supreme court shall consist of one chief justice, and two associate justices, but the number of associate justices may be increased, to a number not exceeding four, by the legislature, by a two-thirds vote, when it shall be deemed necessary. It shall have original jurisdiction in such remedial cases as may be prescribed by law, and appellate jurisdiction in all cases, both in law and equity; but there shall be no trial by jury in said court."

[Const. Minn. art. 6 §§ 1, 2]

§ 1633. "The judges of the supreme court shall be elected by the electors of the state at large, and their term of office shall be six years, and until their successors are elected and qualified."

[Const. Minn. art. 6 § 3]

General powers of supreme court—statute.

§ 1634. "The supreme court has power to issue writs of error, certiorari, mandamus, prohibition, quo warranto, and also all other writs and processes, not especially provided for by law, to all courts of inferior jurisdiction, to corporations and to individuals, that are necessary to the furtherance of justice and the execution of the laws; and shall be always open for the issuance and return of all such writs and processes, and for the hearing and determination of the same, and all matters therein involved, subject to such regulations and conditions as the court may prescribe. Any judge of said court may order the issuance of any such writ or process, and prescribe as to the service and return of the same. * * * Said court is vested with full power and authority necessary for carrying into complete execution all its judgments, decrees and determinations, in the matters aforesaid, and for the exercise of its jurisdiction as the supreme judicial tribunal of the state."

[G. S. 1894 §§ 4823, 4824]

Nature of appellate jurisdiction.

§ 1635. Appellate jurisdiction may be defined as the authority vested in a superior court to review and revise the judicial action of an inferior court. It is the essential criterion of appellate jurisdiction that it revises and corrects the proceedings in a cause already in-

Digitized by Google

stituted and does not create the cause.[1] The very nature of the jurisdiction confines the appellate court to a consideration of such questions as, originating in another court, have been there actually or presumably considered and passed upon in the first instance. Its most obvious purpose in our judicial system is to secure to parties litigant in respect to any controverted question, properly a subject for review, after one determination upon the merits, the benefits of another consideration of the same question, in another and distinct tribunal, differently constituted, and surrounded by different influences. The beneficial tendency of such a principle in any judicial system in promoting a more safe and circumspect administration of justice can hardly be doubted.[2] Save so far as its meaning is controlled or influenced by statute an appeal is properly defined as a proceeding by which a case is taken from an inferior to a superior tribunal, the determination of the former thereby vacated or suspended, and the case brought before the latter to be tried and determined de novo.[3]

[1] Tierney v. Dodge, 9 Minn. 166 Gil. 153.

[2] Johnson v. Howard, 25 Minn. 558. See also, McNamara v. Minnesota Central Ry. Co. 12 Minn. 388 Gil. 269.

[3] Dutcher v. Culver, 23 Minn. 415; Colvill v. Langdon, 22 Minn. 565; Ames v. Boland, 1 Minn. 365 Gil. 268.

Appeal—how far exclusive.

§ 1636. Prior to the revision of 1866 the statutes of this state authorized both an appeal and a writ of error in ordinary civil actions, whether of a legal or equitable nature.[1] It was held that the two remedies were alternative and that an appellant could not pursue both at the same time.[2] Special provision was made for an appeal from the court of chancery.[3] Our present statute dates from 1866 and provides that a judgment or order, in a civil action, in any of the district courts, may be removed to the supreme court by appeal "and not otherwise."[4] The revision dropped the prior statutes authorizing a writ of error in civil cases and expressly made appeal the exclusive remedy in ordinary civil actions. The statutory appeal, however, does not supersede certiorari.[5] The primary object of the statute is to provide a single mode of appeal in all ordinary civil actions whether of a legal or equitable nature.[6] The equitable remedy of appeal was adopted and the common law writ of error abolished. The change is one of form rather than of substance and the general principles which governed the writ of error are applicable to the statutory appeal.[7]

[1] Kern v. Chalfant, 7 Minn. 487 Gil. 393; Moody v. Stephenson, 1 Minn. 401 Gil. 289.

[2] Moody v. Stephenson, 1 Minn. 401 Gil. 289; Humphrey v. Havens, 9 Minn. 318 Gil. 301.

[3] Deuel v. Hawke, 2 Minn. 50 Gil. 37; Folsom v. Evans, 5 Minn. 418 Gil. 338.

[4] See § G. S. 1894 § 6132.

[5] See § 1980.

Digitized by Google

[6] Dutcher v. Culver, 23 Minn. 415.
[7] Gormly v. McIntosh, 22 Barb. (N. Y.) 275.

Appeal a statutory remedy—legislative control.

§ 1637. It is a common expression in the books that the right of appeal is purely statutory.[1] This is true at common law and it is true in this state so far as the mode of carrying a case to the supreme court is concerned. But in this state a party has a constitutional right to have his case reviewed by the supreme court in some mode.[2] Our constitution does not leave it to the legislature to define the jurisdiction of the supreme court. The mode of appeal is statutory; the right of appeal constitutional. The constitutional right is no doubt limited to appeals from the district court.[3] The legislature may withhold a right of appeal from a justice court to the district court as the constitution provides that the district court shall have "such appellate jurisdiction as may be prescribed by law."[4]

[1] Tierney v. Dodge, 9 Minn. 166 Gil. 153; Robertson v. Davidson, 14 Minn. 554 Gil. 422; McMahon v. Davidson, 12 Minn. 357 Gil. 232; Mayall v. Burke, 10 Minn. 285 Gil. 224; City of Minneapolis v. Wilkin, 30 Minn. 140, 14 N. W. 581; Ross v. Evans, 30 Minn. 206, 14 N. W. 897; State v. Jones, 24 Minn. 86; State v. Faribault Waterworks Co. 65 Minn. 345, 68 N. W. 35.

[2] County of Brown v. Winona etc. Co. 38 Minn. 397, 37 N. W. 949. See Sherwood v. City of Duluth, 40 Minn. 22, 41 N. W. 234; Tierney v. Dodge, 9 Minn. 166 Gil. 153; City of Minneapolis v. Wilkin, 30 Minn. 140, 14 N. W. 581; Kerlinger v. Barnes, 14 Minn. 526 Gil. 398.

[3] Ross v. Evans, 30 Minn. 206, 14 N. W. 897.

[4] Const. Minn. art. 6 § 5.

§ 1638. The legislature has no authority to grant an appeal where none was given at the time the judgment was recovered or where the right has been lost by lapse of time. In other words, legislation granting an appeal must be prospective in its operation.

Beaupre v. Hoerr, 13 Minn. 366 Gil. 339; Kerlinger v. Barnes, 14 Minn. 526 Gil. 398. But see Converse v. Burrows, 2 Minn. 229 Gil. 191; McNamara v. Minnesota Central Ry. Co. 12 Minn. 388 Gil. 269.

Review by appeal favored.

§ 1639. It is the general policy of our law to provide for the review of proceedings in the district courts by appeal rather than any other way.

County of Ramsey v. Stees, 27 Minn. 14, 6 N. W. 401.

Construction of statutes regulating appeals.

§ 1640. It is generally laid down in the books that statutes authorizing appeals are remedial in their nature and should receive a liberal construction.[1] There is no question as to the propriety of this rule as regards appeals from final judgments. But statutes authorizing appeals from intermediate orders ought to be strictly construed because they lend themselves so readily to vexatious and dilatory ap-

Digitized by Google

peals and because such orders may generally be quite as well reviewed on appeal from the final judgment.[2] Statutes regulating the procedure in taking an appeal should be liberally construed.[3] Our statute provides that "when a party gives, in good faith, notice of appeal from a judgment or order, and omits, through mistake, to do any other act necessary to perfect the appeal, or to stay proceedings, the court may permit an amendment on such terms as may be just." [4]

[1] Ross v. Evans, 30 Minn. 206, 14 N. W. 897; Witt v. St. Paul etc. Ry. Co. 35 Minn. 404, 29 N. W. 161; Sherwood v. City of Duluth, 40 Minn. 22, 41 N. W. 234; Converse v. Burrows, 2 Minn. 229 Gil. 191.

[2] See Myrick v. Pierce, 5 Minn. 65 Gil. 47; Hulett v. Matteson, 12 Minn. 349 Gil. 227; American Book Co v. Kingdom Pub. Co. 71 Minn. 363, 73 N. W. 1089.

[3] Ream v. Howard, 19 Or. 491; McConnell v. Kaufman, 4 Wash. 229. See Robertson v. Davidson, 14 Minn. 554 Gil. 422.

[4] G. S. 1894 § 6134.

Jurisdiction not given by consent.

§ 1641. The consent of parties cannot clothe the supreme court with authority to hear and determine a subject matter not within its jurisdiction as prescribed by law.

Ames v. Boland, 1 Minn. 365 Gil. 268; Jones v. City of Minneapolis, 20 Minn. 491 Gil. 444; Rathburn v. Moody, 4 Minn. 364 Gil. 273. See Ames v. Mississippi Boom Co. 8 Minn. 467 Gil. 417; American Ins. Co. v. Schroeder, 21 Minn. 331; State v. Bechdel, 38 Minn. 278, 37 N. W. 338.

Waiver of right of appeal—estoppel.

§ 1642. A party waives his right to appeal or estops himself from raising objection in the supreme court—the distinction is not carefully preserved in the cases—by accepting costs ordered paid as a condition of a new trial; [1] by withdrawing a demurrer overruled and pleading over; [2] by amending his pleading after demurrer sustained; [3] by entering into a stipulation that there shall be no appeal; [4] by leading the court into error; [5] by entering into a settlement of the controversy and a satisfaction of the judgment; [6] by voluntarily consenting to a pro forma order; [7] by making default on a motion duly noticed; [8] by moving in the alternative under Laws 1895 ch. 320 for a judgment or a new trial, the new trial being granted; [9] by accepting the benefits of an order and proceeding on the theory that it was proper.[10]

[1] Lamprey v. Henk, 16 Minn. 405 Gil. 362.

[2] Coit v. Waples, 1 Minn. 134 Gil. 110; Thompson v. Ellenz, 58 Minn. 301, 59 N. W. 1023; Cook v. Kittson, 68 Minn. 474, 71 N. W. 670.

[3] Becker v. Sandusky City Bank, 1 Minn. 311 Gil. 243.

[4] Daniels v. Willis, 7 Minn. 374 Gil. 295; State v. Sawyer, 43 Minn. 202, 45 N. W. 155.

[5] Poehler v. Reese, 78 Minn. 71, 80 N. W. 847.

[6] Babcock v. Banning, 3 Minn. 191 Gil. 123.

Digitized by Google

[7] Johnson v. Howard, 25 Minn. 558.
[8] Dols v. Baumhoefer, 28 Minn. 387, 10 N. W. 470; Thompson v. Haselton, 34 Minn. 12, 24 N. W. 199.
[9] St. Anthony Falls Bank v. Graham, 67 Minn. 318, 69 N. W. 1077.
[10] Wright, Barrett & Stilwell Co. v. Robinson, 79 Minn. 272, 82 N. W. 632.

§ 1643. A party does not waive his right to appeal or raise objection in the supreme court by entering into a stipulation for the allowance of costs and the entry of judgment upon a verdict without further notice;[1] by causing judgment to be entered against himself;[2] by failing to appear at the hearing of a demurrer;[3] or by failing to move for a new trial before the entry of judgment.[4]

[1] Everett v. Boyinton, 29 Minn. 264, 13 N. W. 45; Hall v. McCormick, 31 Minn. 280, 17 N. W. 620.
[2] Warner v. Lockerby, 28 Minn. 28, 8 N. W. 879.
[3] Hall v. Williams, 13 Minn. 260 Gil. 242.
[4] Schuek v. Hagar, 24 Minn. 339.

Jurisdiction of lower court after appeal.

§ 1644. After an appeal is perfected the lower court, even where no stay bond is executed, cannot properly make any order or render any decision affecting the order or judgment appealed from,[1] except to amend the same to the end that it may correctly express the original intention of the court.[2] The subject matter of the appeal passes under the exclusive control of the appellate court. But while the lower court is not authorized to act after an appeal with a stay bond, yet such action is not wholly void. The lower court is not completely ousted of jurisdiction.[3] The dismissal of an appeal reinstates the case in the lower court.[4]

[1] La Crosse etc. Packet Co. v. Reynolds, 12 Minn. 213 Gil. 135; McArdle v. McArdle, 12 Minn. 122 Gil. 70; Floberg v. Joslin, 75 Minn. 75, 77 N. W. 557; McMurphy v Walker, 20 Minn. 382 Gil. 334. See Isler v. Brown, 69 N. C. 125; Burgess v. O'Donoghue, 90 Mo. 301.
[2] U. S. Invest. Corp. v. Ulrickson, 84 Minn. 14, 86 N. W. 613, 1004; Kindel v. Lithographing Co. 19 Colo. 310; Chestnutt v. Pollard, 77 Tex. 87; New York Nat. City Bank v. New York Gold Exchange Bank, 97 N. Y. 645.
[3] State v. Young, 44 Minn. 76, 42 N. W. 204; Briggs v. Shea, 48 Minn. 218, 50 N. W. 1037.
[4] Fay v. Davidson, 13 Minn. 523 Gil. 491.

§ 1645. An appeal only carries to the appellate court proceedings already had; it does not deprive the lower court of authority to take subsequent and independent action with reference to the subject matter of the appeal not inconsistent with the jurisdiction of the appellate court. It is always proper for the lower court to protect and preserve the subject matter of the action for the final determination of the appellate court.

Hinson v. Adrian, 91 N. C. 374; Parrish v. Ross, 95 Ky. 318.

Digitized by Google

§ 1646. The trial court retains jurisdiction after an appeal to correct the record and settle and allow a case or bill of exceptions.

Pratt v. Pioneer Press Co. 32 Minn. 217, 18 N. W. 836, 20 N. W. 87; Loveland v. Cooley, 59 Minn. 259, 61 N. W. 138; Bahnsen v. Gilbert, 55 Minn. 334, 56 N. W. 1117; U. S. Invest. Corp. v. Ulrickson, 84 Minn. 14, 86 N. W. 613, 1004.

Burden of proof on appeal.

§ 1647. Error will never be presumed on appeal[1] and the burden of showing it affirmatively by the record rests on the appellant.[2] When a party appeals from an order granting a new trial the burden rests on him to show that the order could not properly have been made on any ground specified in the notice of motion,[3] but it has been held that if the new trial was granted on account of an error of law or fact prejudicial to respondent and not referred to by the appellant it is the duty of the respondent to point it out.[4] If the record shows error and the respondent claims that it is incomplete, it is his duty to secure an amendment or supplementary return.[5]

[1] See § 1838.

[2] Lake Superior etc. Co. v. Greve, 17 Minn. 322 Gil. 299; Mead v. Billings, 40 Minn. 505, 42 N. W. 472; Marsh v. Webber, 13 Minn. 109 Gil. 99; McGeagh v. Nordberg, 53 Minn. 235, 55 N. W. 117; Phoenix v. Gardner, 13 Minn. 294 Gil. 272; Ryder v. Neitge, 21 Minn. 70; Blackman v. Wheaton, 13 Minn. 326 Gil. 299; State v. Ryan, 13 Minn. 370 Gil. 343.

[3] Marsh v. Webber, 13 Minn. 109 Gil. 99; Adams v. Hastings etc. Ry. Co. 18 Minn. 260 Gil. 236; Langan v. Iverson, 78 Minn. 299, 80 N. W. 1051; Jenkinson v. Koester, (Minn.) 90 N. W. 382.

[4] Wilcox v. Mutual Fire Ins. Co. 81 Minn. 478, 84 N. W. 334.

[5] Floberg v. Joslin, 75 Minn. 75, 77 N. W. 557.

Taking judicial notice of its records.

§ 1648. The supreme court will take judicial notice of its own records relating to prior proceedings in the same cause.[1] As a general rule it will not take notice of its records or proceedings in other causes.[2]

[1] Thornton v. Webb, 13 Minn. 498 Gil. 457; Rippe v. Chicago etc. Ry. Co. 23 Minn. 18; In re Rees, 39 Minn. 401, 40 N. W. 370 (district court); Hospes v. Northwestern Mfg. & Car Co. 41 Minn. 256, 43 N. W. 180.

[2] Caldwell v. Bruggerman, 8 Minn. 286 Gil. 252. But see Village of Mankato v. Meagher, 17 Minn. 265 Gil. 243.

Res judicata—law of case.

§ 1649. Except by way of re-argument the supreme court has no authority to review its decisions and judgments. On a second appeal in the same cause all questions, both of law and fact, which were or might have been determined on the first appeal are res judicata.[1] The estoppel rests on the court and on the parties alike. Where a party appeals from an order denying a new trial and later appeals

Digitized by Google

from the judgment all questions which were or might have been raised on the first appeal are res judicata.[2] This rule applies where the order is affirmed on the ground that the appellant failed to serve paper-books and points as required by the rules of the supreme court.[3] But a mere dismissal of an appeal from an order denying a new trial does not bar the appellant from raising, on a subsequent appeal from the judgment entered on the verdict, questions which might have been raised on the first appeal.[4] An order made by the district court in accordance with the mandate of the supreme court will not be reversed on appeal.[5]

[1] Bradley v. Norris, 67 Minn. 48, 69 N. W. 624; Schleuder v. Corey, 30 Minn. 501, 16 N. W. 401; Maxwell v. Schwartz, 55 Minn. 414, 57 N. W. 141; Ayer v. Stewart, 16 Minn. 89 Gil. 77; Johnson v. Northwestern T. E. Co. 54 Minn. 37, 55 N. W. 829; Tilleny v. Wolverton, 54 Minn. 75, 55 N. W. 822; Piper v. Sawyer, 78 Minn. 221, 80 N. W. 970; Phelps v. Sargent, 73 Minn. 260, 72 N. W. 260; Malmgren v. Phinney, 65 Minn. 25, 67 N. W. 649; Adamson v. Sundby, 51 Minn. 460, 53 N. W. 761; Ayer v. Stewart, 16 Minn. 89 Gil. 77; Cochran v. Stewart, 57 Minn. 499, 509, 59 N. W. 543; Connecticut Mutual Life Ins. Co. v. King, 80 Minn. 76, 82 N. W. 1103; La Crosse etc. Packet Co. v. Reynolds, 12 Minn. 213 Gil. 135; Commercial Bank v. Azotine Mfg. Co. 69 Minn. 232, 72 N. W. 108; Hibbs v. Marpe, 84 Minn. 178, 87 N. W. 363; Clark v. B. B. Richards Lumber Co. 72 Minn. 397, 75 N. W. 605; Esch v. White, 82 Minn. 462, 85 N. W. 238, 718; Teryll v. City of Faribault, 84 Minn. 341, 87 N. W. 917; King v. City of Duluth, 81 Minn. 182, 83 N W. 526; Vaule v. Miller, 69 Minn. 440, 72 N. W. 452; St. Paul Trust Co. v. Kittson, 67 Minn. 59, 69 N. W. 625; Smith v. Glover, 50 Minn. 58, 52 N. W. 210, 912.

[2] Tilleny v. Wolverton, 54 Minn. 75, 55 N. W. 822; Schleuder v. Corey, 30 Minn. 501, 16 N. W. 401; Hibbs v. Marpe, 84 Minn. 178, 87 N. W. 363.

[3] Schleuder v. Corey, 30 Minn. 501, 16 N. W. 401; Maxwell v. Schwartz, 55 Minn. 414, 57 N. W 141.

[4] Adamson v. Sundby, 51 Minn. 460, 53 N. W. 761.

[5] State v. St. Paul etc. Ry. Co. 79 Minn. 57, 81 N. W. 544.

§ 1650. An order of the district court, where it has jurisdiction of the person and subject matter, is conclusive unless set aside upon review, by the appellate court. If such order is not reviewed, but acquiesced in by the parties, it is to be treated as the law of that case and final.

Esch v. White, 82 Minn. 462, 85 N. W. 238, 718.

§ 1651. When the evidence is different on a second trial, the opinion on a former appeal, reviewing the former trial, is the law of the case only so far as applicable.

McNamara v. Pengilly, 64 Minn. 543, 67 N. W. 661; Kray v. Muggli, 84 Minn. 90, 86 N. W. 882, 1102. See Hamm Realty Co. v. New Hampshire Fire Ins. Co. 84 Minn. 336, 87 Minn. 932.

Digitized by Google

§ 1652. Where an appeal is taken from an order denying a new trial and the order is affirmed either after argument on the merits or under the rules of court no questions which were or might have been determined on such appeal can be raised on a subsequent appeal from the final judgment entered in the same cause on the verdict or findings.[1] But the judgment of affirmance on the first appeal is no ground for dismissing the subsequent appeal as the latter may involve questions arising subsequent to the order on the motion for a new trial or other questions which could not be raised on such a motion. The proper practice is to object at the hearing or in the brief to the consideration of questions which are res judicata.[2] A mere dismissal of an appeal from an order denying a new trial does not have the effect of an estoppel.[3] The court will take notice of its records in order to determine what was considered on the former appeal.[4]

[1] Schleuder v. Corey, 30 Minn. 501, 16 N. W. 401; Adamson v. Sundby, 51 Minn. 460; 53 N. W. 761; Tilleny v. Wolverton, 54 Minn. 75, 55 N. W. 822; Hibbs v. Marpe, 84 Minn. 178, 87 N. W. 363.

[2] Schleuder v. Corey, 30 Minn. 501, 16 N. W. 401.

[3] Adamson v. Sundby, 51 Minn. 460, 53 N. W. 761.

[4] Rippe v. Chicago etc. Ry. Co. 23 Minn. 18.

Court equally divided.

§ 1653. When the members of the supreme court are equally divided in opinion the judgment or order will be affirmed.

Gran v. Spangenberg, 53 Minn. 42, 54 Minn. 933; Nelson v. Minneapolis etc. Ry. Co. 41 Minn. 131, 42 N. W. 788.

Weight to be given determination of trial court on question of fact.

§ 1654. It is a general rule, without exception, that when the trial court has passed upon a question of fact, either upon oral or written evidence, its determination will not be reversed on appeal, unless it is palpably contrary to the evidence. In other words, when the evidence is such that it might reasonably induce different conclusions in different minds the determination of the trial court thereon will be affirmed on appeal.

First Nat. Bank v. Randall, 38 Minn. 382, 37 N. W. 799; Brown v. Minneapolis Lumber Co. 25 Minn. 384; Lee v. Macfee, 45 Minn. 33, 47 N. W. 309; Bausman v. Tilley, 46 Minn. 66, 48 N. W. 459; Missouri etc. Trust Co. v. Norris, 61 Minn. 256, 63 N. W. 634; Olmstead v. Olmstead, 41 Minn. 297, 43 N. W. 67; Finance Co. v. Hursey, 60 Minn. 17, 61 N. W. 672; Rosenberg v. Burnstein, 60 Minn. 18, 61 N. W. 684; Robinson v. Smith, 62 Minn. 62, 64 N. W. 90; State v. Madigan, 66 Minn. 10, 68 N. W. 179; Knutson v. Davies, 51 Minn. 363, 53 N. W. 646; Tierney v. Minneapolis etc. Ry. Co. 33 Minn. 311, 23 N. W. 229; State v. Levy, 23 Minn. 104; Stai v. Selden (Minn. 1902) 92 N. W. 6. See David Bradley & Co. v. Burk, 81 Minn. 368, 84 N. W. 123.

§ 1655. The findings of a court upon questions of fact are entitled to the same weight as the verdict of a jury and will not be disturbed

Digitized by Google

on appeal from the judgment unless they are manifestly and palpably contrary to the weight of the evidence.[1] The rule governing the supreme court in passing on the sufficiency of the evidence to justify the findings when the appeal is from the judgment is the same as when the appeal is from an order granting or denying a new trial.[2] In many of our cases the rule is laid down that the findings will not be disturbed on appeal if there is any evidence reasonably tending to support them.[3] This is not true. There may be some evidence reasonably tending to support the findings and yet the evidence, as a whole, may be manifestly and palpably contrary to the findings. Of course in such a case it is the duty of the supreme court to reverse the judgment.[4] If different persons might reasonably draw different conclusions from the evidence the judgment should be affirmed.[5]

[1] Basting v. Northern Trust Co. 65 Minn. 495, 67 N. W. 1017; Moran v. Small, 68 Minn. 101, 70 N. W. 850.

[2] See § 1078.

[3] Webb v. Kennedy, 20 Minn. 419 Gil. 374; Torinus v. Thornton, 26 Minn. 103, 1 N. W. 1056; Irvine v. Armstrong, 31 Minn. 216, 17 N. W. 343; Noyes v. Gill, 35 Minn. 289, 28 N. W. 711; James v. Jordon, 37 Minn. 43, 33 N. W. 5; Humphrey v. Havens, 12 Minn. 298 Gil. 196.

[4] See Moran v. Small, 68 Minn. 101, 70 N. W. 850; Dayton v. Buford, 18 Minn. 126 Gil. 111; Rheiner v. Stillwater etc. Co. 29 Minn. 147, 12 N. W. 449; Buenemann v. St. Paul etc. Co. 32 Minn. 390, 20 N. W. 379; Voye v. Penney, 74 Minn. 525, 77 N. W. 422; Martin v. Courtney, 75 Minn. 255, 79 N. W. 583.

[5] Altman v. Graham, 22 Minn. 531; St. Paul Fire & Marine Ins. Co. v. Allis, 24 Minn. 75.

§ 1656. The findings of a referee upon questions of fact are entitled to the same weight as the verdict of a jury and will not be disturbed on appeal from the judgment unless they are manifestly and palpably contrary to the weight of the evidence.[1] The findings of a referee are treated on appeal the same as the findings of a court and what was said in the preceding paragraph is applicable here. Some of our cases lay down the rule that the findings of a referee will not be disturbed on appeal if there is any evidence reasonably tending to support them.[2] But if the evidence as a whole is manifestly and palpably contrary to the findings the judgment should be reversed although there is some evidence reasonably tending to support the findings.[3]

[1] Humphrey v. Havens, 12 Minn. 298 Gil. 196; Dayton v. Buford, 18 Minn. 126 Gil. 111. See also, Kumler v. Ferguson, 7 Minn. 442 Gil. 351; City of Winona v. Huff, 11 Minn. 119 Gil. 75.

[2] Bryant v. Lord, 19 Minn. 396 Gil. 342; Berkey v. Judd, 22 Minn. 287; Sheffield v. Mullin, 27 Minn. 374, 7 N. W. 687; Bidwell v. Coleman, 11 Minn. 78 Gil. 45.

[3] Dayton v. Buford, 18 Minn. 126 Gil. 111; Douglas v. First Nat. Bank, 17 Minn. 35 Gil. 18.

Digitized by Google

PARTIES ON APPEAL

Who may appeal.

§ 1657. An appeal can be taken only by a party to the record [1] or one in privity with him.[2] The statute provides that "the aggrieved party" may appeal. This clearly limits the right of appeal to parties to the record and their privies. The definite article "the" and the word "party" can have no other significance.[3] The mere fact that a person not a party has a direct and material interest in the result of the action does not give him a right of appeal.[4] The statute gives a right of appeal to the party aggrieved, but this means the party deeming himself aggrieved. The right depends upon the fact of being a party, not upon whether it shall finally be determined that the appellant was materially prejudiced by the order or judgment. Any other construction would involve the determination of the question raised on a preliminary hearing as to whether it could be raised.[5] The fact that the appellant was not aggrieved, that is, prejudiced, by the order or judgment is a reason for affirmance rather than a reason for dismissing the appeal for want of a right of appeal in the appellant. This distinction has not been carefully observed by our supreme court. It has frequently been held that a party had no right of appeal because he was not aggrieved.[6] A stranger to the action cannot appeal.[7]

[1] Davis v. Swedish-American Nat. Bank, 78 Minn. 408, 80 N. W. 953, 81 N. W. 210; In re Allen's Will, 25 Minn. 39; In re Hardy, 35 Minn. 193, 28 N. W. 219; Reeves v. Hastings, 61 Minn. 254, 63 N. W. 633 (an insolvent may appeal from order allowing receiver compensation); Kells v. Webster, 71 Minn. 276, 73 N. W. 962; Hospes v. N. W. Mfg. & Car Co. 41 Minn. 256, 43 N. W. 180 (intervening creditor in proceedings winding up an insolvent corporation); Berthold v. Fox, 21 Minn. 51.

[2] See Kells v. Nelson-Tenney Lumber Co. 74 Minn. 8, 76 N. W. 790.

[3] Stewart v. Duncan, 40 Minn. 410, 42 N. W. 89; Martin v. Kanouse, 2 Abb. Pr. (N. Y.) 390.

[4] See Kells v. Nelson-Tenney Lumber Co. 74 Minn. 8, 76 N. W. 790; Reeves v. Hastings, 61 Minn. 254, 63 N. W. 633.

[5] Yudkin v. Gates, 60 Conn. 426. But see, Schuster v. Supervisors, 27 Minn. 253, 6 N. W. 802.

[6] Com. Ins. Co. v. Pierro, 6 Minn. 569 Gil. 404.

[7] Hunt v. O'Leary, 78 Minn. 281, 80 N. W. 1120.

§ 1658. The fact that a person is a party to the record is not decisive of his right to appeal. One who has no beneficial interest in the subject of the action cannot appeal.[1] An assignee under the insolvency law cannot appeal from an order removing him.[2] And this is true generally of receivers.[3]

[1] Burns v. Phinney, 53 Minn. 431, 55 N. W. 540.

[2] Gunn v. Smith, 71 Minn. 281, 73 N. W. 842.

[3] Id.

Digitized by Google

Joinder of parties on appeal.

§ 1659. All the parties against whom a joint judgment is entered must unite in an appeal therefrom.[1] The primary object of this rule is to prevent multiplicity of appeals. A secondary object is to secure a severance and thereby enable the successful party to proceed in the enforcement of his judgment against those who do not desire to have it reviewed.[2] In this state there is no statutory mode of securing a severance in case necessary parties refuse to join in an appeal, and there are no decisions of the supreme court bearing on the subject. At common law the remedy employed was a summons and severance.[3] Undoubtedly a formal judgment of severance is unnecessary in this state but in some mode the fact of refusal to join in the appeal should be made to appear on the record of the trial court in order to enable the successful party in that court to enforce his judgment against those who do not wish to have it reviewed and to save him and the appellate court from being vexed by successive appeals in the same matter.[4] It is probably sufficient in this state merely to serve the notice of appeal on parties refusing to join, stating in the notice that the reason it is served upon them is their refusal to join in the appeal. The same notice should be served on the respondents.

[1] Babcock v. Sanborn, 3 Minn. 141 Gil. 86; Masterson v. Herndon, 10 Wall. (U. S.) 416; Hardee v. Wilson, 146 U. S. 179; Inglehart v. Stanbury, 151 U. S. 68; Dobson v. Fletcher, 78 Fed. 214.

[2] Masterson v. Herndon, 10 Wall. (U. S.) 416; Babcock v. Sanborn, 3 Minn. 141 Gil. 86.

[3] Masterson v. Herndon, 10 Wall. (U. S.) 416; Hardee v. Wilson, 146 U. S. 179.

[4] Inglehart v. Stanbury, 151 U. S. 68.

§ 1660. Where one of several parties against whom a judgment is entered has a separate and distinct interest he may appeal without joining the others.

Gilfillan v. Walker, 159 U. S. 303.

§ 1661. Where the interests of parties against whom a judgment is entered are adverse as between themselves those in community of interest may appeal without joining the others.

Hunter v. Bosworth, 43 Wis. 583.

§ 1662. Parties having separate interests but aggrieved in the same way by the same judgment may unite in an appeal.

Kaehler v. Halpin, 59 Wis. 42; In re California Mutual Life Ins. Co. 81 Cal. 364.

Who must be made respondents.

§ 1663. Where the order or judgment appealed from is indivisible and must necessarily be affirmed, reversed or modified as to all the parties to the action all the adverse parties who have a substantial interest in the maintenance of the order or judgment and will be affected by its modification or reversal must be made respond-

Digitized by Google

ents.[1] The parties to the record are not always necessary parties to the appeal. On the other hand a person who was not a party to the action in the trial court may be a necessary party on appeal.[2] Where the rights of several parties defendant, as related to the subject of the action, are conflicting, and the judgment is in favor of some and against others, a defeated party may serve his notice of appeal upon his co-defendants as well as upon the plaintiff, and have the rights of the defendants as between themselves passed upon by the supreme court.[3]

[1] Kells v. Nelson-Tenney Lumber Co. 74 Minn. 8, 76 N. W. 790; Frost v. St. Paul etc. Co. 57 Minn. 325, 59 N. W. 308; Oswald v. St. Paul etc. Co. 60 Minn. 82, 61 N. W. 902; Lambert v. Scandinavian Bank, 66 Minn. 185, 68 N. W. 834; Davis v. Swedish-American Bank, 78 Minn. 408, 80 N. W. 953; Greenman v. Melbye, 78 Minn. 361, 81 N. W. 21.

[2] Kells v. Nelson-Tenney Lumber Co. 74 Minn. 8, 76 N. W. 790.

[3] Atwater v. Russell, 49 Minn. 57, 52 N. W. 88.

Substitution of parties in case of death—statute.

§ 1664. "In all cases where an appeal has been taken to the supreme court, and before such appeal has been perfected, or argued and submitted, the respondent to such appeal dies, it shall be and is the duty of the appellant to apply to the supreme court, if in session, to any judge thereof when not in session, to have the legal representative or successor in interest of such deceased respondent substituted as the party respondent in such appeal. In case such appellant fails or neglects to cause such substitution to be made within sixty days from the death of such respondent, or in case any such appeal has heretofore been taken, and remains unperfected, and no substitution made, as herein provided, within sixty days from the passage of this act, upon the filing of an affidavit, by the legal representative or successor in interest of such deceased respondent, with the clerk of the supreme court, showing that such appeal has been taken, and the death of the respondent therein, and that the appellant has failed to make, or cause to be made, such substitution, such appeal shall be deemed abandoned, and it shall be the duty of the clerk of the supreme court to enter an order dismissing said appeal; and upon the filing of a certified copy of such order in the office of clerk of the court from which such appeal was taken, it will be restored to and have full jurisdiction over the action in which such appeal was taken, in the same manner and to all intents and purposes, and shall proceed thereon, as if no appeal had been taken."

[G. S. 1894 § 6153]

§ 1665. This provision is to be regarded as a rule of practice for the conduct of appeals and subject to the control of the supreme court. Accordingly the court may relieve an appellant and reinstate an appeal where it has been dismissed under this section.

Baldwin v. Rogers, 28 Minn. 68, 9 N. W. 79.

Digitized by Google

Substitution on death of party after case has been submitted—statute.

§ 1666. "In all cases where an appeal has been taken to the supreme court, and, after the case has been submitted to the supreme court but before the entry of judgment thereon in such court, either party to such appeal dies, and the surviving parties to such action, or the legal representative or successor in interest of said deceased party or either of them, shows by affidavit filed therein that such death has occurred, it shall be the duty of the clerk of the supreme court to substitute the name of the person so shown to be the legal representative or successor in interest of such deceased party; and the action shall thereupon proceed, and all subsequent proceedings had, and judgment be entered therein, for or against such legal representative or successor in interest, or such jointly or alone, as the case may be."

[G. S. 1894 § 6154]

TIME WITHIN WHICH TO APPEAL

The statute.

§ 1667. "The appeal from a judgment hereafter rendered may be taken within six months after the entry thereof, and from an order within thirty days after written notice of the same."

[G. S. 1894 § 6138]

When judgment is entered.

§ 1668. The judgment must be made a matter of record in order to limit the time for taking an appeal and the time does not commence to run until the entry of the judgment, that is, the entry of the judgment by the clerk in the judgment book.[1] Until this is done it matters not that the party is entitled to judgment, either by default or upon a decision or direction of the court.[2] An appeal cannot be taken from an order for judgment or from a decision or opinion of the court.[3] The law contemplates an appeal from a record and there is no record until the entry is made in the judgment book.[4] An appeal taken before the entry of judgment will be dismissed [5] but such dismissal will not preclude the party from taking another appeal after the entry of judgment.[6] It is held that a judgment is not perfected, for the purpose of limiting the time for taking an appeal, until costs have been taxed and inserted therein,[7] unless the prevailing party has waived them.[8]

[1] Humphrey v. Havens, 9 Minn. 318 Gil. 301; Hodgins v. Heaney, 15 Minn. 185 Gil. 142; Hostetter v. Alexander, 22 Minn. 559; Exley v. Berryhill, 36 Minn. 117, 30 N. W. 436. The following cases arose under the old law: Furlong v. Griffin, 3 Minn. 207 Gil. 138; Haines v. Paxton, 5 Minn. 442 Gil. 361; Ayer v. Termatt, 8 Minn. 96 Gil. 71.

[2] Rockwood v. Davenport, 37 Minn. 533, 35 N. W. 377.

[3] See § 1722.

[4] Hodgins v. Heaney, 15 Minn. 185 Gil. 142.

[5] Exley v. Berryhill, 36 Minn. 117, 30 N. W. 436.

Digitized by Google

[6] G. S. 1894, § 6152.
[7] Richardson v. Rogers, 37 Minn. 461, 35 N. W. 270; Fall v. Moore, 45 Minn. 517, 48 N. W. 404; Maurin v. Carnes, 80 Minn. 524, 83 N. W. 415.
[8] Mielke v. Nelson, 81 Minn. 228, 83 N. W. 836.

Time within which to appeal from order.

§ 1669. The statute provides that an appeal may be taken from an order within thirty days after written notice of the same.[1] This means a written notice served by the adverse party; the statutory notice served by the clerk does not limit the time of appealing.[2] Actual notice does not take the place of written notice. The obligation to give written notice rests upon both parties and each must be served with notice to set the statute running as to him.[3] Notice cannot be given to a party for the purpose of limiting the time for appealing from a conditional order until the order becomes as to him a final order and therefore appealable. The correct practice requires the party upon whom the condition is imposed to perform it, and then give written notice of the making of the order and of his compliance with its terms. The opposite party must then, if he desires to appeal from the order, do so within thirty days after receiving such notice.[4] The time within which to appeal cannot be extended by a renewal of substantially the same motion,[5] or by a second entry of the same order.[6] It is not in the power of a party by his own act to extend the statutory period for appealing from an order, nor has the court power, by an order made for that purpose, to grant an extension of such period. It may, however, result from the exercise of the authority of the court to review, set aside, or modify its own orders that on an appeal from an order redetermining a matter once passed upon by a former order, made more than thirty days before such appeal was taken, there may be brought up for review the same questions involved in the former order. Where a court has once made an appealable order, but before the time for appeal therefrom has expired, indicates by proper order its purpose to reconsider the question thus passed upon and thereafter does reconsider and by final order redetermine the matter affirming the former decision, an appeal may be taken from such final order, although the time for appeal from the former order has passed.[7] The statute is uncertain but it is probable that notice cannot be served until after the entry of the order.[8]

[1] See § 1667.
[2] G. S. 1894 § 5388.
[3] Levine v. Barrett, 83 Minn. 145, 85 N. W. 942.
[4] Swanson v. Andrus, 84 Minn. 168, 87 N. W. 363, 88 N. W. 252.
[5] Kittredge v. Stevens, 23 Cal. 283.
[6] Carli v. Jackman, 9 Minn. 249 Gil. 235.
[7] First Nat. Bank v. Briggs, 34 Minn. 266, 26 N. W. 6. See Billson v. Lardner, 67 Minn. 35, 69 N. W. 477.
[8] See §§ 1673, 2089.

Digitized by Google

Extension of time.

§ 1670. The statutory limitation of time within which an appeal may be taken is jurisdictional. The supreme court has no authority to do more than dismiss an appeal taken after the statutory time.[1] Neither the supreme nor district court can extend the time for an appeal.[2] The limitation of time is so far jurisdictional that the parties cannot waive the objection or by stipulation clothe the supreme court with authority to determine a belated appeal.[3]

[1] Ayer v. Termatt, 8 Minn. 96 Gil. 71; Furlong v. Griffin, 3 Minn. 207 Gil. 138; Haines v. Paxton, 5 Minn. 442 Gil. 361; Beaupre v. Hoerr, 13 Minn. 366 Gil. 339; Folsom v. Evans, 5 Minn. 418 Gil. 338.

[2] G. S. 1894 § 5219; Burns v. Phinney, 53 Minn. 431, 55 N. W. 540; First Nat. Bank v. Briggs, 34 Minn. 266, 26 N. W. 6; Gallagher v. Irish-American Bank, 79 Minn. 226, 81 N. W. 1057.

[3] Brown v. County of Cook, 82 Minn. 542, 85 N. W. 550; First Nat. Bank v. Briggs, 34 Minn. 266, 26 N. W. 6; Deering v. Johnson, 33 Minn. 97, 22 N. W. 174; Richardson v. Rogers, 37 Minn. 461, 35 N. W. 270; Fairchild v. Daten, 38 Cal. 286; Kenyon v. West Greenwich Probate Court, 17 R. I. 652; Cogswell v. Hogan, 1 Wash. 4.

Appeal from a modified judgment.

§ 1671. An appeal lies from a judgment modifying a former judgment in the same case although the time for appealing from the original judgment has expired.

Malmgren v. Phinney, 65 Minn. 25, 67 N. W. 649.

In action for claim against county.

§ 1672. An appeal from a judgment of the district court in proceedings on appeal from the action of the board of county commissioners on a claim against the county, pursuant to G. S. 1894 § 645, must be taken within thirty days after the entry thereof.

Brown v. County of Cook, 82 Minn. 542, 85 N. W. 550.

NOTICE OF APPEAL

The statute.

§ 1673. "An appeal shall be made by the service of a notice in writing, on the adverse party, and on the clerk with whom the judgment or order appealed from is entered, stating the appeal from the same, or some specified part thereof. When a party gives, in good faith, notice of appeal from a judgment or order, and omits, through mistake, to do any other act necessary to perfect the appeal, or to stay proceedings, the court may permit an amendment on such terms as may be just."

[G. S. 1894 § 6134]

Contents of notice.

§ 1674. The notice should contain a description of the order or judgment.[1] It is not necessary that the notice should show that the

Digitized by Google

appellant is the party aggrieved;[2] or that he is acting as a guardian ad litem;[3] or, in case of an appeal by a creditor, devisee or heir from the allowance of a claim against the estate, that the executor has refused the appeal.[4]

[1] Galloway v. Litchfield, 8 Minn. 188 Gil. 160; Gregg v. Uhless, 25 Minn. 272; Town of Haven v. Orton, 37 Minn. 445, 35 N. W. 264; Anderson v. County of Meeker, 46 Minn. 237, 48 N. W. 1022.

[2] Anderson v. County of Meeker, 46 Minn. 237, 48 N. W. 1022.

[3] In re Allen, 24 Minn. 39.

[4] Schultz v. Brown, 47 Minn. 255, 49 N. W. 982.

Upon whom to be served.

§ 1675. The statute provides that an appeal shall be made by service of a notice in writing on the adverse party and the clerk of court. While an appeal is the continuation of the original action or proceeding in another jurisdiction, yet it is analogous in many respects to a writ of error, which is regarded as the beginning of a new action; and the supreme court will consider only questions between the appellant and the parties upon whom the notice of appeal has been served. Therefore the notice of appeal must be served on each adverse party as to whom it is sought to review, in the supreme court, any order or judgment, although he did not appear in the proceeding or action in the district court.[1] It necessarily follows that where the order or judgment appealed from is indivisible and must necessarily be affirmed, reversed or modified as to all parties to the action or proceeding, the appeal must be dismissed if they are not all made parties to the appeal by service of notice upon them individually.[2] The adverse party, within the intent of the statute, means the party whose interest in relation to the subject of the appeal is in direct conflict with a reversal or modification of the order or judgment appealed from.[3] The parties to the record are not always necessary parties to the appeal.[4] On the other hand a person who was not a party to the action in the lower court may be a necessary party on appeal. A purchaser at a sale made by an assignee in insolvency, subject to the approval of the court, is a party to the proceedings resulting in an order confirming the sale, and a necessary and adverse party to an appeal from such order.[5] A party not served with notice is not before the supreme court.[6] An appeal may be taken against a co-plaintiff or co-defendant and notice of appeal should be served upon them as well as on the opposite parties.[7]

[1] Kells v. Nelson-Tenney Lumber Co. 74 Minn. 8, 76 N. W. 790; Frost v. St. Paul etc. Co. 57 Minn. 325, 59 N. W. 308; Oswald v. St. Paul etc. Co. 60 Minn. 82, 61 N. W. 902; Lambert v. Scandinavian-American Bank, 66 Minn. 185, 68 N. W. 834. But see Davis v. Swedish-American Nat. Bank, 78 Minn. 408, 80 N. W. 953.

[2] Kells v. Nelson-Tenney Lumber Co. 74 Minn. 8, 76 N. W. 790. But see Oswald v. St. Paul Globe Pub. Co. 60 Minn. 82, 61 N. W. 902.

Digitized by Google

[3] Kells v. Nelson-Tenney Lumber Co. 74 Minn. 8, 76 N. W. 790.
[4] Id.
[5] Id.
[6] Adams v. City of Thief River Falls, 84 Minn. 30, 86 N. W. 767.
[7] Atwater v. Russell, 49 Minn. 57, 52 N. W. 26.

Service on the clerk.

§ 1676. A notice of appeal having been served on the adverse party, a filing of such notice with the clerk of the court, with proof of such service, is a sufficient compliance with the statutory requirement of service upon the clerk although such notice is not specifically directed to the clerk.[1] The primary object of the service on the clerk is to supply the files with the notice served on the adverse party so that its sufficiency may be determined when questioned.[2] The statute authorizing the service of notices by mail has no application to service on the clerk. Consequently such a service on the clerk is unavailing unless the notice actually reaches him within the proper time.[3]

[1] Baberick v. Magner, 9 Minn. 232 Gil. 217; State v. Klitzke, 46 Minn. 343, 49 N. W. 54.
[2] Baberick v. Magner, 9 Minn. 232 Gil. 217.
[3] Thorson v. St. Paul etc. Ins. Co. 32 Minn. 434, 21 N. W. 471.

Service on attorney.

§ 1677. Service of notice on the attorney of record in the trial court is sufficient if there has been no formal substitution,[1] even though such attorney is not in fact the attorney of the respondent for purposes of appeal.[2] If two or more attorneys appeared of record for the respondent in the trial court service on any one is sufficient.[3] If there are several adverse parties represented by separate attorneys service should be made on each of the latter.[4] Service on one member of a firm is sufficient service on the firm.[5] Service on a corporation should be made by serving on one of the officers as provided by statute for the service of summons.[6] Notice of appeal by a contestant of a will may properly be served upon the attorney of the proponent.[7] Prosecutions for the violation of municipal ordinances of the city of Minneapolis, although in the name of the state, are for offences against the city, and not against the state. Consequently notices of appeal should be served on the city attorney and not on the attorney general.[8]

[1] In re Brown, 32 Minn. 443, 21 N. W. 474; Tripp v. De Bow, 5 How. Pr. (N. Y.) 114; United States v. Curry, 6 How. (U. S.) 106; Richardson v. Pate, 93 Ind. 423; Rule 7, Supreme Court.
[2] United States v. Curry, 6 How. (U. S.) 106.
[3] Comstock v. Cole, 28 Neb. 470.
[4] Senter v. De Bernal, 38 Cal. 640.
[5] Shirley v. Burch, 16 Or. 1.
[6] Pacific Coast Ry. Co. v. San Luis Obispo County, 79 Cal. 103.
[7] In re Brown, 32 Minn. 443, 21 N. W. 474.
[8] State v. Sexton, 43 Minn. 154, 43 N. W. 845.

Digitized by Google

Mode of service.

§ 1678. In the absence of any special provision to the contrary the practice is to serve notice of appeal in the mode prescribed for the service of notices generally. It is practically advisable to make a personal service.

See § 2031; Toner v. Advance Thresher Co. 45 Minn. 293, 47 N. W. 810; Thorson v. St. Paul etc. Ins. Co. 32 Minn. 434, 21 N. W. 471.

By whom served.

§ 1679. Probably any person who may serve an ordinary notice may serve a notice of appeal; but it is practically advisable that the service should be made by some person other than the appellant.

BONDS ON APPEAL

For costs—statute.

§ 1680. "To render an appeal effectual for any purpose, a bond shall be executed by the appellant, with at least two sureties, conditioned that the appellant will pay all costs and charges which may be awarded against him on the appeal, not exceeding the penalty of the bond, which shall be at least two hundred and fifty dollars; or that sum shall be deposited with the clerk with whom the judgment or order was entered, to abide the judgment of the court of appeal; but such bond or deposit may be waived by a written consent on the part of the respondent."

[G. S. 1894 § 6141] Cited in County Com'rs v. Robinson, 16 Minn. 381 Gil. 340; Dutcher v. Culver, 23 Minn. 415; Erickson v. Elder, 34 Minn. 370, 25 N. W. 804.

On appeal from money judgment—statute.

§ 1681. "If the appeal is from a judgment directing the payment of money, it does not stay the execution of the judgment, unless a bond is executed by the appellant with at least two sureties, conditioned that if the judgment appealed from, or any part thereof, is affirmed, the appellant will pay the amount directed to be paid by the judgment, or the part of such amount as to which the judgment is affirmed, if it is affirmed only in part, and all damages which are awarded against the appellant upon the appeal."

[G. S. 1894 § 6143] Cited in Dutcher v. Culver, 23 Minn. 415; Allen v. Robinson, 17 Minn. 113 Gil. 90; Erickson v. Elder, 34 Minn. 370, 25 N. W. 804; State v. Albrick, 63 Minn. 328, 65 N. W. 639 (not applicable to appeals in bastardy proceedings).

On appeal from judgment directing delivery of personal property—statute.

§ 1682. "If the judgment appealed from, directs the assignment or delivery of documents, or personal property, the execution of the judgment is not stayed by appeal, unless the things required to be assigned or delivered are brought into court, or placed in the custody of such officer or receiver as the court may appoint; or unless

Digitized by Google

a bond is executed, by the appellant, with at least two sureties, and in such amount as the court or judge thereof may direct, conditioned that the appellant will obey the order of the appellate court upon the appeal."

[G. S. 1894 § 6144] Cited in Allen v. Robinson, 17 Minn. 113 Gil. 30; Dutcher v. Culver, 23 Minn. 415; Erickson v. Elder, 34 Minn. 370, 25 N. W. 804.

On appeal from judgment directing a conveyance—statute.

§ 1683. "If the judgment appealed from directs the execution of a conveyance, or other instrument, the execution of the judgment is not stayed by the appeal, until the instrument is executed, and deposited with the clerk with whom the judgment is entered, to abide the judgment of the appellate court."

[G. S. 1894 § 6145] Cited in Dutcher v. Culver, 23 Minn. 415.

On appeal from judgment directing sale or delivery of real property—statute.

§ 1684. "If the judgment appealed from directs the sale or delivery of possession of real property, the execution of the same is not stayed, unless a bond is executed on the part of the appellant, with two sureties, conditioned that, during the possession of such property by the appellant, he will not commit or suffer to be committed any waste thereon; and that, if the judgment is affirmed, he will pay the value of the use and occupation of the property, from the time of the appeal until the delivery of the possession thereof, pursuant to the judgment."

[G. S. 1894 § 6146] Cited in Dutcher v. Culver, 23 Minn. 415.

On appeal from judgment in all other cases—statute.

§ 1685. "In the cases not specified in sections eleven, twelve, thirteen and fourteen (§§ 1681, 1682, 1683, 1684 supra) the perfecting of an appeal, by giving the bond mentioned in section nine (§ 1680 supra), stays proceedings in the court below, upon the judgment appealed from, except that when it directs the sale of perishable property, the court below may order the property to be sold, and the proceeds thereof to be deposited or invested, to abide the judgment of the appellate court."

[G. S. 1894 § 6151]

Bonds may be in one instrument—service of copy—statute.

§ 1686. "The bonds prescribed by sections nine, eleven, twelve and fourteen [§§ 1680, 1681, 1682, 1684 supra] may be in one instrument, or several, at the option of the appellant; and a copy, including the names and residence of the sureties, shall be served on the adverse party, with the notice of appeal, unless a deposit is made as provided in section nine [§ 1680 supra], and notice thereof given."

[G. S. 1894 § 6149]

General nature and object of appeal bonds.

§ 1687. An appeal bond, in our practice, is a voluntary obligation entered into by the appellant and his sureties, as obligors, and the

Digitized by Google

respondents, as obligees, conditioned to answer to the liability created by the bond.[1] The condition varies with the nature of the appeal. It may be merely to pay the costs of the appeal and when of that nature it does not operate as a stay.[2] Our statutes do not make necessary a bond "to prosecute the appeal with effect," such as is required in many jurisdictions. The purposes of an appeal bond are to prevent vexatious appeals and to indemnify the respondent, in part, for the expenses and losses of an unsuccessful appeal. The obligation to execute an appeal bond is wholly statutory. In the absence of express statutory authority no court or judge can require a bond as a condition of the right to appeal.[3]

[1] See Esch v. White, 76 Minn. 220, 78 N. W. 1114; Erickson v. Elder, 34 Minn. 370, 25 N. W. 804; Dutcher v. Culver, 23 Minn. 415.

[2] See §§ 1680–1685; 1705–1716

[3] Woolfolk v. Bruns, 45 Minn. 96, 47 N W. 460; Republic of Honduras v. Soto, 112 N. Y. 310.

§ 1688. Our statutory appeal in civil cases is a substitute for the appeal in chancery, which operated to supersede the determination appealed from, and the writ of error in proceedings at law, which had no such operation. This double character appears to be in some measure expressly preserved by our statute. Appeals are provided for, both with and without a stay of the proceedings below; but, unless otherwise expressly provided, the rule is that, in order to a stay of proceedings, indemnity against the consequences of the stay must be secured by a bond, the sufficiency of which is to be passed upon by the court or some of its officers.

Dutcher v. Culver, 23 Minn. 415.

Whether jurisdictional.

§ 1689. Bonds on appeal are not jurisdictional. The supreme court has authority to allow a bond to be filed nunc pro tunc, or to permit a defective bond to be amended.

See § 1640; Board of County Com'rs v. Robinson, 16 Minn. 381 Gil. 340; Riley v. Mitchell, 38 Minn. 9, 35 N. W. 472.

On separate appeals.

§ 1690. If distinct appeals are taken from distinct judgments and orders there must be appeal bonds for each appeal; but they may be included in a single instrument.[1] If an appeal is taken from an order denying a new trial and also from the final judgment there should be separate bonds as the two appeals are distinct.[2] If the first appeal is dismissed a new bond must be executed to perfect a second appeal.[3]

Digitized by Google

[1] Sharon v. Sharon, 68 Cal. 327; McCormick v. Belvin, 96 Cal. 182; Shermerhorn v. Anderson, 1 N. Y. 430.
[2] Eddy v. Van Ness, 2 Idaho 94; Cronin v. Bear Creek Gold Mining Co., 2 Idaho 1146. See County Com'rs v. Robinson, 16 Minn. 381 Gil. 340.
[3] Kelsey v. Campbell, 38 Barb. (N. Y.) 238.

Parties to appeal bonds.

§ 1691. All parties united in interest and appealing jointly should unite as obligors in the bond.[1] Separate parties who are aggrieved by the same order or judgment may unite in an appeal bond.[2] Where a single party is entitled to appeal upon the refusal of the rest his sole bond is sufficient.[3] The bond must run to the respondent and all the parties to the appeal interested in maintaining the judgment or order should be made joint obligees.[4]

[1] Dingler v. Strawn, 36 Ill. App. 564; Andre v. Jones, 1 Colo 489; Gordon v. Robertson, 26 Ga. 410.
[2] Schlieder v. Martinez, 38 La. Ann. 727.
[3] Weeks v. Lego, 9 Ga. 199.
[4] Brown v. Levins, 6 Porter (Ala.) 414; Young v. Russell, 60 Tex. 684; Chandler v. Lappington, 36 Tex. 272; Zeigler v. Hunter, 16 La. Ann. 165.

Exemptions.

§ 1692. No bond is required, at least for costs, where the appellant is the state, or a county, town, city, school district, executor or administrator.[1] Such statutory exemptions are strictly construed.[2]

[1] G. S. 1894 §§ 7989, 6147.
[2] See Holmes v. Mattoon, 111 Ill. 28; Crismon v. Bingham etc. Ry. Co. 3 Utah 249; Von Schmidt v. Widber, 99 Cal. 511; Scheerer v. Edgar, 67 Cal. 377; Butler v. Jarvis, 117 N. Y. 115; In re Danielson, 88 Cal. 480.

Sufficiency of bond—amendment.

§ 1693 If the condition of an appeal bond substantially covers the provisions of the statute, and secures to the respondent all that the law designed for him, it is sufficient, although not in the exact words of the statute.

Riley v. Mitchell, 38 Minn. 9, 35 N. W. 472; Anderson v County of Mecker, 46 Minn. 237, 48 N. W. 1022.

Description of order or judgment.

§ 1694. The bond must describe the order or judgment from which the appeal is taken so that it may be identified; but nicety of description is not demanded and defects in this regard are waived if objection is not promptly made. It is not the office of the bond to define the nature and scope of the appeal and the only object of describing the order or judgment in the bond is to identify it as the particular order or judgment from which the appeal is taken.

McElroy v. Mumford, 128 N. Y. 303; Putnam v. Boyer, 140 Mass. 235; Johnston v. King, 83 Wis. 8.

Digitized by Google

Attorneys as sureties.

§ 1695. An attorney in the case is not authorized to become a surety on an appeal bond except where the client is a non-resident.

Schuek v. Hagar, 24 Minn. 339; Rule 1, District Court.

Justification of sureties—statute.

§ 1696. "A bond upon an appeal is of no effect, unless it is accompanied by the affidavit of the sureties, that they are each worth double the amount specified therein; the adverse party may, however, except to the sufficiency of the sureties, within ten days after notice of the appeal; and unless they or other sureties justify before a judge of the court below, as prescribed by law in other cases, within ten days thereafter, the appeal shall be regarded as if no such bond had been given; the justification shall be upon a notice of not less than five days."

[G. S. 1894 § 6150]

§ 1697. The court has no authority to compel ordinary sureties to justify upon exception of the respondent. Their obligation is purely voluntary.[1] The rule is otherwise as respects surety companies.[2]

[1] Esch v. White, 76 Minn. 220, 78 N. W. 1114.

[2] State v. District Court, 58 Minn. 351, 59 N. W. 1055.

STAY ON APPEAL FROM JUDGMENT

The statute.

§ 1698. "Whenever an appeal is perfected, as provided by sections eleven, twelve and fourteen (§§ 1681, 1682, 1684 supra), it stays all further proceedings in the court below, upon the judgment appealed from, or upon the matter embraced therein; but the court below may proceed upon any other matter included in the action, and not affected by the judgment appealed from. And the court below may, in its discretion, dispense with or limit the security required by said sections, when the appellant is an executor, administrator, trustee, or other person acting in another's right."

[G. S. 1894 § 6147]

§ 1699. An appeal with a supersedeas bond from an order or judgment which in fact is not appealable does not operate as a stay.

State v. District Court, 52 Minn. 283, 53 N. W. 1157.

§ 1700. An appeal to the supreme court with a supersedeas bond does not oust the district court of jurisdiction to the extent of making its proceedings in the action during the stay absolutely void. A distinction exists between jurisdiction and the propriety or rightfulness of exercising it in the particular instance. Proceedings without jurisdiction are void. Those within the jurisdiction, but wrongful, are voidable only; are error or irregularity, and stand unless set aside or reversed; and the party may waive or by laches lose his remedy. The district court may, in a proper case, stay temporarily all proceedings in a cause before it. The stay would not affect its jurisdiction, though proceeding in disregard of it, while in force, might be

Digitized by Google

error or irregularity. The stay provided on an appeal and stay bond is similar in effect, except the court below cannot remove it.

State v. Young, 44 Minn. 76, 46 N. W. 204; McArdle v. McArdle, 12 Minn. 122 Gil. 70; Briggs v. Shea, 48 Minn. 218, 50 N. W. 218; State v. Webber, 31 Minn. 211, 17 N. W. 339.

§ 1701. Upon the perfection of a judgment subject to revision by appeal, the party in whose favor it is rendered is not compelled to await the expiration of the period allowed for such appeal, but may, in the absence of such appeal, proceed to the execution of the judgment. The effect of an appeal with a supersedeas is to stay or suspend the proceedings which may have been taken at the time the appeal is perfected in the condition in which they then exist, and to prevent any further step or proceeding on the judgment or matter embraced therein. The stay operates until the determination of the appeal.

Robertson v. Davidson, 14 Minn. 554 Gil. 422; Northwestern Express Co. v. Landes, 6 Minn. 564 Gil. 400; Allen v. Robinson, 17 Minn. 113 Gil. 90; First Nat. Bank v. Rogers, 13 Minn. 407 Gil. 376; State v. Young, 44 Minn. 76, 46 N. W. 204; Floberg v. Joslin, 75 Minn. 75, 77 N. W. 557.

§ 1702. An appeal with a stay bond does not have the effect of vacating a levy made prior thereto. It only prevents further proceeding on the execution until the determination of the appeal. The sheriff may retain possession of property levied upon until the decision of the appellate court.

Northwestern Express Co. v. Landes, 6 Minn 564 Gil. 400; First Nat. Bank v. Rogers, 13 Minn. 407 Gil. 376.

§ 1703. An appeal with a stay bond does not have the effect of destroying the force of a judgment as a lien.

Allen v. Robinson, 17 Minn. 113 Gil. 90.

§ 1704. In an early case[1] it was said that "it may admit of doubt whether that portion of the section of the statute above cited, which provides that 'the court below may proceed upon any of the matters included in the action and not affected by the judgment appealed from,' applies to legal as distinguished from equitable proceedings." This distinction is not well founded The lower court always has authority, pending an appeal, to proceed in regard to matters collateral to the subject matter of the appeal.[2]

[1] McArdle v. McArdle, 12 Minn. 122 Gil. 70.

[2] Hinson v. Adrian, 91 N. C. 372; Allen v. Allen, 80 Ala. 155. See State v. Young, 44 Minn. 76, 46 N. W. 204.

Digitized by Google

STAY ON APPEAL FROM ORDER

The statute.

§ 1705. "Such appeal, when taken from an order, shall stay all proceedings thereon, and save all rights affected thereby, if the appellant, or some one in his behalf, as principal, executes a bond, in such sum, and with such sureties, as the judge making the order, or in case he cannot act, the court commissioner or clerk of the court where the order is filed, directs and approves, conditioned to pay the costs of said appeal, and the damages sustained by the respondent in consequence thereof, if said order or any part thereof is affirmed, or said appeal dismissed, and abide and satisfy the judgment or order which the appellate court may give therein; which bond shall be filed in the office of said clerk."

[G. S. 1894 § 6142]

Extent and effect of stay.

§ 1706. A supersedeas is a statutory remedy, and is only obtained by a strict compliance with all the required conditions, one of which, in case of an appeal from an order, is that the supersedeas bond shall be filed in the office of the clerk of the court where the order is filed. Hence, proceedings on the order are stayed, and rights under it are saved, as of the date of the filing of the bond. The supersedeas does not relate back to the date of the order, so as to annul proceedings already had, or restore rights under it already lost. The stay simply leaves the proceedings on the order, and the rights of the appellant under it, just as they are when it takes effect on the date of filing the bond.

Woolfolk v. Bruns, 45 Minn. 96, 47 N. W. 460; Althen v. Tarbox, 48 Minn. 18, 50 N. W. 1018; Robertson v. Davidson, 14 Minn. 554 Gil. 422. But see Farmers National Bank v. Backus, 63 Minn. 115, 65 N. W. 255.

§ 1706a. An appeal from an order refusing a new trial and the filing of a supersedeas bond operates as a stay and suspends the right to enter judgment.

St. Paul etc. Ry. Co. v. Village of Hinckley, 53 Minn. 102, 54 N. W. 940.

§ 1707. An ex parte order granting an injunction is not appealable. Hence an appeal from such an order and the filing of a supersedeas bond, is not effectual to stay or suspend the operation of the order.[1] But an appeal from an order dissolving a temporary writ of injunction, if a proper supersedeas bond is filed, operates to revive and continue the writ in force pending the appeal.[2] A stay of proceedings until a motion for an injunction may be heard and determined is not revived nor continued by an appeal, with a supersedeas bond, from the order denying the injunction.[3]

[1] State v. District Court, 52 Minn. 283, 53 N. W. 1157.

[2] State v. Duluth Street Ry. Co. 47 Minn. 369, 50 N. W. 332; State v. District Court, 78 Minn. 464, 81 N. W. 323

Digitized by Google

[8] Sullivan v. Weibeler, 37 Minn. 10, 32 N. W. 787. See Graves v. Backus, 69 Minn. 532, 72 N. W. 811.

§ 1708. An appeal from an order dissolving a writ of attachment and the filing of a supersedeas bond suspend the operation of the order and the suspension relates back to the date of the order, so that, if the officer still has the property his right to hold it is restored; and it may also be, as between the parties to the writ, that, if between the date of the order and the appeal with a stay the officer has returned the property to the defendant, the appeal and stay reinstates the lien so that the plaintiff may require the sheriff to retake the property.

Ryan Drug Co. v. Peacock, 40 Minn. 470, 42 N. W. 298.

§ 1709. When an appeal is taken from an order appointing a receiver pendente lite and a supersedeas bond is executed and filed in accordance with the provisions of G. S. 1894 § 6142, the power of the receiver is suspended in reference to the order appealed from and the order remains inoperative pending the appeal. It is the duty of the receiver when the bond is duly executed and filed and he is duly notified thereof, to restore to the appellant possession of such property as he may have taken from him by virtue of the order. When an appeal is taken from an interlocutory order, that part of the case which is appealed is completely removed from the jurisdiction of the district court and wholly transferred to that of the supreme court. The supreme court has inherent power to make any order necessary to effectuate the spirit and intent of the statute authorizing a supersedeas.

Farmers National Bank v. Backus, 63 Minn. 115, 65 N. W. 255.

§ 1710. Where an appeal with a supersedeas bond is taken from an order striking out portions of the answer the cause cannot be noticed for trial during the pendency of the appeal.

Starbuck v. Dunklee, 12 Minn. 161 Gil. 97.

§ 1711. An appeal, with a statutory supersedeas bond, from an order allowing a peremptory writ of mandamus relieves the party from complying with the command in the writ and precludes the district court from enforcing it.

State v. Webber, 31 Minn. 211, 17 N. W. 339.

§ 1712. In proceedings under G. S. 1894 § 2642 for the location of crossings the proceedings cannot be stayed by appealing from an order appointing commissioners and executing a supersedeas bond under the general law. The matter is subject to a special provision.

State v. District Court, 35 Minn. 461, 29 N. W. 60.

§ 1713. An appeal, with a stay bond, from an order setting aside a judgment does not operate to reinstate the judgment as an estoppel.

Hershey v. Meeker County Bank, 71 Minn. 255, 73 N. W. 967.

§ 1714. An appeal from an order refusing, except upon terms, to open a default and allow an answer to be made, with a statutory supersedeas bond, is not effectual to stay the entry of judgment upon the default.

Digitized by Google

Exley v. Berryhill, 37 Minn. 182, 33 N. W. 567. But see St. Paul & Duluth Ry. Co. v. Village of Hinckley, 53 Minn. 102, 54 N. W. 940.

§ 1715. The stay arising from the filing of the bond is strictly limited to the order from which the appeal is taken. Thus a clause, granting a party ten days to answer, in an order denying his motion to set aside the summons, is not affected by his appeal from the order and the filing of a stay bond; the extension of time to answer not being an essential part of the order.

Yale v. Edgerton, 11 Minn. 271 Gil. 184.

§ 1716. An appeal, with a stay bond, from an order sustaining a demurrer but allowing the adverse party twenty days in which to plead over, extends the time for answering until after the determination of the appeal.

Stickney v. Jordain, 50 Minn. 258, 52 N. W. 861.

Liability under the bond.

§ 1717. The condition of the statutory supersedeas bond upon an appeal from an order denying a new trial does not render the appellant liable to pay the judgment thereafter entered on the verdict or findings unless the benefit of the judgment is lost to the respondent in consequence of the appeal and stay.[1] Where an order of the district court requiring the payment of money is appealed to the supreme court and a statutory supersedeas bond executed, "conditioned to abide and satisfy the judgment or order which the appellate court may give therein," and the order appealed from is affirmed, an action may be maintained upon the bond for the sum of money required to be paid by the order appealed from, with interest thereon.[2] To "abide" a judgment or order is to perform, execute, conform to, and to satisfy it; that is to say, to carry it into complete effect. The policy of our law is to indemnify a respondent, and to prevent a stay from operating to his disadvantage, by requiring security for carrying into effect the action of the appellate court with respect to appeals from orders.[3] Payment to the clerk of his fees included in the judgment, unless authorized or sanctioned by the adverse party is not a defence.[4] The sureties may set up any defence that is available to the principal.[5] If, on an appeal from an order a bond is given as upon appeal from a judgment the non-payment of the judgment is not a breach of the bond.[6]

[1] Reitan v. Goebel, 35 Minn. 384, 29 N. W. 6; Friesenhahn v. Merrill, 52 Minn. 55, 53 N. W. 1024; Vent v. Duluth Trust Co. 77 Minn. 523, 80 N. W. 640; Estes v. Roberts, 63 Minn. 265, 65 N. W. 445. See L. Kimball Printing Co. v. Southern Land Imp. Co. 57 Minn. 37, 58 N. W. 868 (bond containing extra-statutory language).

[2] Erickson v. Elder, 34 Minn. 370, 25 N. W. 804. See Reitan v. Goebel, 35 Minn. 384, 29 N. W. 6.

[3] Erickson v. Elder, 34 Minn. 370, 25 N. W. 804.

[4] Menage v. Newcomb, 33 Minn. 143, 22 N. W. 182.

Digitized by Google

[5] First Nat. Bank v. Rogers, 13 Minn. 407 Gil. 376.
[6] Galloway v. Yates, 10 Minn. 75 Gil. 53.

§ 1718. When an appeal with a supersedeas bond is taken from an interlocutory order that part of the case which is appealed is completely removed from the jurisdiction of the district court and wholly transferred to that of the supreme court and the latter court has full authority to enforce the supersedeas by appropriate remedies.
Farmers' Nat. Bank v. Backus, 63 Minn. 115, 65 N. W. 255.

WHAT ORDERS AND JUDGMENTS APPEALABLE

The statute.

§ 1719. "An appeal may be taken to the supreme court, by the aggrieved party, in the following cases:
(1) From a judgment in an action commenced in the district court, or brought there from another court from any judgment rendered in such court, and, upon the appeal from such judgment, the court may review any intermediate order involving the merits, or necessarily affecting the judgment.
(2) From an order granting or refusing a provisional remedy, or which grants, refuses, dissolves, or refuses to dissolve an injunction, or an order vacating or sustaining an attachment.
(3) From an order involving the merits of the action, or some part thereof.
(4) From an order granting or refusing a new trial, or from an order sustaining or overruling a demurrer.
(5) From an order, which, in effect, determines the action, and prevents a judgment from which an appeal might be taken.
(6) From a final order affecting a substantial right, made in a special proceeding, or upon a summary application in an action after judgment."
[G. S. 1894 § 6140]

Appeal from a judgment in the district court in an action commenced in a lower court and appealed to the district court.

§ 1720. Under the provision of the statute allowing appeals in this class of cases it has been held that an order of the probate court admitting a will to probate is a judgment within the meaning of the statute and that an appeal lies to the supreme court from the judgment of the district court affirming such order; [1] that a judgment in unlawful detainer proceedings is appealable; [2] that a judgment on an appeal from the award of commissioners in condemnation proceedings is appealable.[3]

[1] In re Penniman, 20 Minn. 245 Gil. 220.
[2] See Barker v. Walbridge, 14 Minn. 469 Gil. 351.
[3] Witt v. St. Paul etc. City Ry. Co. 35 Minn. 404, 29 N. W. 161.

§ 1721. Where the law authorizes an appeal from a special tribunal to the district court an appeal will ordinarily be allowed from that court to the supreme court without any express authorization.

Digitized by Google

See County of Ramsey v. Stees, 27 Minn. 14, 6 N. W. 401; Witt v. St. Paul etc. Ry. Co. 35 Minn. 404, 29 N. W. 161; Moede v. County of Stearns, 43 Minn. 312, 45 N. W. 435.

Appeal from a judgment in an action commenced in the district court.

§ 1722. A judgment, to be appealable under the statute, must be the final determination of the rights of the parties in the action.[1] It is not necessary that it should be on the merits and preclude the parties from bringing another action. It is only necessary that it should be final in the sense of terminating the particular action. Judgments of dismissal are appealable as well as judgments on the merits.[2] Form is not controlling and if an order is in effect a final judgment it is appealable as such.[3] On the other hand a judgment which is such only in name is not appealable.[4] Any decision or adjudication, by whatever name it may be called, an order, or direction for judgment, or judgment, which leaves necessary a further judgment in order to give the parties the relief they are entitled to, and to terminate the action so far as the judgment may, is not a final judgment. In an action for partition the judgment provided for in G. S. 1894 § 5777 is the final judgment and upon appeal from it the judgment provided for in G. S. 1894 § 5775 may be reviewed.[5] In an action for the foreclosure of a mortgage the only judgment now authorized is that provided for in G. S. 1894 § 6059. There is no authority for the entry of a separate personal judgment for a deficiency.[6] It was formerly held that the "final decree" authorized by G. S. 1894 § 6066 was a final judgment and appealable, but that on an appeal from such judgment no error in the judgment directed under G. S. 1894 § 6059 could be reviewed.[7] As the law now stands there is no "final decree" and of course an appeal lies from the judgment entered under § 6059. An appeal may be taken from a part of a judgment.[8] An appeal lies from a final judgment regardless of whether the action is legal or equitable in its nature.[9] No appeal lies from a judgment for taxes.[10] Where condemnation proceedings are brought into the district court for the assessment of damages they are deemed for the purpose of appeal to have been commenced in that court and an appeal lies from a final judgment.[11] The statute contemplates an appeal from a record. The judgment must be formally entered in the judgment book before an appeal is taken. No appeal lies from a mere opinion, decision, or finding of the court[12] No appeal lies from an order for judgment.[13] As regards appeal a judgment ordered by the court, notwithstanding the verdict, stands on the same footing with a judgment entered upon a verdict.[14]

[1] In re Penninian, 20 Minn. 245 Gil. 220; Dobberstein v. Murphy, 44 Minn. 526, 47 N. W. 171; Deuel v. Hawke, 2 Minn. 50 Gil. 37; Hawke v. Deuel, 2 Minn. 59 Gil. 46; Dodge v. Allis, 27 Minn. 376, 7 N. W. 732; Chouteau v. Rice, 1 Minn. 24 Gil. 8; The Aetna Ins. Co. v. Swift, 12 Minn. 437 Gil. 326; Ayer v. Termatt, 8 Minn. 96 Gil. 71; Lamprey v. St. Paul etc. Ry. Co. (Minn. 1892) 91 N. W. 29.

[2] Thorp v. Lorenz, 34 Minn. 350, 25 N. W. 712.

Digitized by Google

[3] In re Penniman, 20 Minn. 245 Gil. 220.
[4] Hawke v. Deuel, 2 Minn. 59 Gil. 46; Deuel v. Hawke, 2 Minn. 50 Gil. 37.
[5] Dobberstein v. Murphy, 44 Minn. 526, 47 N. W. 171.
[6] Thompson v. Dale, 58 Minn. 365, 59 N. W. 1086. See Dunnell, Minn. Pl. § 1627.
[7] Dodge v. Allis, 27 Minn. 376, 7 N. W. 732.
[8] Hall v. McCormick, 31 Minn. 280, 17 N. W. 620; St. Paul Trust Co. v. Kittson, 84 Minn. 493, 87 N. W. 1012.
[9] Kern v. Chalfant, 7 Minn. 487 Gil. 393.
[10] See § 1741.
[11] Witt v. St. Paul etc. Ry. Co. 35 Minn. 404, 29 N. W. 161.
[12] Hodgins v. Heaney, 15 Minn. 185 Gil. 142; Thompson v. Howe, 21 Minn. 1; Wilson v. Bell, 17 Minn. 61 Gil. 40; Von Glahn v. Sommer, 11 Minn. 203 Gil. 132; Johnson v. Northern Pac. Ry. Co. 39 Minn. 30, 38 N. W. 804.
[13] Oelschlegel v. Chicago etc. Ry. Co. 71 Minn. 50, 73 N. W. 631; St. Anthony Falls Bank v. Graham, 67 Minn. 318, 69 N. W. 1077; Gottstein v. St. Jean, 79 Minn. 232, 82 N. W. 311; Herrick v. Butler, 30 Minn. 156, 14 N. W. 794; Felber v. Southern Minnesota Ry. Co. 28 Minn. 156, 9 N. W. 635; Shepard v. Pettit, 30 Minn. 119, 14 N. W. 511; Hodgins v. Heaney, 15 Minn. 185 Gil. 142; State v. Bechdel, 38 Minn. 278, 37 N. W. 338; Johnson v. Northern Pacific etc. Ry. Co. 39 Minn. 30, 38 N. W. 804; Fulton v. Town of Andrea, 72 Minn. 99, 75 N. W. 4; Croft v. Miller, 26 Minn. 317, 4 N. W. 45; Ames v. The Mississippi Boom Co. 8 Minn. 467 Gil. 417; Chesterson v. Munson, 26 Minn. 18; Westervelt v. King, 4 Minn. 320 Gil. 236; Langdon v. Thompson, 25 Minn. 509; Ryan v. Kranz, 25 Minn. 362; Lamb v. McCanna, 14 Minn. 513 Gil. 385; Rogers v. Holyoke, 14 Minn. 514 Gil. 387; Searles v. Thompson, 18 Minn. 316 Gil. 285; United States etc. Co. v. Ahrens, 50 Minn. 332, 52 N. W. 898.
[14] De Blois v. Great Northern Ry. Co. 71 Minn. 45, 73 N. W. 637.

Default judgments.

§ 1723. In this state an appeal lies from a default judgment without any preliminary application for relief in the trial court.[1] It is rarely advisable, however, to take such an appeal. In the ordinary course of practice an application should first be made to the trial court to open the default and if this is not done the appellate court will sustain the judgment if possible.[2] On an appeal from a default judgment the sufficiency of the complaint may be questioned but every intendment will be indulged in its favor.[3] It is of course permissible on such an appeal to raise the objection that the court is without jurisdiction of the subject matter of the action.[4] A judgment by default entered upon a void service of summons is a nullity and an appeal lies to set it aside.[5] An appeal from a default judgment carries up only the judgment-roll and the review is limited to matters appearing thereon.[6] Error of the clerk in the taxation of

Digitized by Google

costs cannot be reviewed unless an appeal was taken to the court below.[7] In an early case it was held that error of the clerk in entering judgment upon insufficient proof of personal service could not be reviewed on such an appeal.[8] This case has never been explicitly overruled but it is inconsistent with later cases.[9] It is now the general rule that the action of the clerk in entering a default judgment is to be taken as the action of the court and reviewable as such.[10] It has been held, overruling a long line of earlier cases, that an error of the clerk in assessing damages may be reviewed on an appeal from a default judgment.[11] Where, on a motion for judgment in the district court, the order therefor is made on default, an appeal from the judgment will not avail until an application for relief has been made to the court granting the order.[12]

[1] Karns v. Kunkle, 2 Minn. 313 Gil. 268; Masterson v. Le Claire, 4 Minn. 163 Gil. 108; Reynolds v. La Crosse etc. Co. 10 Minn. 178 Gil. 144; Kennedy v. Williams, 11 Minn. 314 Gil. 219; Grant v. Schmidt, 22 Minn. 1; White v. Iltis, 24 Minn. 43; Hollinshead v. Von Glahn, 4 Minn. 190 Gil. 131; Smith v. Dennett, 15 Minn. 81 Gil. 59; Northern Trust Co. v. Markell, 61 Minn. 271, 63 N. W. 735; Brown v. Brown, 28 Minn. 501, 11 N. W. 64; Keegan v. Peterson, 24 Minn. 1; Jensen v. Crevier, 33 Minn. 372, 23 N. W. 541; Skillman v. Greenwood, 15 Minn. 102 Gil. 77; Dillon v. Porter, 36 Minn. 341, 31 N. W. 56; Hersey v. Walsh, 38 Minn. 521, 38 N. W. 613; Doud Sons & Co. v. Duluth Milling Co. 55 Minn. 53, 56 N. W. 463; Northern Trust Co. v. Albert Lea College, 68 Minn. 112, 71 N. W. 9.

[2] Karns v. Kunkle, 2 Minn. 313 Gil. 268; Hollinshead v. Von Glahn, 4 Minn. 190 Gil. 131; Smith v. Dennett, 15 Minn. 81 Gil. 59.

[3] Karns v. Kunkle, 2 Minn. 313 Gil. 268; Kennedy v. Williams, 11 Minn. 314 Gil. 219; Smith v. Dennett, 15 Minn. 81 Gil. 51; Northern Trust Co. v. Markell, 61 Minn. 271, 63 N. W. 735.

[4] G. S. 1894 § 5235.

[5] Sullivan v. The La Crosse etc. Co. 10 Minn. 386 Gil. 308. See Masterson v. Le Claire, 4 Minn. 163 Gil. 108.

[6] Brown v. Brown, 28 Minn. 501, 11 N. W. 64; Keegan v. Peterson, 24 Minn. 1; Northern Trust Co. v. Albert Lea College, 68 Minn. 112, 71 N. W. 9.

[7] Jensen v. Crevier, 33 Minn. 372, 23 N. W. 541.

[8] Masterson v. Le Claire, 4 Minn. 163 Gil. 108.

[9] Reynolds v. La Crosse etc. Co. 10 Minn. 178 Gil. 144; Kipp v. Fullerton, 4 Minn. 473 Gil. 366.

[10] Kipp v. Fullerton, 4 Minn. 473 Gil. 366; Reynolds v. La Crosse etc. Co. 10 Minn. 178 Gil. 144; Skillman v. Greenwood, 15 Minn. 102 Gil. 77; Dillon v. Porter, 36 Min. 341, 31 N. W. 56; Hersey v. Walsh, 38 Minn. 521, 38 N. W. 613.

[11] Reynolds v. La Crosse etc. Co. 10 Minn. 178 Gil. 144. Overruling, Babcock v. Sanborn, 3 Minn. 141 Gil. 86; Milwain v. Sanford, 3 Minn. 147 Gil. 92; Willoughby v. Stanton, 3 Minn.

Digitized by Google

150 Gil. 94; Slaughter v. Nininger, 3 Minn. 150 Gil. 95; Daniels v. Wainwright, 4 Minn. 171 Gil. 116; Daniels v. Harris, 4 Minn. 169 Gil. 114; Daniels v. Allen, 4 Minn. 170 Gil. 115.

[12] Gederholm v. Davies, 59 Minn. 1, 60 N. W. 676.

Appeal from orders relating to provisional and ancillary remedies.

§ 1724. The statute provides for an appeal from an order granting or refusing a provisional remedy, or which grants, refuses, dissolves, or refuses to dissolve an injunction, or an order vacating or sustaining an attachment.[1] Under this provision of the statute the following orders have been held appealable: an order vacating an attachment;[2] an order refusing to vacate an attachment;[3] an order modifying an injunction and suspending its operation in part;[4] an order refusing to appoint a receiver;[5] an order appointing a receiver;[6] an order vacating the appointment of a receiver.[7] An ex parte order granting an injunction is not appealable.[8]

[1] See § 1719.

[2] Davidson v. Owens, 5 Minn. 69 Gil. 50; Gale v. Seifert, 39 Minn. 171, 39 N. W. 69. See State v. District Court, 52 Minn. 283, 53 N. W. 1157.

[3] Thomas v. Craig, 60 Minn. 501, 62 N. W. 1133; Ely v. Titus, 14 Minn. 125 Gil. 93.

[4] Weaver v. Mississippi etc. Co. 30 Minn. 477, 16 N. W. 269.

[5] Grant v. Webb, 21 Minn. 39.

[6] State v. Egan, 62 Minn. 280, 64 Minn. 813.

[7] See Folsom v. Evans, 5 Minn. 418 Gil. 338.

[8] State v. District Court, 52 Minn. 283, 53 N. W. 1157.

Appeal from orders involving the merits.

§ 1725. The statute provides for an appeal from an order involving the merits of the action or some part thereof.[1] This remarkably liberal provision has been made a veritable stalking-horse behind which appeals from all kinds of intermediate orders have crept into the supreme court, causing vexatious delays in the trial of actions on the merits.[2] Inasmuch as any intermediate order involving the merits may be reviewed on an appeal from the final judgment this provision ought to be very strictly construed. An order involving the merits is one which determines "the strict legal rights of the parties as contradistinguished from those mere questions of practice which every court regulates for itself, and from all matters which depend upon the discretion or favor of the court."[3] It "must be decisive of the question involved, or of some strictly legal right of the party appealing. An order which leaves the point involved still pending before the court, and undetermined, cannot be said to involve the merits or affect a substantial right."[4] To be appealable under this provision the order should be, in its effect, in the nature of a final judgment in the action, or at least a final determination of some material question involved therein. It must be something more than a mere ruling or intermediate order made in the course of the trial on a question of procedure. To allow an

Digitized by Google

appeal in such cases would make the delay and expense of litigation intolerable.[8]

[1] See § 1719.

[2] Bond v. Welcome, 61 Minn. 43, 63 N. W. 3.

[3] Choteau v. Parker, 2 Minn. 118 Gil. 95; Holmes v. Campbell, 13 Minn. 66 Gil. 58; County of Chisago v. St. Paul etc. Ry. Co. 27 Minn. 109, 6 N. W. 454; National Albany Exchange Bank v. Cargill, 39 Minn. 477, 40 N. W. 570; Piper v. Johnston, 12 Minn. 60 Gil. 27; Starbuck v. Dunklee, 10 Minn. 168 Gil. 136; Plano Mfg. Co. v. Kaufert, (Minn.) 89 N. W. 1124.

[4] McMahon v. Davidson, 12 Minn. 357 Gil. 232; Nat. Albany Exchange Bank v. Cargill, 39 Minn. 477, 40 N. W. 570; Minneapolis Trust Co. v. Menage, 66 Minn. 447, 69 N. W. 224.

[5] Hulett v. Matteson, 12 Minn. 349 Gil. 227; American Book Co. v. Kingdom Publishing Co. 71 Minn. 363, 73 N. W. 1089; State v. O'Brien, 83 Minn. 6, 85 N. W. 1135.

§ 1726. Under this provision of the statute the following orders have been held appealable: an order striking out a pleading or a portion of a pleading for any cause;[1] an order vacating a judgment on default and granting defendant leave to answer;[2] an order setting aside a stipulation of counsel for a dismissal;[3] an order setting aside a stipulation as to the facts of a case;[4] an order refusing to vacate an unauthorized judgment;[5] an order setting aside a judgment in proceedings to enforce the payment of taxes;[6] an order allowing counsel fees after judgment in a divorce case;[7] an order denying a motion to strike from the files a settled case or bill of exceptions for irregularities in the settlement thereof;[8] an order of the district court, vacating its previous order, affirming on the merits an order of the probate court refusing to vacate its order allowing the account of a guardian;[9] an order granting attorneys fees in divorce proceedings;[10] an order striking a cause from the calendar on the ground that it has been transferred to another court and the validity of the attempted removal is disputed;[11] an order of sale and an order of confirmation in proceedings winding up an insolvent corporation;[12] an order after judgment allowing an amendment of the complaint and directing certain issues to be placed on the calendar for trial;[13] an order denying the motion of the defendant, appearing specially for that purpose to set aside the service of summons upon him.[14]

[1] Starbuck v. Dunklee, 10 Minn. 168 Gil. 136; Kingsley v. Gilman, 12 Minn. 515 Gil. 425; Wolf v. Banning, 3 Minn. 202 Gil. 133; Brisbin v. American Express Co. 15 Minn. 43 Gil. 25; Vermilye v. Vermilye, 32 Minn. 499, 18 N. W. 832; Harlan v. St. Paul etc. Ry. Co. 31 Minn. 427, 18 N. W. 147.

[2] Peoples' Ice Co. v. Schlenker, 50 Minn. 1, 52 N. W. 219; Holmes v. Campbell, 13 Minn. 66 Gil. 58.

[3] Rogers v. Greenwood, 14 Minn. 333 Gil. 256.

[4] Bingham v. Board of Supervisors, 6 Minn. 136 Gil. 82. But see Sunvold v. Melby, 82 Minn. 544, 85 N. W. 1135.

[5] Piper v. Johnston, 12 Minn. 60 Gil. 27.

Digitized by Google

[6] County of Chisago v. St. Paul etc. Ry. Co. 27 Minn. 109, 6 N. W. 454.
[7] Wagner v. Wagner, 34 Minn. 441, 26 N. W. 450. See Schuster v. Schuster, 84 Minn. 403, 87 N. W. 1014.
[8] Baxter v. Coughlan, 80 Minn. 322, 83 N. W. 190.
[9] Levi v. Longini, 82 Minn. 324, 84 N. W. 1017, 86 N. W. 333.
[10] Schuster v. Schuster, 84 Minn. 403, 87 N. W. 1014.
[11] Chadbourne v. Reed, 83 Minn. 447, 86 N. W. 415.
[12] Hospes v. N. W. Mfg. & Car Co. 41 Minn. 256, 43 N. W. 180.
[13] North v. Webster, 36 Minn. 99, 30 N. W. 429.
[14] Plano Mfg. Co. v. Kaufert, (Minn.) 89 N. W. 1124.

§ 1727. The following orders have been held not appealable under this provision: an order denying a motion on the trial for judgment on the pleadings;[1] an order directing a compulsory reference;[2] an order refusing to strike out a pleading;[3] an order denying a motion to make a pleading more definite and certain;[4] an order denying a motion to change the place of trial;[5] an order vacating a prior order vacating a judgment;[6] an order denying a motion to set aside a complaint on the ground that it does not conform to the notice in the summons;[7] an order modifying a prior order granting a new trial;[8] an order denying a motion to strike out and dismiss objections filed to the allowance of the account of a trustee;[9] an order refusing an application to intervene;[10] an order refusing to dismiss an appeal;[11] an order appointing a committee in proceedings to condemn land for the purpose of enlarging a cemetery under G. S. 1894 § 3096;[12] an order denying a motion to affirm an order of the probate court.[13]

[1] McMahon v. Davidson, 12 Minn. 357 Gil. 232.
[2] Bond v. Welcome, 61 Minn. 43, 63 N. W. 3.
[3] National Albany Exchange Bank v. Cargill, 39 Minn. 477, 40 N. W. 577; Rice v. First Division St. Paul etc. Ry. Co. 24 Minn. 447; Vermilye v. Vermilye, 32 Minn. 499, 18 N. W. 832; Exley v. Berryhill, 36 Minn. 117, 30 N. W. 436.
[4] American Book Co. v. Kingdom Publishing Co. 71 Minn. 363, 73 N. W. 1089; State v. O'Brien, 83 Minn. 6, 85 N. W. 1135.
[5] Carpenter v. Comfort, 22 Minn. 539; Allis v. White, 59 Minn. 97, 60 N. W. 809; Mayall v. Burke, 10 Minn. 285 Gil. 224.
[6] State v. Crosley Park Land Co. 63 Minn. 205, 65 N. W. 268.
[7] Board County Com'rs v. Young, 21 Minn. 335.
[8] Chouteau v. Parker, 2 Minn. 118 Gil. 95.
[9] Minneapolis Trust Co. v. Menage, 66 Minn. 447, 69 N. W. 224.
[10] Bennett v. Whitcomb, 25 Minn. 148.
[11] Rabitte v. Nathan, 22 Minn. 266.
[12] Forest Cemetery Assoc. v. Constans, 70 Minn. 436, 73 N. W. 153.
[13] McGinty v. Kelley, 85 Minn. 117, 88 N. W. 430.

Appeal from orders granting or denying a new trial.

§ 1728. The statute provides for an appeal from an order granting or refusing a new trial.[1] Before the enactment of this provision

Digitized by Google

it was held that such orders were not appealable.[2] A new trial means a retrial of issues of fact as distinguished from issues of law and hence an order denying a motion to vacate an order sustaining a demurrer and for a new trial on the demurrer is not appealable as an order denying a new trial.[3] When an action is tried by the court without a jury a party may move for a new trial and from the order made on the motion an appeal lies to the supreme court.[4] So also an appeal lies from an order of the district court granting or denying a motion for a new trial after a trial by a referee.[5] An order refusing to vacate an order denying a new trial is not appealable.[6] An order granting or denying a new trial is appealable although made after the entry of judgment.[7] As the law formerly stood an order of the court was necessary to give a party a second trial of right in an action in the nature of ejectment and such order was held appealable.[8] A mere pro forma order denying a new trial is not appealable.[9] An order granting or denying a new trial under G. S. 1894 § 5267 is appealable.[10] An order modifying a prior order granting a new trial is not appealable.[11] A refusal to entertain a motion for a new trial is in effect a denial of such a motion and appealable as such.[12]

[1] See § 1719.
[2] Chouteau v. Rice, 1 Minn. 121 Gil. 97; Dufolt v. Gorman, 1 Minn. 301 Gil. 234.
[3] Dodge v. Bell, 37 Minn. 382, 34 N. W. 739.
[4] Chittenden v. German American Bank, 27 Minn. 143, 6 N. W. 773; Ashton v. Thompson, 28 Minn. 330, 9 N. W. 876.
[5] Thayer v. Barney, 12 Minn. 502 Gil. 406.
[6] Little v. Leighton, 46 Minn. 201, 48 N. W. 778.
[7] Humphrey v. Havens, 9 Minn. 318 Gil. 301; Schuek v. Hagar, 24 Minn. 339.
[8] Howes v. Gillett, 10 Minn. 397 Gil. 316.
[9] Johnson v. Howard, 25 Minn. 558.
[10] Sheffield v. Mullin, 28 Minn. 251, 9 N. W. 756.
[11] Chouteau v. Parker, 2 Minn. 118 Gil. 95.
[12] Ashton v. Thompson, 28 Minn. 330, 9 N. W. 876; McCord v. Knowlton, 76 Minn. 391, 79 N. W. 397.

Appeal from an order sustaining or overruling a demurrer.

§ 1729. The statute provides for an appeal from an order sustaining or overruling a demurrer.[1] Prior to 1861 no appeal was allowed from such an order.[2] Laws 1861 ch. 21 authorized an appeal from any order made on a demurrer.[3] This provision was not included in the Revision of 1866. Our present statute was enacted in 1867.[4] Of course the right to appeal from an order sustaining or overruling a demurrer does not cut off the right to appeal from a judgment entered on a demurrer. A party has an option either to appeal from the order made on the demurrer or to wait until a judgment is entered thereon and then appeal from the judgment. On the appeal from the judgment the order made on the demurrer may be reviewed as an intermediate order involving the merits. But

Digitized by Google

a party cannot appeal from the order and judgment at the same time[5] and of course if an appeal is taken from the order the decision thereon would be conclusive on a subsequent appeal from the judgment. In our practice the appeal is almost uniformly taken from the order. An order striking out a demurrer as frivolous has always been treated as appealable in this state,[6] but it has apparently never been decided whether it is appealable by virtue of this or the third subdivision of the statute. The statute does not apply to a criminal action.[7]

[1] See § 1719.
[2] Cummings v. Heard, 2 Minn. 34 Gil. 25; Sons of Temperance v. Brown, 9 Minn. 151 Gil. 141.
[3] Sons of Temperance v. Brown, 9 Minn. 151 Gil. 141.
[4] Laws 1867 ch. 63.
[5] Hatch & Essendrup Co. v. Schusler, 46 Minn. 207, 48 N. W. 782.
[6] Hatch & Essendrup Co. v. Schusler, 46 Minn. 207, 48 N. W. 782; Olsen v. Cloquet Lumber Co. 61 Minn. 17, 63 N. W. 95; Friesenhahn v. Morrill, 52 Minn. 55, 53 N. W. 1024.
[7] State v. Abrisch, 42 Minn. 202, 43 N. W. 1115.

§ 1730. When a party by leave of court withdraws his demurrer and pleads over he is held to waive objection to the decision on demurrer.[1] So, also, by amending his pleading after demurrer a party is held to waive his objection.[2] The failure of a party demurring to appear at the hearing below does not prevent him from being heard on appeal.[3] Where a demurrer based on two grounds is sustained upon one of them, the court holding the other not good, the demurrant cannot appeal.[4]

[1] Coit v. Waples, 1 Minn. 134 Gil. 110; Thompson v. Ellenz, 58 Minn. 301, 59 N. W. 1023; Cook v. Kittson, 68 Minn. 474, 71 N. W. 670. See Dunnell, Minn. Pl. §§ 413, 414.
[2] Becker v. Sandusky City Bank, 1 Minn. 311 Gil. 243.
[3] Hall v. Williams, 13 Minn. 260 Gil. 242.
[4] Commonwealth Ins. Co. v. Pierro, 6 Minn. 569 Gil. 404.

§ 1731. Unless the decision on demurrer is practically decisive of his cause of action under any complaint which the facts would warrant it is ordinarily advisable for the plaintiff to amend his complaint to conform to the views of the court rather than to appeal.

Benton v. Schulte, 31 Minn. 312, 17 N. W. 621.

Appeal from order determining action and preventing a judgment.

§ 1732. The statute provides for an appeal from an order, which, in effect, determines the action, and prevents a judgment from which an appeal might be taken.[1] The following orders have been held appealable under this provision: an order vacating a prior order setting aside a judgment, the second order being made after the time to appeal from the judgment had expired;[2] an order dismissing an appeal from an order of the town supervisors laying out a highway and from their award of damages;[3] an order discharging a garnishee;[4] an order in insolvency proceedings setting aside insurance money as exempt;[5] an order denying the petition of a creditor in

Digitized by Google

insolvency proceedings to be permitted to file his claim for allowance after the time limited;[6] an order for judgment without proof upon a demurrer in an equitable action being overruled;[7] an order dismissing an appeal from a justice court.[8]

[1] See § 1719.
[2] Marty v. Ahl, 5 Minn. 27 Gil. 14.
[3] Town of Haven v. Orton, 37 Minn. 445, 35 N. W. 264.
[4] McConnell v. Rakness, 41 Minn. 3, 42 N. W. 539.
[5] In re How, 59 Minn. 415, 61 N. W. 456.
[6] Richter v. Merchants' Nat. Bank, 65 Minn. 237, 67 N. W. 995.
[7] Deuel v. Hawke, 2 Minn. 50 Gil. 37.
[8] Ross v. Evans, 30 Minn. 206, 14 N. W. 897. Overruled by statute, Graham v. Conrad, 66 Minn. 470, 69 N. W. 215; Taylor v. Red Lake Falls Lumber Co. 81 Minn. 492, 84 N. W. 301.

§ 1733. The following orders have been held not appealable under this provision: an order dismissing an action before trial on the application of the plaintiff;[1] an order dismissing an appeal from a justice court;[2] an order denying a motion to dismiss an appeal from the probate court;[3] an order appointing a committee in proceedings to condemn land for the purpose of enlarging a cemetery under G. S. 1894 § 3096;[4] an order denying a motion to set aside the report of commissioners in condemnation proceedings;[5] an order denying a motion to set aside a complaint on the ground that it does not conform to the notice in the summons;[6] an order denying a motion to affirm an order of the probate court allowing the account of an executor;[7] an order refusing to strike a cause from the calendar;[8] an order denying the motion of the defendant appearing specially for that purpose, to set aside the service of summons upon him.[9]

[1] Jones v. Rahilly, 16 Minn. 177 Gil. 155.
[2] Graham v. Conrad, 66 Minn. 470, 69 N. W. 215.
[3] Kelly v. Hopkins, 72 Minn. 258, 75 N. W. 374; Rabitte v. Nathan, 22 Minn. 266.
[4] Forest Cemetery Assoc. v. Constans, 70 Minn. 436, 73 N. W. 153.
[5] Fletcher v. Chicago etc. Ry. Co. 67 Minn. 339, 69 N. W. 1085.
[6] Board County Commissioners v. Young, 21 Minn. 335.
[7] McGinty v. Kelley, 85 Minn. 117, 88 N. W. 430.
[8] Chadbourne v. Reed, 83 Minn. 447, 86 N. W. 415.
[9] Plano Mfg. Co. v. Raufert, (Minn.) 89 N. W. 1124.

Appeal from final orders in special proceedings.

§ 1734. The statute provides for an appeal from a final order affecting a substantial right, made in a special proceeding, or upon a summary application in an action after judgment.[1] A mere interlocutory or administrative order is not a "final" order.[2] A final order is one that ends a proceeding so far as the court making it is concerned.[3] The phrase "special proceeding" is a generic term for all civil remedies in courts of justice which are not ordinary actions.[4]

[1] See § 1719.
[2] Brown v. Minnesota Thresher Mfg. Co. 44 Minn. 322, 46 N. W. 560.

Digitized by Google

[3] Rondeau v. Beaumette, 4 Minn. 224 Gil. 163.
[4] Schuster v. Schuster, 84 Minn. 403, 87 N. W. 1014.

§ 1735. The following orders have been held appealable under this provision: an order granting leave to issue execution after the statutory time;[1] an order made upon a disclosure in proceedings supplementary to execution, directing the assignment of certain claims belonging to the judgment debtor and appointing a receiver to collect the same;[2] an order made under G. S. 1894 § 788 directing a sheriff to pay over certain moneys collected by him on execution;[3] an order appointing a receiver under the insolvency law of 1881;[4] an order directing a receiver to distribute the proceeds of the estate of an insolvent equally among all his creditors and setting aside the liens of attaching and execution creditors;[5] an order in insolvency proceedings dismissing a petition under G. S. 1894 § 4249;[6] an order denying a motion to correct a judgment entered by the clerk and not conforming to the findings;[7] an order in proceedings for contempt other than criminal;[8] an order vacating an execution sale of real estate, the certificate and sheriff's return;[9] an order dismissing a motion under G. S. 1894 § 5435 to compel an entry of satisfaction of a judgment;[10] an order discharging a person on habeas corpus;[11] an order vacating an order discharging a person on habeas corpus;[12] an order allowing a peremptory writ of mandamus;[13] an order directing a sheriff who has possession of warrants by virtue of replevin proceedings to turn them over to a receiver in another action;[14] an order denying a motion under Laws 1877 ch. 79 to open a tax judgment;[15] an order denying a motion to vacate a judgment of divorce and to allow defendant to answer;[16] an order denying an application to vacate a judgment rendered against a party after his decease;[17] an order made on a motion to correct a judgment entered by the clerk on insufficient evidence of personal service of summons;[18] an order appointing or refusing to appoint a receiver in proceedings supplementary to execution;[19] an order in condemnation proceedings dismissing an appeal from the award of the commissioners;[20] an order on disclosure in proceedings supplementary to execution directing the payment of money by the judgment debtor;[21] an order setting apart to the insolvent, in insolvency proceedings, insurance money exempt by law;[22] an order denying a new trial in condemnation proceedings;[23] an order setting aside a judgment in proceedings to enforce the payment of taxes under Laws 1878 ch. 11;[24] an order in proceedings on certiorari quashing the proceedings of county commissioners in forming a new school district;[25] an order, made pursuant to G. S. 1894 § 2046 relating to bastardy proceedings, denying the defendant's application for his discharge;[26] an order granting attorneys fees in divorce proceedings;[27] an order permitting creditors of an insolvent to share in his estate without filing releases of their debts;[28] an order discharging a garnishee after examination;[29] an order of sale and an order confirming a sale in proceedings winding up an insolvent corporation;[30] an order assessing stockholders in proceedings under

Digitized by Google

chapter 76;[21] an order allowing claims of creditors in proceedings under chapter 76.[22]

[1] Entrop v. Williams, 11 Minn. 381 Gil. 276.
[2] Knight v. Nash, 22 Minn. 452.
[3] Coykendall v. Way, 29 Minn. 162, 12 N. W. 452.
[4] In re Graeff, 30 Minn. 358, 16 N. W. 395; In re Jones, 33 Minn. 405, 23 N. W. 835. See Brown v. Minnesota Thresher Mfg. Co. 44 Minn. 322, 46 N. W. 560.
[5] State v. Severance, 29 Minn. 269, 13 N. W. 48. See Brown v. Minnesota Thresher Mfg. Co. 44 Minn. 322, 46 N. W. 560.
[6] In re Harrison, 46 Minn. 331, 48 N. W. 1132.
[7] Nell v. Dayton, 47 Minn. 257, 49 N. W. 981.
[8] State v. Leftwich, 41 Minn. 42, 42 N. W. 598; In re Fanning, 40 Minn. 4, 41 N. W. 1076; State v. Willis, 61 Minn. 120, 63 N. W. 169; Semrow v. Semrow, 26 Minn. 9, 46 N. W. 446; Menage v. Lustfield, 30 Minn. 487, 16 N. W. 398; Papke v. Papke, 30 Minn. 260, 15 N. W. 117; Registor v. State, 8 Minn. 214 Gil. 185.
[9] Hutchins v. County Com'rs, 16 Minn. 13 Gil. 1; Tillman v. Jackson, 1 Minn. 183 Gil. 157.
[10] Ives v. Phelps, 16 Minn. 451 Gil. 407.
[11] State v. Buckham, 29 Minn. 462, 13 N. W. 902.
[12] State v. Hill, 10 Minn. 63 Gil. 45.
[13] State v. Webber, 31 Minn. 211, 17 N. W. 339. Overruled, Stat v. Copeland, 74 Minn. 371, 77 N. W. 221.
[14] Elwell v. Goodnow, 71 Minn. 390, 73 N. W. 1095.
[15] Com'rs of Aitkin County v. Morrison, 25 Minn. 295. See County of Chisago v. St. Paul & Duluth Ry. Co. 27 Minn. 109, 6 N W. 454.
[16] Young v. Young, 17 Minn. 181 Gil. 153.
[17] Stocking v. Hanson, 22 Minn. 542.
[18] Masterson v. Le Claire, 4 Minn. 163 Gil. 108.
[19] Knight v. Nash, 22 Minn. 452; Roeller v. Ames, 33 Minn. 132, 22 N. W. 177.
[20] Warren v. First Division St. Paul etc. Ry. Co. 18 Minn. 384 Gil. 345. See Conter v. St. Paul etc. Ry. Co. 24 Minn. 315.
[21] Christensen v. Tostevin, 51 Minn. 230, 53 N. W. 461.
[22] In re How, 59 Minn. 415, 61 N. W. 456.
[23] Minnesota Valley Ry. Co. v. Doran, 15 Minn. 230 Gil. 178.
[24] County of Chisago v. St. Paul & Duluth Ry. Co. 27 Minn. 109, 6 N. W. 454.
[25] Moede v. County of Stearns, 43 Minn. 312, 45 N. W. 435.
[26] State v. District Court, 79 Minn. 27, 81 N. W. 536.
[27] Schuster v. Schuster, 84 Minn. 403, 87 N. W. 1014.
[28] Ekberg v. Schloss, 62 Minn. 427, 64 N. W. 922.
[29] McConnell v. Rakness, 41 Minn. 3, 42 N. W. 539.
[30] Hospes v. N. W. Mfg. & Car Co. 41 Minn. 256, 43 N. W. 180.
[31] London etc. Co. v. St. Paul etc. Co. 84 Minn. 144, 86 N. W. 872.
[32] Id.

Digitized by Google

§ 1736. The following orders have been held not appealable under this provision: an order to appear and answer and of reference in proceedings supplementary to execution;[1] an order refusing an application to intervene;[2] an order denying a motion to strike out and dismiss objections filed to the allowance of the account of a trustee;[3] an order denying a motion to set aside the report of commissioners in condemnation proceedings;[4] an order appointing a committee in proceedings to condemn land for the purpose of a cemetery;[5] an order denying a motion to dismiss an appeal from the probate court;[6] an order dismissing an appeal from the award of water commissioners under Special Laws 1881 ch. 188;[7] an order granting a new trial in condemnation proceedings;[8] an order denying a motion to dismiss a petition under the statute relating to dams and mills;[9] an order appointing commissioners in condemnation proceedings;[10] an order refusing to dismiss an appeal from the probate court;[11] an order denying a motion to affirm an order of the probate court allowing the account of an executor;[12] an order vacating a previous order of dismissal in insolvency proceedings;[13] an order denying a motion for a new trial, after the entry of judgment in proceedings to enforce the collection of assessments for local improvements under the charter of the city of St. Paul;[14] an administrative order in action to wind up corporation.[15]

[1] Rondeau v. Beaumette, 4 Minn. 224 Gil. 163 (overruled by statute).
[2] Bennett v. Whitcomb, 25 Minn. 148.
[3] Minneapolis Trust Co. v. Menage, 66 Minn. 447, 69 N. W. 224.
[4] Fletcher v. Chicago etc. Ry. Co. 67 Minn. 339, 69 N. W. 1085.
[5] Forest Cemetery Assoc. v. Constans, 70 Minn. 436, 73 N. W. 153.
[6] Kelly v. Hopkins, 72 Minn. 258, 75 N. W. 374.
[7] Gurney v. City of St. Paul, 36 Minn. 163, 30 N. W. 661.
[8] McNamara v. Minnesota Central Ry. Co. 12 Minn. 388 Gil. 269. But see Witt v. St. Paul etc. Ry. Co. 35 Minn. 404, 29 N. W. 161.
[9] Turner v. Holleran, 11 Minn. 253 Gil. 168.
[10] Duluth Transfer Ry. Co. v. Duluth Terminal Ry. Co. 81 Minn. 62, 83 N. W. 497.
[11] Kelley v. Hopkins, 72 Minn. 258, 75 N. W. 374.
[12] McGinty v. Kelley, 85 Minn. 117, 88 N. W. 430.
[13] In re Studdart, 30 Minn. 553, 16 N. W. 452.
[14] City of St. Paul v. Rogers, 22 Minn. 492.
[15] Brown v. Minnesota Thresher Mfg. Co. 44 Minn. 322, 46 N. W. 560.

Appealable orders—enumeration of.

§ 1737. An appeal lies from the following orders: granting or denying a new trial;[1] granting an injunction,[2] except ex parte;[3] refusing an injunction;[4] dissolving an injunction;[5] refusing to dissolve an injunction;[6] vacating an attachment;[7] refusing to vacate an attachment;[8] sustaining a demurrer;[9] overruling a demurrer;[10] vacating a judgment on default and granting defendant leave to an-

Digitized by Google

swer;[11] striking out a pleading or a portion of a pleading, for any cause;[12] refusing to vacate an unauthorized judgment;[13] setting aside a judgment in proceedings to enforce the payment of taxes;[14] discharging a garnishee;[15] discharging a person on habeas corpus;[16] vacating an order discharging a person on habeas corpus;[17] granting or denying a blended motion for a judgment notwithstanding the verdict or a new trial;[18] denying a motion to correct a judgment entered by the clerk and not conforming to the findings;[19] directing the payment of money by the judgment debtor upon disclosure in proceedings supplementary to execution;[20] appointing a receiver in proceedings supplementary to execution;[21] appointing a receiver in foreclosure proceedings;[22] refusing to appoint a receiver;[23] vacating the appointment of a receiver;[24] directing a sheriff to turn property levied upon over to a receiver in insolvency proceedings;[25] directing a sheriff who has possession of warrants by virtue of replevin proceedings to turn them over to a receiver in another action;[26] setting apart to the insolvent in insolvency proceedings insurance money exempt by law;[27] committing or punishing a party for contempt, not criminal;[28] denying a motion to strike from the files a settled case or bill of exceptions for irregularities in the settlement thereof;[29] setting aside a stipulation of counsel for a dismissal;[30] setting aside a stipulation as to the facts of a case;[31] allowing counsel fees in divorce proceedings;[32] appointing commissioners in condemnation proceedings;[33] directing the sheriff to pay over money under G. S. 1894 § 788;[34] dismissing motion under G. S. 1894 § 5435 to compel entry of satisfaction of judgment;[35] denying motion, under Laws 1877 ch. 79, to open a tax judgment;[36] granting leave to issue execution after time limited by statute;[37] vacating an execution sale of real estate, the certificate and sheriff's return;[38] dismissing an appeal from an order of the town supervisors laying out a highway;[39] appointing a receiver under the insolvency law of 1881;[40] vacating a previous order affirming on the merits an order of the probate court refusing to vacate its order allowing the account of a guardian;[41] striking a case from the calendar on the ground that the cause has been transferred to another court;[42] directing and confirming a sale in proceedings winding up an insolvent corporation;[43] allowing an amendment of the complaint after judgment and directing certain issues to be placed on the calendar for trial;[44] dismissing a petition, in insolvency proceedings, under G. S. 1894 § 4249;[45] denying a motion to vacate a judgment of divorce and to allow defendant to answer;[46] denying an application to vacate a judgment rendered against a party after his decease;[47] dismissing an appeal in condemnation proceedings;[48] denying a new trial in condemnation proceedings;[49] quashing the proceedings of county commissioners in forming a new school district;[50] denying an application under G. S. 1894 § 2046 for a discharge in bastardy proceedings;[51] allowing creditors to share in estate without filing releases;[52] assessing stockholders under chapter 76;[53] allowing claims of creditors under chapter 76;[54] vacating a prior order setting aside a judgment;[55] denying the peti-

Digitized by Google

tion of a creditor in insolvency proceedings to be permitted to file his claim for allowance after the time limited;[56] in supplementary proceedings;[57] denying the motion of defendant appearing specially for that purpose, to set aside the service of summons upon him.[58]

[1] See § 1728. [2] See § 1724.
[3] State v. District Court, 52 Minn. 285, 53 N. W. 1157.
[4] See § 1724. [5] See § 1724. [6] See § 1724.
[7] See § 1724. [8] See § 1724. [9] See § 1729.
[10] See § 1729.
[11] People's Ice Co. v. Schlenker, 50 Minn. 1, 52 N. W. 219; Holmes v. Campbell, 13 Minn. 66 Gil. 58.
[12] Starbuck v. Dunklee, 10 Minn. 168 Gil. 136; Kingsley v. Gilman, 12 Minn. 515 Gil. 425; Vermilye v. Vermilye, 32 Minn. 499, 18 N. W. 832; Brisbin v. Amer. Ex. Co. 15 Minn. 43 Gil. 25; Harlan v. St. Paul etc. Ry. Co. 31 Minn. 427, 18 N. W. 147; Wolf v. Banning, 3 Minn. 202 Gil. 133.
[13] Piper v. Johnson, 12 Minn. 60 Gil. 27.
[14] County of Chisago v. St. Paul etc. Ry. Co. 27 Minn. 109, 6 N. W. 454.
[15] McConnell v. Rakness, 41 Minn. 3, 42 N. W. 539.
[16] State v. Buckham, 29 Minn. 462, 13 N. W. 902.
[17] State v. Hill, 10 Minn. 63 Gil. 45.
[18] Kernan v. St. Paul City Ry. Co. 64 Minn. 312, 67 N. W. 71.
[19] Nell v. Dayton, 47 Minn. 257, 49 N. W. 981.
[20] Christensen v. Tostevin, 51 Minn. 230, 53 N. W. 461.
[21] In re Graeff, 30 Minn. 358, 16 N. W. 395; In re Jones, 33 Minn. 405, 23 N. W. 835.
[22] State v. Egan, 62 Minn. 280, 64 N. W. 814.
[23] Grant v. Webb, 21 Minn. 39.
[24] Folsom v. Evans, 5 Minn. 418 Gil. 338.
[25] In re Jones, 33 Minn. 405, 23 N. W. 835.
[26] Elwell v. Goodnow, 71 Minn. 390, 73 N. W. 1095.
[27] In re How, 59 Minn. 415, 61 N. W. 456.
[28] State v. Willis, 61 Minn. 120, 63 N. W. 169; State v. Leftwich, 41 Minn. 42, 42 N. W. 598; In re Fanning, 40 Minn. 4, 41 N. W. 1076; Semrow v. Semrow, 26 Minn. 9, 46 N. W. 446; Menage v. Lustfield, 30 Minn. 487, 16 N. W. 398; Papke v. Papke, 30 Minn. 260, 15 N. W. 117; Register v. State, 8 Minn. 214 Gil. 185.
[29] Baxter v. Coughlan, 80 Minn. 322, 83 N. W. 190.
[30] Rogers v. Greenwood, 14 Minn. 333 Gil. 256.
[31] Bingham v. Board of Supervisors, 6 Minn. 136 Gil. 82. See Sunvold v. Melby, 82 Minn. 544, 85 N. W. 549.
[32] Wagner v. Wagner, 34 Minn. 441, 26 N. W. 450; Schuster v. Schuster, 84 Minn. 403, 87 N. W. 1014.
[33] In re St. Paul etc. Ry. Co. 34 Minn. 227, 25 N. W. 345.
[34] Coykendall v. Way, 29 Minn. 162, 12 N. W. 452.
[35] Ives v. Phelps, 16 Minn. 451 Gil. 407.
[36] Com'rs of Aitkin County v. Morrison, 25 Minn. 295. See County of Chisago v. St. Paul etc. Ry. Co. 27 Minn. 109, 6 N. W. 454.

Digitized by Google

[37] Entrop v. Williams, 11 Minn. 381 Gil. 276.
[38] Hutchins v. Board of County Com'rs, 16 Minn. 13 Gil. 1; Tillman v. Jackson, 1 Minn. 183 Gil. 157.
[39] Town of Haven v. Orton, 37 Minn. 445, 35 N. W. 264.
[40] Knight v. Nash, 22 Minn. 452; Roeller v. Ames, 33 Minn. 132, 22 N. W. 177.
[41] Levi v. Longini, 82 Minn. 324, 84 N. W. 1017, 86 N. W. 333.
[42] Chadbourne v. Reed, 83 Minn. 447, 86 N. W. 415.
[43] Hospes v. N. W. Mfg. & Car Co. 41 Minn. 256, 43 N. W. 180.
[44] North v. Webster, 36 Minn. 99, 30 N. W. 429.
[45] In re Harrison, 46 Minn. 331, 48 N. W. 1132.
[46] Young v. Young, 17 Minn. 181 Gil. 153.
[47] Stocking v. Hanson, 22 Minn. 542.
[48] Warren v. First Division St. Paul etc. Ry. Co. 18 Minn. 384 Gil. 345. See Conter v. St. Paul etc. Ry. Co. 24 Minn. 315.
[49] Minnesota Valley Ry. Co. v. Doran, 15 Minn. 230 Gil. 178.
[50] Moede v. County of Stearns, 43 Minn. 312, 45 N. W. 435.
[51] State v. District Court, 79 Minn. 27, 81 N. W. 536.
[52] Ekberg v. Schloss, 62 Minn. 427, 64 N. W. 922.
[53] London etc. Co. v. St. Paul etc. Co. 84 Minn. 144, 86 N. W. 872.
[54] Id.
[55] Marty v. Ahl, 5 Minn. 27 Gil. 14.
[56] Richter v. Merchants Nat. Bank, 65 Minn. 237, 67 N. W. 995.
[57] G. S. 1894 § 5489 overruling Rondeau v. Beaumette, 4 Minn. 224 Gil. 163.
[58] Plano Mfg. Co. v. Kaufert, (Minn.) 89 N. W. 1124.

Non-appealable orders—enumeration of.

§ 1738. No appeal lies from the following orders: dismissing an action on the trial for insufficiency of the evidence [1] or for insufficiency of the pleadings; [2] refusing to dismiss an action on the trial for insufficiency of the evidence, [3] or for insufficiency of the pleadings, [4] or for want of jurisdiction; [5] granting a motion on the trial for judgment on the pleadings; [6] refusing a motion on the trial for judgment on the pleadings; [7] directing a compulsory reference; [8] granting or refusing an amendment of the pleadings on the trial; [9] admitting or excluding evidence on the trial; [10] refusing to strike out a pleading as sham; [11] refusing to strike out allegations claimed to be irrelevant and redundant; [12] denying motion to make a pleading more definite and certain; [13] refusing to strike out portions of a pleading for duplicity; [14] denying a motion for a change of venue; [15] denying a motion for additional or amended findings; [16] for judgment; [17] setting aside a judgment upon a question of practice as to the service of an answer; [18] requiring a bill of particulars to be made more specific; [19] dismissing an application for the settlement of a bill of exceptions or case; [20] settling and allowing a case or bill of exceptions; [21] denying a motion to amend or change conclusions of law; [22] granting an injunction ex parte; [23] vacating a prior order vacating a judgment; [24] refusing to set aside garnishment proceedings for insufficiency of the affidavit and granting plaintiff leave to file a supple-

Digitized by Google

mental complaint;[25] refusing to dismiss an appeal from the probate to the district court;[26] appointing a committee in proceedings to condemn land for a cemetery;[27] denying a motion to set aside the report of the commissioners in condemnation proceedings;[28] granting a receiver leave to bring action to enforce the statutory liability of stockholders;[29] denying motion for judgment on the findings after reversal on appeal;[30] denying a motion for a new trial on an issue of law;[31] denying a motion to set aside a complaint on the ground that it does not conform to the notice in the summons;[32] refusing permission to intervene;[33] dismissing an action before trial on the application of the plaintiff;[34] dismissing an appeal from a justice court;[35] refusing to dismiss an appeal from the award of commissioners in railway condemnation proceedings;[36] refusing to dismiss an appeal from the award of water commissioners proceeding under a city charter;[37] refusing leave to serve a case after the statutory time;[38] setting aside taxation of costs and ordering retaxation;[39] on default under rule 10 of the district court;[40] refusing an application for the removal of a cause from a state to a federal court;[41] requiring payment of costs as a condition of continuance;[42] affirming taxation of costs in justice court;[43] determining a party's right to costs;[44] in proceedings for criminal contempt;[45] granting or denying a motion to vacate a nonappealable order;[46] modifying a prior order granting a new trial;[47] denying a motion to strike out and dismiss objections filed to the allowance of the account of a trustee;[48] directing judgment upon an appeal from a justice court;[49] an "opinion" of the court;[50] "findings" of the court;[51] "decision" of the court;[52] refusing to dismiss an appeal from the probate court;[53] made ex parte;[54] dismissing an action for want of prosecution;[55] appointing commissioners in condemnation proceedings;[56] opening the case and permitting a party to offer further evidence upon certain points;[57] denying a motion made under the provisions of Laws 1895 ch. 320, for the entry of judgment in favor of the moving party, notwithstanding the verdict against him;[58] denying a motion to affirm an order of the probate court allowing the account of an executor;[59] a conditional order before compliance with the condition;[60] refusing to discharge a garnishee;[61] striking a cause from the calendar for any cause which does not prevent a trial of the action at some future term;[62] refusing to strike a cause from the calendar;[63] granting a peremptory writ of mandamus;[64] denying a stay of proceedings;[65] granting leave to file a claim in insolvency proceedings after the time limited;[66] in tax proceedings;[67] vacating a previous order of dismissal and reinstating a petition in insolvency proceedings;[68] discharging an order to show cause and a restraining order;[69] denying a new trial after judgment in special proceedings for the collection of assessments for local improvements under the charter of the city of St. Paul;[70] denying, in an election contest, as a matter of strict legal right, the contestant's motion to amend his notice of contest.[71]

[1] Searles v. Thompson, 18 Minn. 316 Gil. 285; Hodgins v. Heaney, 15 Minn. 185 Gil. 142; Gottstein v. St. Jean, 79 Minn. 232, 82 N. W. 311.

Digitized by Google

[2] Thorp v. Lorenz, 34 Minn. 350, 25 N. W. 712.
[3] See cases under (4), (5) and (6).
[4] McMahon v. Davidson, 12 Minn. 357 Gil. 232.
[5] Pillsbury v. Foley, 61 Minn. 434, 63 N. W. 1027.
[6] Lamb v. McCanna, 14 Minn. 513 Gil. 385; Rogers v. Holyoke, 14 Minn. 514 Gil. 387; United States etc. Co. v. Ahrens, 50 Minn. 332, 52 N. W. 898; Hodgins v. Heaney, 15 Minn. 185 Gil. 142; Lockwood v. Bock, 46 Minn. 73, 48 N. W. 458.
[7] McMahon v. Davidson, 12 Minn. 357 Gil. 232; Lockwood v. Bock, 46 Minn. 73, 48 N. W. 458.
[8] Bond v. Welcome, 61 Minn. 43, 63 N. W. 3.
[9] Macauley v. Ryan, 55 Minn. 507, 57 N. W. 151; White v. Culver, 10 Minn. 192 Gil. 155; City of Winona v. Minnesota Ry. Const. Co. 25 Minn. 328; Fowler v. Atkinson, 5 Minn. 505 Gil. 399; Hanley v. Board of County Com'rs, (Minn.) 91 N. W. 756.
[10] Hulett v. Matteson, 12 Minn. 345 Gil. 227.
[11] National Albany Exchange Bank v. Cargill, 39 Minn. 477, 40 N. W. 570.
[12] Rice v. First Division etc. Ry. Co. 24 Minn. 447; Vermilye v. Vermilye, 32 Minn. 499, 18 N. W. 832.
[13] American Book Co. v. Kingdom Publishing Co. 71 Minn. 363, 73 N. W. 1089; State v. O'Brien, 83 Minn. 6, 85 N. W. 1135.
[14] Exley v. Berryhill, 36 Minn. 117, 30 N. W. 436.
[15] Carpenter v. Comfort, 22 Minn. 539; Allis v. White, 59 Minn. 97, 60 N. W. 809; Mayall v. Burke, 10 Minn. 285 Gil. 224.
[16] Rogers v. Hedemark, 70 Minn. 441, 73 N. W. 252; Lamprey v. St. Paul etc. Ry. Co. (Minn. 1902) 91 N. W. 29.
[17] See § 1722 (13).
[18] Westervelt v. King, 4 Minn. 320 Gil. 236.
[19] Van Zandt v. Wood Produce Co. 54 Minn. 202, 55 N. W. 863.
[20] Richardson v. Rogers, 37 Minn. 461, 35 N. W. 270; State v. Cox, 26 Minn. 214, 2 N. W. 494; State v. Macdonald, 30 Minn. 98, 14 N. W. 459; State v. Baxter, 38 Minn. 137, 36 N. W. 108.
[21] Arine v. Minneapolis etc. Ry. Co. 76 Minn. 201, 78 N. W. 1108.
[22] Wheadon v. Mead, 71 Minn. 322, 73 N. W. 975; Shepard v. Pettit, 30 Minn. 119; Lamprey v. St. Paul etc. Ry. Co. (Minn. 1902) 91 N. W. 29, 14 N. W. 511; Savings Bank of St. Paul v. St. Paul Plow Co. 76 Minn. 7, 78 N. W. 7.
[23] State v. District Court, 52 Minn. 286, 53 N. W. 1157.
[24] State v. Crosley Park Land Co. 63 Minn. 205, 65 N. W. 268.
[25] Prince v. Heenan, 5 Minn. 347 Gil. 279.
[26] Kelly v. Hopkins, 72 Minn. 258, 75 N. W. 374; Rabitte v. Nathan, 22 Minn. 266.
[27] Forest Cemetery Assoc. v. Constans, 70 Minn. 436, 73 N. W. 153.
[28] Fletcher v. Chicago etc. Ry. Co. 67 Minn. 339, 69 N. W. 1085; Duluth Transfer Ry. Co. v. Duluth Terminal Ry. Co. 81 Minn. 62, 83 N. W. 497.
[29] Bank of Minnesota v. Anderson, 70 Minn. 414, 73 N. W. 175.
[30] Fulton v. Town of Andrea, 72 Minn. 99, 75 N. W. 4.

Digitized by Google

[31] St. Cloud Common Council v. Karels, 55 Minn. 155, 56 N. W. 592.
[32] Board of County Com'rs v. Young, 21 Minn. 335.
[33] Bennett v. Whitcomb, 25 Minn. 148.
[34] Jones v. Rahilly, 16 Minn. 177 Gil. 155; Fallman v. Gilman, 1 Minn. 179 Gil. 153.
[35] Graham v. Conrad, 66 Minn. 470, 69 N. W. 215; Taylor v. Red Lake Falls Lumber Co. 81 Minn. 492, 84 N. W. 301.
[36] Minnesota Central Ry. Co. v. Peterson, 31 Minn. 42, 16 N. W. 456.
[37] Gurney v. City of St. Paul, 36 Minn. 163, 30 N. W. 661.
[38] Irvine v. Myers, 6 Minn. 558 Gil. 394.
[39] Felber v. Southern Minnesota Ry. Co. 28 Minn. 156, 9 N. W. 635; Herrick v. Butler, 30 Minn. 156, 14 N. W. 794.
[40] Dols v. Baumhoefer, 28 Minn. 387, 10 N. W. 420; Thompson v. Hazelton, 34 Minn. 12, 24 N. W. 199.
[41] St. Anthony Falls Water Power Co. v. King Bridge Co. 23 Minn. 186.
[42] Fay v. Davidson, 13 Minn. 298 Gil. 275.
[43] Closen v. Allen, 29 Minn. 86, 12 N. W. 146.
[44] Minnesota Valley Ry. Co. v. Flynn, 14 Minn. 552 Gil. 421; Closen v. Allen, 29 Minn. 86, 12 N. W. 146.
[45] State v. Leftwich, 41 Minn. 42, 42 N. W. 598; In re Fanning, 40 Minn. 4, 41 N. W. 1076; State v. Willis, 61 Minn. 120, 63 N. W. 169; Semrow v. Semrow, 26 Minn. 9, 46 N. W. 446; Menage v. Lustfield, 30 Minn. 487, 16 N. W. 398.
[46] Brown v. Minnesota Thresher Mfg. Co. 44 Minn. 322, 46 N. W. 560; Lockwood v. Bock, 45 Minn. 73, 48 N. W. 458.
[47] Chouteau v. Parker, 2 Minn. 118 Gil. 95.
[48] Minneapolis Trust Co. v. Menage, 66 Minn. 447, 69 N. W. 224.
[49] Chesterson v. Munson, 26 Minn. 303, 3 N. W. 303.
[50] Thompson v. Howe, 21 Minn. 1.
[51] Von Glahn v. Sommer, 11 Minn. 203 Gil. 132.
[52] Wilson v. Bell, 17 Minn. 61 Gil. 40; Johnson v. Northern Pacific etc. Ry. Co. 39 Minn. 30, 38 N. W. 804.
[53] Rabitte v. Nathan, 22 Minn. 266; Kelly v. Hopkins, 72 Minn. 258, 75 N. W. 374. See McGinty v. Kelley, 85 Minn. 117, 88 N. W. 430.
[54] State v. District Court, 52 Minn. 283, 53 N. W. 1157.
[55] Gottstein v. St. Jean, 79 Minn. 232, 82 N. W. 311.
[56] Duluth Transfer Ry. Co. v. Duluth Terminal Ry. Co. 81 Minn. 62, 83 N. W. 497.
[57] Sunvold v. Melby, 82 Minn. 544, 85 N. W. 1135.
[58] Oelschlegel v. Chicago etc. Ry. Co. 71 Minn. 50, 73 N. W. 631; St. Anthony Falls Bank v. Graham, 67 Minn. 318, 69 N. W. 1077.
[59] McGinty v. Kelley, 85 Minn. 117, 88 N. W. 430.
[60] Swanson v. Andrus, 84 Minn. 168, 87 N. W. 363.
[61] Duxbury v. Shanahan, 84 Minn. 353, 87 N. W. 944.
[62] Chadbourne v. Reed, 83 Minn. 447, 86 N. W. 415.

Digitized by Google

[63] Id.
[64] State v. Copeland, 74 Minn. 375, 77 N. W. 221.
[65] Graves v. Backus, 69 Minn. 532, 72 N. W. 811.
[66] Richter v. Merchants Nat. Bank, 65 Minn. 237, 67 N. W. 995.
[67] State v. Faribault Waterworks Co. 65 Minn. 345, 68 N. W. 35.
[68] In re Studdart, 30 Minn. 553, 16 N. W. 452.
[69] Baldwin v. Canfield, 26 Minn. 62, 1 N. W. 585 (question left open).
[70] City of St. Paul v. Rogers, 22 Minn. 492.
[71] Hanley v. Board of County Com'rs, (Minn.) 91 N. W. 756.

Ex parte orders.

§ 1739. As a general rule no appeal lies from an ex parte order. To allow an appeal from such orders would violate the fundamental principle of appellate procedure that the appellate court should only review questions already considered and determined by the lower court on the merits. The law attaches much importance to the hearing of both the interested parties, not only as a matter of right to them but as an aid to courts in the determination of matters brought before them. It is ordinarily to be supposed that a court which may have acted inconsiderately or erroneously upon an ex parte application would perceive and correct its error if the adverse party were heard. It is well understood, as a matter of practice, that a judge granting an ex parte order does not ordinarily pass upon and determine the point involved. If it is considered that the order was improvidently granted, a motion is made to the court to vacate it and on such motion both parties are heard and a deliberate judgment of the court obtained, from which an appeal may lie; until such hearing and decision there is no ground for an appeal, for no question has been decided. To sooner present the question to the supreme court would not be to ask it to affirm or reverse the judgment or order of the lower court but to pass upon a question not decided in that court. Such a practice would be contrary to the obvious design of our laws. It would work injustice to the lower court, indicating error where there had been no deliberate judgment or decision of the question. It would also encourage vexatious and dilatory appeals to the injury of suitors and the community.

McNamara v. Minnesota Central Ry. Co. 12 Minn. 388 Gil. 269; State v. District Court, 52 Minn. 283, 53 N. W. 1157; Hoffman v. Mann, 11 Minn. 364 Gil. 262; Schurmeier v. First Division St. Paul etc. Ry. Co. 12 Minn. 351 Gil. 228.

Orders vacating non-appealable orders.

§ 1740. A non-appealable order cannot be carried to the supreme court for review on the merits by means of an appeal from an order granting or refusing a motion to vacate such order. That which cannot be done directly cannot be done indirectly.

Brown v. Minnesota Thresher Mfg. Co. 44 Minn. 322, 46 N. W. 560; Lockwood v. Bock, 46 Minn. 73, 48 N. W. 458.

Digitized by Google

No appeal from tax judgments.

§ 1741. No appeal is allowed from a real or personal tax judgment. The exclusive mode of securing a review by the supreme court is by certifying questions as provided by G. S. 1894 § 1589 [1] or by certiorari in case the court refuses to certify upon a proper application.[2] In certifying questions under this statute the trial judge should state what points he certifies up and make a statement of the facts established bearing on such points together with his decision or conclusion.[3] The supreme court will not consider points not explicitly certified.[4] The statement made by the court of the facts established and its decision thereon have the same force in the supreme court as the findings and decision of a trial court in an ordinary case.[5] No costs are allowed in the supreme court.[6]

[1] State v. Faribault Waterworks Co. 65 Minn. 345; County of Washington v. German-Amer. Bank, 28 Minn. 360, 10 N. W. 21; State v. Jones, 24 Minn. 86; Davis v. Board of County Com'rs, 75 Minn. 59, 77 N. W. 548.

[2] County of Brown v. Winona etc. Co. 38 Minn. 397, 37 N. W. 949; State v. Red River Valley Elevator Co. 69 Minn. 131, 72 N. W. 60.

[3] County of Morrison v. St. Paul etc. Ry. Co. 42 Minn. 451, 44 N. W. 982; State v. St. Croix Boom Corp. 49 Minn. 450, 52 N. W. 44; County of Ramsey v. Chicago etc. Ry. Co. 33 Minn. 537, 24 N. W. 313.

[4] State v. Robert P Lewis Co. 77 Minn. 317, 79 N. W. 1003; State v. Lakeside Land Co. 71 Minn. 283, 73 N. W. 970; State v. Moffett, 64 Minn. 292, 67 N. W. 68; State v. Robert P. Lewis Co. 70 Minn. 202, 72 N. W. 962; State v. Franklin Sugar-Refining Co. 79 Minn. 127, 81 N. W. 752 and cases under (3) supra.

[5] County of Ramsey v. Chicago etc. Ry. Co. 33 Minn. 537, 24 N. W. 313.

[6] County of Olmstead v. Barber, 31 Minn. 256, 17 N. W. 473.

THE RETURN

Return on appeal—statutes.

§ 1742. "Upon an appeal being perfected, the clerk shall transmit to the supreme court a certified copy of the judgment roll, or order appealed from, and the papers upon which the order was granted, at the expense of the appellant. When a case is made, or bill of exceptions allowed, it may, for the purpose of the appeal, stand in place of or be attached to the judgment roll, and certified to the appellate court as aforesaid."

[G. S. 1894 § 6135]

§ 1743. "Immediately after entering the judgment, the clerk shall attach together and file the following papers, which constitute the judgment roll.

(1) In case the complaint is not answered by any defendant, the summons and complaint, or copies thereof, proof of service and that

Digitized by Google

no answer has been received, the report, if any, and a copy of the judgment.

(2) In all other cases, the summons, pleadings, or copies thereof, and a copy of the judgment, with any verdict, decision or report, the offer of the defendant, exceptions, and all orders in any way involving the merits, and necessarily affecting the judgment. If a statement of the case is made, the same may be attached to the judgment roll, on the request of either party."

[G. S. 1894 § 5423]

§ 1744. "The appellant shall furnish the court with copies of the notice of appeal, and of the order or judgment roll. If he fails to do so, the appeal may be dismissed."

[G. S. 1894 § 6139]

Necessity of a return.

§ 1745. The jurisdiction of the supreme court over a cause is not complete until a return is filed. Prior to the filing of a return it is premature to file a note of issue or notice the appeal for hearing and the court will only entertain a motion to dismiss the appeal or compel a return.[1] In the absence of a return there can be no competent evidence before the supreme court of the proceedings below. The deficiency cannot be supplied by stipulation of the parties.[2] An order on appeal based on what purports to be a return from the district court, no return in fact having been made, will be set aside for want of jurisdiction.[3]

[1] Briggs v. Shea, 48 Minn. 218, 50 N. W. 1037; Reynolds v. Steamboat Favorite, 9 Minn. 148 Gil. 138; Com. Ins. Co. v. Pierro, 6 Minn. 569 Gil. 404.

[2] American Ins. Co. v. Schroeder, 21 Minn. 331.

[3] Page v. Mille Lacs Lumber Co. 53 Minn. 492, 55 N. W. 608.

Return without case or bill of exceptions—appeal from judgment—appearance.

§ 1746. When an appeal is taken from a judgment without a case or bill of exceptions, there having been an appearance by a defendant, the return consists of certified copies of the following:

(1) The summons.[1] [Proof of service not included]

(2) The pleadings.[1]

(3) The verdict;[1] or the findings of fact and conclusions of law, if the trial was by court or referee,[2] with any memorandum that may be filed.[3]

(4) Any offer of judgment made by the defendant.[1]

(5) Any interrogatories submitted to the jury and the answers thereto.[4]

(6) The judgment.[1]

(7) All orders involving the merits and necessarily affecting the judgment.[1] [It is to be observed that the statute does not authorize the inclusion of the papers on which such orders are made. It is therefore necessary, in order to secure a review of intermediate orders not based wholly upon the record, to have a case or bill of exceptions settled and included in the return].[5]

Digitized by Google

(8) Notice of appeal, with proof of service.[6]

(9) Any papers, affidavits, or documents on file, in the district court, in the action in which the appeal is taken, which either party may deem necessary to or proper for the elucidation and determination of any question expected or intended to be raised on the hearing of the appeal and which he requests to have certified up.[7]

[1] See §§ 1742, 1743; Anderson v. Kittell, 37 Minn. 125, 33 N. W. 125; Guiterman v. Saterlie, 76 Minn. 19, 78 N. W. 863; Pabst Brewing Co. v. Butchart, 68 Minn 303, 71 N. W. 273; Chase v. Carter, 76 Minn. 367, 79 N. W. 307; Pieper v. Lind, 83 Minn. 436, 86 N. W. 415.

[2] G. S. 1894 §§ 5423, 6135; Farnham v. Thompson, 34 Minn. 330, 26 N. W. 9; Morrison v. March, 4 Minn. 422 Gil. 325.

[3] Rule 9, Supreme Court.

[4] See § 879.

[5] See § 1754.

[6] G. S. 1894 § 6139; Rule 3, Supreme Court.

[7] Rule 3, Supreme Court.

Return without a case or bill of exceptions on appeal from judgment on default.

§ 1747. When an appeal is taken without a case or bill of exceptions from a judgment on default the return consists of certified copies of the following:

(1) The summons, with proof of service.

(2) Proof of default.

(3) The report of the referee, if any.

(4) The findings of fact and conclusions of law or the order for judgment.

(5) The judgment.

(6) Notice of appeal, with proof of service.

(7) Any papers, affidavits, or documents on file, in the district court, in the action in which the appeal is taken, which either party may deem necessary to or proper for the elucidation and determination of any question expected or intended to be raised on the hearing of the appeal and which he requests to have certified up.

See cases under § 1746.

Return on appeal from orders.

§ 1748. When an appeal is taken from an order the return consists of certified copies of the following:

(1) The order.[1]

(2) The papers upon which the order was made, that is, the notice of motion, proof of service of notice in case of default, the affidavits for and against the motion and all the files and proceedings in the action provided the motion was based thereon.[1] If oral evidence was received on the motion a statement thereof must be returned duly authenticated by a certificate of the judge.[2]

(3) Notice of appeal, with proof of service.[3]

(4) Any papers, affidavits, or documents on file, in the district court, in the action in which the appeal is taken, which either party

Digitized by Google

may deem necessary or proper for the elucidation and determination of any question expected or intended to be raised on the hearing of the appeal and which he requests to have certified up.[4] [Attached to the return there must be a certificate of the judge that the return contains all that was offered or considered on the motion, or a certificate of the clerk that the return contains all the records and files in the case] [5]

[1] See § 1742.
[2] See § 1749.
[3] G. S. 1894 § 6139. See § 1744.
[4] Rule 3, Supreme Court.
[5] See § 1749.

Return on appeal from order granting or denying a motion for a new trial.

§ 1748a. When an appeal is taken from an order granting or denying a motion for a new trial the record on appeal must in all cases contain the notice of motion,[1] setting forth the grounds of the motion;[2] the affidavits and other papers used on the motion [3] and the order granting or denying the motion.[4] These constitute the "papers" upon which the order was made and copies of which the clerk certifies to the supreme court at the expense of the appellant when the appeal is perfected.[5] If the motion for a new trial was based on an error of law or irregularity occurring on the trial the record must also contain a case or bill of exceptions sufficiently full and explicit to enable the court to pass on the alleged error or irregularity.[6]

[1] Spencer v. Stanley, 74 Minn. 35, 76 N. W. 953.
[2] Spencer v. Stanley, 74 Minn. 35, 76 N. W. 953; First Nat. Bank v. City of St. Cloud, 73 Minn. 219, 75 N. W. 1054; Chesley v. Mississippi etc. Co. 39 Minn. 83, 38 N. W. 769; Clark v. Nelson Lumber Co. 34 Minn. 289, 25 N. W. 628.
[3] Tierney v. Minneapolis etc. Ry. Co. 33 Minn. 311, 23 N. W. 229. See also, Hospes v. N. W. Mfg. & Car Co. 41 Minn. 256, 43 N. W. 180; Murphy v. Holterhoff, 72 Minn. 98, 75 N. W. 4.
[4] Granite Savings Bank & Trust Co. v. Weinberg, 62 Minn. 202, 64 N. W. 380.
[5] G. S. 1894 § 6135.
[6] See §§ 1752–1760.

Certificate of judge on appeal from orders.

§ 1749. When an appeal is taken from an order made on affidavits or other documentary evidence not introduced in the course of a trial no case or bill of exceptions is necessary. The statute provides that in such cases the clerk shall transmit to the supreme court a certified copy of the order and the papers upon which the order was granted.[1] This statute is imperfect in that it makes no provision for a certificate that the record as returned contains everything upon which the order was based. The statute has been supplemented by a decision of the supreme court which holds that in such cases there must be attached to the return either a certificate of the judge that the record contains all that was offered or considered on the mo-

Digitized by Google

tion, or a certificate of the clerk that the return contains all the records and files in the case.[2] It is much the better practice to obtain a certificate of the judge. When an order is based on oral evidence or on both oral and documentary evidence a case or certified statement should be prepared containing everything offered or considered on the motion.[3] When the motion is based on facts occurring at a regular trial a case or bill of exceptions is necessary.[4]

[1] G. S. 1894 § 6135. See Lyman-Eliel Drug Co. v. Spencer, 70 Minn. 183, 72 N. W. 1066; Mallett v. Swain, 56 Cal. 171; Bailey v. Scott, 1 S. D. 337.

[2] Hospes v. N. W. Mfg. & Car Co. 41 Minn. 256, 43 N. W. 180. To same effect: State v. Egan, 62 Minn. 280, 64 N. W. 813; Du Toit v. Fergestad, 55 Minn. 462, 57 N. W. 204; Prouty v. Hallowell, 53 Minn. 488, 55 N. W. 623; Dow v. Northern Land & Loan Co. 51 Minn. 326, 53 N. W. 649; Seibert v. Minneapolis & St. Louis Ry. Co. 58 Minn. 69, 59 N. W. 829; Firth v. Brack, 64 Minn. 242, 66 N. W. 987; Schultz v. Bower, 66 Minn. 281, 68 N. W. 1080; Gardner v. Fidelity Mutual Life Assoc. 67 Minn. 207, 69 N. W. 895; Parker v. Bradford, 68 Minn. 437, 71 N. W. 619; Lyman-Eliel Drug Co. v. Spencer, 70 Minn. 183, 72 N. W. 1066; Murphy v. Holterhoff, 72 Minn. 98, 75 N. W. 4; Aure v. Board of County Com'rs, 68 Minn. 85, 70 N. W. 791; Downs v. Nourse, 30 Minn. 552, 16 N. W. 412; Vaughan v. McCarthy, 63 Minn. 221, 65 N. W. 249; Fallgatter v. Lammers, 71 Minn. 238, 73 N. W. 860; Duncan v. Everitt, 55 Minn. 151, 56 N. W. 591.

[3] State v. Egan, 62 Minn. 280, 64 N. W. 813.

[4] See § 1761 et seq.

Memorandum of trial judge.

§ 1750. Under Rule 9, Supreme Court, it is necessary to include in the return any memorandum filed by the trial judge in connection with his decision. But such a memorandum is no part of the decision or record and cannot be held on appeal to qualify, characterize or limit the determination of the trial court.

Morrow v. St. Paul City Ry. Co. 65 Minn. 382, 67 N. W. 1002; Boen v. Evans, 72 Minn. 169, 75 N. W. 116; Kertson v. Great Northern Express Co. 72 Minn. 378, 75 N. W. 378; Myers v. Chicago etc. Ry. Co. 69 Minn. 476, 72 N. W. 694; Jenkinson v. Koester (Minn.) 90 N. W. 382.

Matters not a part of return.

§ 1751. Depositions [1] and stenographer's notes [2] are not included in the return unless there is a case or bill of exceptions. Security for judgment is not a necessary part of the return on an appeal from a default judgment.[3]

[1] Winternute v. Stinson, 16 Minn. 468 Gil. 420.

[2] Thompson v. Lamb, 33 Minn. 196, 22 N. W. 443.

[3] Brown v. Brown, 28 Minn. 501, 11 N. W. 64.

Digitized by Google

SUFFICIENCY OF RECORD TO REVIEW QUESTIONS RAISED

General rule as to completeness of return.

§ 1752. The judgment or order of a court cannot be declared erroneous on appeal when the whole case upon which the judgment or order was founded, or all of the same which is material, does not appear to have been returned to the appellate court.

In re Post, 33 Minn. 478, 24 N. W. 184; Gibson v. Brennan, 46 Minn. 92, 48 N. W. 460; Hospes v. N. W. Mfg. etc. Co. 41 Minn. 256, 43 N. W. 180; Spriesterbach v. Schmidt, 64 Minn. 211, 66 N. W. 721.

To review any question of fact.

§ 1753. The supreme court will not review the decision of the lower court upon any question of fact unless the record contains all of the evidence introduced on the trial pertaining to such question.

Brackett v. Cunningham, 44 Minn. 498, 47 N. W. 157; Board of Trustees v. Brown, 66 Minn. 179, 68 N. W. 837; Downs v. Nourse, 30 Minn. 552, 16 N. W. 412; Cotterell v. Dill, 29 Minn. 114, 12 N. W. 355; Spriesterbach v. Schmidt, 64 Minn. 211, 66 N. W. 721.

Necessity of a bill of exceptions or case on appeal from a judgment.

§ 1754. On appeal from a judgment without a case or bill of exceptions the supreme court can only consider questions appearing on the judgment roll.[1] Ordinarily in such cases the only question that the court can consider is whether the conclusions of law embodied in the judgment are warranted by the findings of fact,[2] or the verdict. The sufficiency of the pleadings to sustain the judgment cannot be considered, except on appeal from a default judgment.[3] It is true that the judgment roll includes "all orders in any way involving the merits, and necessarily affecting the judgment"[4] but the statute makes no provision for incorporating in the judgment roll the evidence upon which such orders were based. The practical consequence is that it is rare indeed that on an appeal from a final judgment without a case or bill of exceptions an intermediate order can be reviewed. Obviously the only orders that may be so reviewed are such as are based solely on the record. Thus no case or bill of exceptions is necessary in order to review an order of dismissal for want of jurisdiction over the subject matter;[5] or an order sustaining or overruling a demurrer;[6] or an order granting or denying a motion for judgment on the pleadings;[7] or an order made on a motion in arrest of judgment;[8] or an order dismissing an appeal from a lower court;[9] or an order made on a motion to quash an indictment.[10]

[1] Keegan v. Peterson, 24 Minn. 1; Bazille v. Ullman, 2 Minn. 134 Gil. 110; Morrison v. March, 4 Minn. 422 Gil. 325; Conron v. Hoerr, 83 Minn. 183, 85 N. W. 1012; Jones v. Wilder, 28

Digitized by Google

Minn. 238, 9 N. W. 707; Watier v. Buth, (Minn. 1902) 92 N. W. 331.

[2] See § 1877.

[3] Peach v. Reed, (Minn. 1902) 92 N. W. 229.

[4] See § 1743.

[5] Doctor v. Hartman, 74 Ind. 221; Plunket v. Evans, 2 S. D. 434.

[6] Lindley v. Kelley, 42 Ind. 297; State v. Strong, 6 Iowa 72; Young v. Martin, 8 Wall. (U. S.) 354; Hamlin v. Reynolds, 22 Ill. 207.

[7] Weeks v. Garibaldi etc. Co. 73 Cal. 599; Robinson v. Bartlett, 11 Minn. 410 Gil. 302.

[8] Daniels v. City of Denver, 2 Colo. 669; Nichols v. People, 40 Ill. 395.

[9] Plunket v. Evans, 2 S. D. 434.

[10] State v. Judy, 60 Ind. 138; Baker v. People, 105 Ill. 452.

In what cases record must contain all the evidence.

§ 1755. In the following cases, in order to secure a full review on appeal, it must affirmatively appear, either in the body of the case or the certificate of the trial judge, that the record contains all the evidence introduced on the trial: on appeal from an order granting or denying a motion for a new trial on the ground that the verdict is not justified by the evidence,[1] or on the ground of newly discovered evidence,[2] or for error in dismissing or refusing to dismiss the action on the trial for insufficiency of evidence,[3] or in directing or refusing to direct a verdict at the close of the testimony,[4] or on the ground that the damages are excessive,[5] or on the ground that the findings of the court [6] or referee [7] are not justified by the evidence, or on the ground that the findings are without the issues;[8] on appeal from a judgment in an action tried by the court without a jury and the sufficiency of the evidence to justify the findings is questioned;[9] on appeal from a judgment where error is assigned in refusing to dismiss the action on the trial for insufficiency of the evidence [10] or in directing or refusing to direct a verdict at the close of the case;[11] on appeal from a judgment and it is assigned for error that the findings are without the issues;[12] on appeal from a judgment and it is assigned for error that the court erred in granting or denying an application for additional or amended findings.[13]

[1] Chesley v. Mississippi etc. Co. 39 Minn. 83, 38 N. W. 769; Koethe v. O'Brien, 32 Minn. 78, 19 N. W. 388; Brackett v. Cunningham, 44 Minn. 498, 47 N. W. 157; Mead v. Billings, 40 Minn. 505, 42 N. W. 472; Butler v. Fitzpatrick, 21 Minn. 59; Thomas v. West Duluth Light & Water Co. 51 Minn. 398, 53 N. W. 710.

[2] State v. Lautenschlager, 23 Minn. 290; Scofield v. Walrath, 35 Minn. 356, 28 N. W. 926; Gardner v. Fidelity etc. Assoc. 67 Minn. 207, 69 N. W. 895.

[3] Mickelson v. Duluth Building & Loan Assoc. 68 Minn. 535, 71 N. W. 703; Craver v. Christian, 32 Minn. 525, 21 N. W. 716; Rhoades v. Siman, 24 Minn. 192; Densmore v. Shepard, 46

Digitized by Google

Minn. 54, 48 N. W. 528, 651; Klein v. Funk, 82 Minn. 3, 84 N. W. 460 (the record need only contain all the evidence introduced up to the time of the order).

[4] Board of Trustees v. Brown, 66 Minn. 179, 68 N. W. 837; Gardner v. Fidelity Mutual Life Assoc. 67 Minn. 207, 69 N. W. 895; Klein v. Funk, 82 Minn. 3, 84 N. W. 460.

[5] Moran v. Mackey, 32 Minn. 266, 20 N. W. 159; City of St. Paul v. Kuby, 8 Minn. 154 Gil. 125; Davis v. Tribune Job Printing Co. 70 Minn. 95, 72 N. W. 808; Page v. Merwin, 54 Conn. 426.

[6] Boright v. Springfield etc. Ins. Co. 34 Minn. 352, 25 N. W. 796; Dickerman v. Ashton, 21 Minn. 538; Mickelson v. Duluth Building & Loan Assoc. 68 Minn. 535, 71 N. W. 703; State v. St. Paul etc. Ry. Co. 38 Minn. 246, 36 N. W. 870.

[7] Teller v. Bishop, 8 Minn. 226 Gil. 195; Brown v. Gurney, 20 Minn. 527 Gil. 473; City of St. Paul v. Kuby, 8 Minn. 154 Gil. 125; Madigan v. Mead, 31 Minn. 94, 16 N. W. 539; Thompson v. Howe, 21 Minn. 98; Lundell v. Cheney, 50 Minn. 470, 52 N. W. 918.

[8] St. Paul Trust Co. v. St. Paul Chamber of Commerce, 64 Minn. 439, 67 N. W. 350.

[9] Albee v. Hayden, 25 Minn. 267; McDermid v. McGregor, 21 Minn. 111; Downer v. Foulhuber, 19 Minn. 179 Gil. 142; Thompson v. Lamb, 33 Minn. 196, 22 N. W. 443; Woodbridge v. Sellwood, 65 Minn. 135, 67 N. W. 799; First Nat. Bank v. Parsons, 19 Minn. 289 Gil. 246.

[10] See cases under (3) supra.

[11] See cases under (4) supra.

[12] Jones v. Wilder, 28 Minn. 238, 9 N. W. 707; Olson v. St. Paul etc. Ry. Co. 38 Minn. 479, 38 N. W. 490; Abbott v. Morrissette, 46 Minn. 10, 48 N. W. 416.

[13] School District v. Wrabeck, 31 Minn. 77, 16 N. W. 493; Baker v. Byerly, 40 Minn. 489, 42 N. W. 395; Groomes v. Waterman, 59 Minn. 258, 61 N. W. 139; Levine v. Lancashire Ins. Co. 66 Minn. 138, 68 N. W. 855; Stevens v. Stevens, 82 Minn. 1, 84 N. W. 457.

Certificate of judge as to completeness of record.

§ 1756. In all cases where it is necessary that the record on appeal should contain all the evidence it must affirmatively and unequivocally appear either in the body of the case or the certificate of the judge that the case contains all the evidence introduced on the trial or at least all the evidence introduced on the issue of fact raised in the appellate court.[1] Good practice requires that the completeness of the case should be certified by the judge but this is not indispensable if the case purports on its face to contain all of the evidence.[2] The certificate of the judge is not conclusive.[3]

[1] Board of Trustees of Ripon College v. Brown, 66 Minn. 179, 68 N. W. 837; Gardner v. Fidelity Mutual Life Assoc. 67 Minn. 207, 69 N. W. 895; Chesley v. Mississippi etc. Co. 39 Minn. 83, 38 N. W. 769; Mead v. Billings, 40 Minn. 505, 42 N. W. 472;

Digitized by Google

Koethe v. O'Brien, 32 Minn. 78, 19 N. W. 388; Kohn v. Tedford, 46 Minn. 146, 48 N. W. 686; Scofield v. Walrath, 35 Minn. 356, 28 N. W. 926; State v. Lautenschlager, 23 Minn. 290; Craver v. Christian, 32 Minn. 525, 21 N. W. 716; Brackett v. Cunningham, 44 Minn. 498, 47 N. W. 157; Boright v. Springfield etc. Ins. Co. 34 Minn. 352, 25 N. W. 796; St. Paul Harvester Works v. Langin, 23 Minn. 462; Dickerman v. Ashton, 21 Minn. 538; Butler v. Fitzpatrick, 21 Minn. 59; Young v. Young, 18 Minn. 90 Gil. 72; Cowley v. Davidson, 13 Minn. 92 Gil. 86; Dorman v. Ames, 12 Minn. 451 Gil. 347.

[2] Coleman v. Reierson, 36 Minn. 222, 30 N. W. 811; Brackett v. Cunningham, 44 Minn. 498, 47 N. W. 157; Vassau v. Campbell, 79 Minn. 167, 81 N. W. 829.

[3] Acker Post v. Carver, 23 Minn. 567; Lundell v. Cheney, 50 Minn. 470, 52 N. W. 918; Coleman v. Reierson, 36 Minn. 222, 30 N. W. 811; Vassau v. Campbell, 79 Minn. 167, 81 N. W. 829; Sage v. Rudnick, 67 Minn. 362, 69 N. W. 1096.

Sufficiency of record to review rulings on evidence.

§ 1757. In order to secure a review on appeal of a ruling of the trial court in admitting or excluding evidence it is indispensable in all cases that there should be a bill of exceptions or case containing the evidence erroneously admitted or excluded, the objection of counsel, the ruling of the court upon the objection and so much of the other evidence in the case as may be necessary to enable the supreme court to review intelligently the action of the trial court.[1] The amount of evidence which it is necessary to include in the record depends upon the nature of the appeal. In rare instances it is sufficient if the record contains merely the evidence erroneously admitted or excluded, with the objection of counsel and the ruling of the court.[2] This is more often the case when evidence is erroneously excluded than when admitted. When it is claimed that the court erred in admitting evidence it is almost always necessary that the record contain all the evidence introduced on the trial, because, in the absence of such a record, it will be presumed on appeal that the evidence was rightly admitted if it was admissible for any conceivable purpose within the issues or upon any conceivable state of facts.[3] When the objection to a question propounded a witness is that it assumes a fact not proved the record must contain all the evidence.[4] If the materiality and admissibility of the evidence sought to be introduced is not apparent from the question propounded the witness the record must contain an offer sufficiently full and explicit to make the materiality and admissibility obvious when considered in connection with the pleadings and the other evidence in the record.[5]

[1] Stone v. Johnson, 30 Minn. 16, 13 N. W. 920; St. Anthony Mill Co. v. Vandall, 1 Minn. 246 Gil. 195; Claflin v. Lawler, 1 Minn. 297 Gil. 231; Bazille v. Ullman, 2 Minn. 134 Gil. 110; Acker Post v. Carver, 23 Minn. 567; St. Paul etc. Ry. Co. v. Murphy, 19 Minn. 500 Gil. 433; Dartnell v. Davidson, 16 Minn. 530 Gil. 477; Wintermute v. Stinson, 16 Minn. 468 Gil. 420; John-

Digitized by Google

son v. Howard, 51 Minn. 170, 53 N. W. 363; Roehl v. Baasen, 8 Minn. 26 Gil. 9; Sandborn v. Mueller, 38 Minn. 27, 35 N. W. 666; Hewetson v. Dossett, 71 Minn. 358, 73 N. W. 1089; Le May v. Brett, 81 Minn. 506, 84 N. W. 339.

[2] Stout v. Woods, 79 Ind. 108; Johnson v. Wiley, 74 Ind. 233.

[3] See § 1854.

[4] St. Paul etc. Ry. Co. v. Murphy, 19 Minn. 500 Gil. 433.

[5] Le May v. Brett, 81 Minn. 506, 84 N. W. 339.

To review instructions.

§ 1758. In all cases the instructions given and objected to and the instructions refused must be included in the record by a bill of exceptions or case. They are not a part of the record in this state.[1] The practical effect of Laws 1891, ch. 113 is to require the entire charge to be included in the record when the appeal is taken from the final judgment. If the instructions objected to are an imperfect and misleading statement of the law applicable to the case it is necessary that the record should contain the entire charge for otherwise it will be presumed that additional instructions essential to a full and accurate presentation of the law of the case were given.[2] When instructions are abstractly correct but are erroneous as applied to the evidence the record must contain all the evidence introduced on the trial.[3] If instructions on matters of pure law are erroneous on their face it is not necessary that the record should contain any of the evidence in order to secure a review.[4]

[1] Hendrickson v. Back, 74 Minn. 90, 76 N. W. 1019; State v. Sackett, 39 Minn. 69, 38 N. W. 773.

[2] Cogley v. Cushman, 16 Minn. 397 Gil. 354; Stearns v. Johnson, 17 Minn. 142 Gil. 116; State v. Taunt, 16 Minn. 109 Gil. 99.

[3] Day v. Raguet, 14 Minn. 273 Gil. 203; State v. Taunt, 16 Minn. 109 Gil. 99; Sheffield v. Ladue, 16 Minn. 388 Gil. 346; State v. Owens, 22 Minn. 238; Desnoyer v. L'Hereux, 1 Minn. 17 Gil. 1; State v. Brown, 12 Minn. 538 Gil. 448; Blackman v. Wheaton, 13 Minn. 326 Gil. 299.

[4] Tharp v. State, 15 Ala. 749.

§ 1759. In order to secure a review on appeal of a refusal to give requested instructions it is necessary in all cases that the record should contain the charge in full,[1] the requests,[2] and all the evidence introduced on the trial.[3]

[1] Stearns v. Johnson, 17 Minn. 142 Gil. 116; State v. Sackett, 39 Minn. 69, 38 N. W. 773; Huff v. Aultman, 69 Iowa 71; Linton v. Allen, 154 Mass. 432; Malcohm v. Hansen, 32 Neb. 50.

[2] Kleinschmidt v. McDermott, 12 Mont. 309.

[3] State v. Sackett, 39 Minn. 69, 38 N. W. 773; Coles v. Yorks, 28 Minn. 464, 10 N. W. 775; State v. Daniels, 76 Iowa 87; Willis v. State, 27 Neb. 98; Missouri River etc. Ry. Co. v. Owen, 8 Kans. 409; California Central Ry. Co. v. Hooper, 76 Cal. 404; State v. Schuessler, 3 Ala. 419.

Digitized by Google

Miscellaneous cases.

§ 1760. In the absence of a case or bill of exceptions sufficiently full for the particular purpose the supreme court will not review rulings of the trial court in connection with the impaneling of a jury;[1] or improper remarks of counsel;[2] or improper remarks[3] or conduct[4] of the judge; or error in denying a jury trial;[5] or error in refusing to allow an amendment;[6] or the misconduct of jurors;[7] or error in receiving additional affidavits on an appeal from the taxation of costs by the clerk;[8] or error in dismissing a complaint for insufficiency;[9] or misconduct of a party on the trial;[10] or the sufficiency of an affidavit in garnishment proceedings;[11] or error in submitting depositions to a jury;[12] or an alleged variance;[13] or the refusal of a continuance and an attachment for a witness;[14] or error in excluding evidence to impeach the credibility of a witness;[15] or rulings on objections reserved;[16] or the sufficiency of an affidavit in claim and delivery;[17] or the granting of an amendment to the pleadings on the trial;[18] or error in granting or denying an application for additional or amended findings.[19]

[1] State v. Brecht, 41 Minn. 50, 42 N. W. 50; Ham v. Wheaton, 61 Minn. 212; 63 N. W. 495.

[2] Smith v. Wilson, 36 Minn. 334, 31 N. W. 176; St. Martin v. Desnoyer, 1 Minn. 156 Gil. 131; State v. Adamson, 43 Minn. 196, 45 N. W. 152; Haug v. Haugan, 51 Minn. 558, 53 N. W. 874.

[3] Smith v. Kingman & Co. 70 Minn. 453, 73 N. W. 253.

[4] State v. Nichols, 29 Minn. 357, 13 N. W. 153.

[5] Coolbaugh v. Roemer, 32 Minn. 445, 21 N. W. 472.

[6] Shumann v. Mark, 35 Minn. 379, 28 N. W. 927; Harris v. Kerr, 37 Minn. 537, 35 N. W. 379.

[7] Edlund v. St. Paul City Ry. Co. 78 Minn. 434, 81 N. W. 214.

[8] Schultz v. Bower, 66 Minn. 281, 68 N. W. 1080.

[9] Flibotte v. Mullen, 36 Minn. 144, 30 N. W. 448.

[10] Ham v. Wheaton, 61 Minn. 212, 63 N. W. 495.

[11] Hinckley v. St. Anthony etc. Co. 9 Minn. 55 Gil. 44.

[12] Conron v. Hoerr, 83 Minn. 183, 85 N. W. 1012.

[13] Cushman v. Board of County Com'rs, 19 Minn. 295 Gil. 252.

[14] Barnes v. Christofferson, 62 Minn. 318, 64 N. W. 821.

[15] Aske v. Duluth etc. Ry. Co. 83 Minn. 197, 85 N. W. 1011.

[16] Nat. Invest. Co. v. Schickling, 56 Minn. 283, 57 N. W. 663.

[17] Goodell v. Ward, 17 Minn. 17 Gil. 1.

[18] Macauley v. Ryan, 55 Minn. 507, 57 N. W. 151.

[19] School District v. Wrabeck, 31 Minn. 77, 16 N. W. 493; Baker v. Byerly, 40 Minn. 489, 42 N. W. 395; Groomes v. Waterman, 59 Minn. 258, 61 N. W. 139; Levine v. Lancashire Ins. Co. 66 Minn. 138, 68 N. W. 855; Stevens v. Stevens, 82 Minn. 1, 84 N. W. 457.

Digitized by Google

CASES AND BILLS OF EXCEPTIONS

Necessity of a case or bill of exceptions generally.

§ 1761. No ruling or decision made in the course of a trial not entered as an order can be reviewed on appeal in the absence of a case or bill of exceptions.[1] On appeal from an interlocutory order no case or bill of exceptions is necessary.[2]

[1] Macauley v. Ryan, 55 Minn. 507, 57 N. W. 151.

[2] State v. Egan, 62 Minn. 280, 64 N. W. 813. See § 1749.

No substitute for a case or bill of exceptions.

§ 1762. A fact occurring at the trial, not a matter of record, can only be presented to the supreme court for review by means of a case or bill of exceptions settled and allowed by the trial judge or referee as provided by law.[1] It has been held that the following cannot take the place of a case or bill of exceptions: a statement in the findings or decision of the trial judge;[2] an affidavit;[3] a transcript of the stenographer's notes;[4] a statement in the brief of counsel;[5] a certificate of a referee;[6] a certificate of the clerk;[7] a statement in the memorandum of the trial judge;[8] recitals in an order;[9] a statement in the certificate of the judge.[10]

[1] Conron v. Hoerr, 83 Minn. 183, 85 N. W. 1012; Ham v. Wheaton, 61 Minn. 212, 63 N. W. 495.

[2] Stewart v. Cooley, 23 Minn. 347; Stone v. Johnson, 30 Minn. 16, 13 N. W. 920; Coolbaugh v. Roemer, 32 Minn. 445, 21 N. W. 472; D. M. Osborne & Co. v. Williams, 39 Minn. 353, 40 N. W. 165; Prouty v. Hallowell, 53 Minn. 488, 55 N. W. 623; Nat. Invest. Co. v. Schickling, 56 Minn. 283, 57 N. W. 663; Rhoades v. Siman, 24 Minn. 192.

[3] Smith v. Kingman & Co. 70 Minn. 453, 73 N. W. 253; Edlund v. St. Paul City Ry. Co. 78 Minn. 434, 81 N. W. 434; Conron v. Hoerr, 83 Minn. 183, 85 N. W. 1012; Smith v. Wilson, 36 Minn. 334, 31 N. W. 176.

[4] Thompson v. Lamb, 33 Minn. 196, 22 N. W. 443.

[5] Goodell v. Ward, 17 Minn. 17 Gil. 1.

[6] Thompson v. Howe, 21 Minn. 98; Barber v. Kennedy, 18 Minn. 216 Gil. 196; Bazille v. Ullman, 2 Minn. 134 Gil. 110; Robinson v. Bartlett, 11 Minn. 410 Gil. 302.

[7] Blake v. Lee, 38 Minn. 478, 38 N. W. 487; Hospes v. N. W. Mfg. etc. Co. 41 Minn. 256, 43 N. W. 180; Village of Elbow Lake v. Holt, 69 Minn. 349, 72 N. W. 564.

[8] Nat. Invest. Co. v. Schickling, 56 Minn. 283, 57 N. W. 663.

[9] Hendrickson v. Bock, 74 Minn. 90, 76 N. W. 1019.

[10] State v. Durnam, 73 Minn. 150, 75 N. W. 1127.

Definition of bill of exceptions.

§ 1763. Prior to Laws 1901 ch. 113, a bill of exceptions was defined as a formal statement in writing of exceptions taken by a party on the trial to a ruling, order, decision, charge or opinion of the court upon matters of law, with so much of the evidence and at-

Digitized by Google

tendant proceedings as may be necessary to acquaint an appellate court with all the material facts upon which the action of the trial court was based, and authenticated by the trial judge according to law.

Board of Trustees v. Brown, 66 Minn. 179, 68 N. W. 837; State v. Egan, 62 Minn. 280, 64 N. W. 813; St. Croix Lumber Co. v. Pennington, 2 Dak. 470; Hanna v. Maas, 122 U. S. 24; People v. Torres, 38 Cal. 142; Galvin v. State, 56 Ind. 56.

Definition of case.

§ 1764. A case in our practice is a formal statement in writing of the proceedings of a trial authenticated by the trial judge. It does not generally include all the proceedings but only such as are sought to be reviewed on a motion for a new trial or on appeal and which are not otherwise a part of the record.[1] It has been said that a case must always contain all the evidence introduced or offered on the trial.[2] There is nothing in our statutes requiring any such view. On the contrary they seem to provide that a case may be used as a substitute for a bill of exceptions in all cases. However, the distinction is one of names merely. The office of both is to place in the record matters occurring on the trial which are not made a part of the record by statute,[3] and neither is required to contain a fuller account of the trial than is necessary for a proper determination by the supreme court of errors assigned therein. The statute provides that when a case is made it may, for the purpose of an appeal, stand in place of or be attached to the judgment roll.[4] The usual practice is to attach the case to the judgment roll and therefore not to include in it matters which are made a part of the judgment roll by statute.

[1] Farnham v. Thompson, 34 Minn. 330, 26 N. W. 9.

[2] Board of Trustees v. Brown, 66 Minn. 179, 68 N. W. 837; Gardner v. Fidelity etc. Assoc. 67 Minn. 207, 69 N. W. 895.

[3] Farnham v. Thompson, 34 Minn. 330, 26 N. W. 9; Perry v. Miller, 61 Minn. 412, 63 N. W. 1040.

[4] G. S. 1894 § 6135. See § 1742.

Securing a stay.

§ 1765. A party should always secure a stay within which to have his case or bill of exceptions settled, and to move for a new trial if desired.[1] If a stay is granted the party has until the last day of the stay in which to serve his case or bill upon the adverse party, although the statutory period of twenty days has expired.[2]

[1] Kimball v. Palmerlee, 29 Minn. 302, 13 N. W. 129; Van Brunt etc. Co. v. Kinney, 51 Minn. 337, 53 N. W. 643; Cook v. Finch, 19 Minn. 408 Gil. 350.

[2] State v. Searle, 81 Minn. 467, 84 N. W. 324.

Who may settle case.

§ 1766. A case or bill of exceptions will ordinarily be disregarded on appeal if not settled and allowed by the judge or referee as provided by statute.[1] The settlement and allowance is a judicial

Digitized by Google

act which cannot be performed by the clerk [2] or dispensed with by stipulation of the parties.[3] The supreme court has no authority to settle and allow a case or bill of exceptions.[4] A district judge may settle a case in an action tried by his predecessor.[5]

[1] Abrahams v. Sheehan, 27 Minn. 401, 7 N. W. 822; Phoenix v. Gardner, 13 Minn. 294 Gil. 272; Sherman v. St. Paul etc. Ry. Co. 30 Minn. 227, 15 N. W. 239.

[2] Blake v. Lee, 38 Minn. 478, 38 N. W. 487; Hospes v. N. W. Mfg. Co. 41 Minn. 256, 43 N. W. 180.

[3] Abrahams v. Sheehan, 27 Minn. 401, 7 N. W. 822; Sherman v. St. Paul etc. Ry. Co. 30 Minn. 227, 15 N. W. 239; Spriesterbach v. Schmidt, 64 Minn. 211, 66 N. W. 721. See Hall v. Smith, 16 Minn. 58 Gil. 46; Kelly v. Clow Reaper Mfg. Co. 20 Minn. 88 Gil. 74.

[4] Hanna v Mass, 122 U. S. 24.

[5] Bahnsen v. Gilbert, 55 Minn. 334, 56 N. W. 1117.

Time within which to serve a case or bill of exceptions—manner of settlement—statute.

§ 1767. "The party preparing a bill of exceptions or case shall, within twenty days after the trial, or, in case a motion for a new trial has been made upon the minutes of the court, as provided in the preceding section, within twenty days after written notice of the filing of the order deciding such motion, serve it upon the adverse party, who may, within ten days after such service, propose amendments thereto, and the same, with the amendments proposed thereto, shall, within fifteen days after service of such amendments, be presented to the judge or referee who tried the cause, for allowance or settlement and signature, upon a notice of five days; if not presented within the time aforesaid, or such further time as may be stipulated or granted, the same shall be deemed abandoned; provided, that whenever the judge who tried the case shall cease to be judge, or shall die, or become incapable of acting from sickness or other cause, before a bill of exceptions is allowed or case made, or shall depart from and remain without the state at the time limited for the allowance or settlement, the said bill may be allowed, or case settled, by or before the judge of a judicial district adjoining that in which the action is pending; or in case a referee shall so die, or become incapacitated, or remain absent, as herein set forth, such bill may be allowed, or case settled, by the judge of the district court in which such action is pending; and, in either case, such allowance or settlement shall be made upon the files in the cause, the minutes of the judge or referee, if attainable, and upon such proof of what transpired at the trial as may be presented by affidavit on behalf of the parties to the action, with like effect in all respects as if such bill were allowed or case settled by the judge or referee who tried the cause. The case or bill, being examined, and found or made conformable to the truth, shall be allowed and signed by the judge, referee, or other officer acting as such judge or referee, as provided herein."

[G. S. 1894 § 5400 as amended by Laws 1901 ch. 26]

Digitized by Google

§ 1768. One of the primary objects of this statute is to secure the settlement and allowance of the case or bill of exceptions when the details of the trial are still fresh in the minds of counsel and the trial judge.

Van Brunt & Wilkins Mfg. Co. v. Kinney, 51 Minn. 337, 53 N. W. 643.

§ 1769. This limitation applies to all cases. Where a party appeals from a judgment he cannot, as a matter of right, propose a case at any time before the expiration of the six months in which an appeal might have been taken.

State v. Powers, 69 Minn. 429, 72 N. W. 705.

§ 1770. In case of trials by the court or by referees, the time for serving a case or bill of exceptions shall be computed from the date of service of notice of filing the report, decision, or finding.

Rule 47, District Court; Irvine v. Myers, 6 Minn. 558 Gil. 394.

§ 1771. The neglect of the adverse party to propose amendments within ten days after the service of the proposed bill or case is a waiver of the right to do so; but it does not extend or enlarge the time within which the party proposing the bill or case is bound, in the absence of an order or stipulation extending the time, to present it to the judge or referee for allowance, that is, within fifteen days after service of amendments or failure to do so within the ten days allowed for that purpose.

State v. Searle, 81 Minn. 467, 84 N. W. 324.

§ 1772. By participating without objection in the settlement of a case or bill of exceptions after the statutory time has expired a party waives any objection on that ground.[1] If a case or bill of exceptions is improperly served after the statutory time it should be refused or promptly returned with the reason stated thereon.[2] It has been held that if a party admits "due service" he will be deemed to have waived the objection that the bill of exceptions or case was not served in time.[3] This rule does not commend itself to reason and should be applied subject to the qualification that a party may overcome the presumption of waiver involved in the admission of due service by promptly returning the case or bill of exceptions—say, within twenty-four hours.[4]

[1] Abbott v. Nash, 35 Minn. 451, 29 N. W. 69.

[2] Van Brunt & Wilkins Mfg. Co. v. Kinney, 51 Minn. 337, 53 N. W. 643; Loveland v. Cooley, 59 Minn. 259, 61 N. W. 138.

[3] State v. Baxter, 38 Minn. 137, 36 N. W. 108. See State v. Powers, 69 Minn. 429, 72 N. W. 705.

[4] Van Brunt & Wilkins Mfg. Co. v. Kinney, 51 Minn. 337, 53 N. W. 643; Loveland v. Cooley, 59 Minn. 259, 61 N. W. 138.

Extension of time.

§ 1773. Where a party has failed to have a case or bill of exceptions settled and allowed within the statutory period he may, for good cause shown, secure an order of the court granting an extension of time. The matter of granting or denying such an ap-

Digitized by Google

plication lies almost wholly in the discretion of the trial court and its action will not be reversed on appeal except for a palpable abuse of discretion.[1] The court may allow a case or bill of exceptions to be settled even after an appeal has been perfected,[2] but the time within which an appeal is allowed by statute cannot be extended by any such means.[3] The mere entertaining of a motion to settle and allow a case after the expiration of the statutory period does not in itself constitute an extension of time. Without having previously relieved a party in default in the service of a proposed case or bill of exceptions, a trial court cannot entertain and pass upon a motion to settle and allow such case or bill after the statutory period of time has expired.[4]

[1] Irvine v. Myers, 6 Minn. 558 Gil. 394; Volmer v. Stagerman, 25 Minn. 234; Cook v. Finch, 19 Minn. 407 Gil. 350; Bahnsen v. Gilbert, 55 Minn. 334, 56 N. W. 1117; Loveland v. Cooley, 59 Minn. 259, 61 N. W. 138; State v. Powers, 69 Minn. 429, 72 N. W. 705; Nickerson v. Wells-Stone Mercantile Co. 71 Minn. 230, 73 N. W. 959, 74 N. W. 891; State v. Searle, 81 Minn. 467, 84 N. W. 324; Seibert v. Minneapolis etc. Ry. Co 58 Minn. 72, 59 N. W. 828.

[2] Pratt v. Pioneer Press Co. 32 Minn. 217, 18 N. W. 836, 20 N. W. 87; Loveland v. Cooley, 59 Minn. 259, 61 N. W. 138. See Abbott v. Nash, 35 Minn. 451, 29 N. W. 69.

[3] Richardson v. Rogers, 37 Minn. 461, 35 N. W. 270.

[4] Van Brunt & Wilkins Mfg. Co. v. Kinney, 51 Minn. 337, 53 N. W. 643.

§ 1774. By stipulation the parties may extend the time for serving and settling a case or bill of exceptions.[1] Of course such a stipulation cannot have the effect of extending the statutory time for an appeal.[2]

[1] State v. Baxter, 38 Minn. 137, 36 N. W. 108; State v. Powers, 69 Minn. 429, 72 N. W. 705.

[2] Richardson v. Rogers, 37 Minn. 461, 35 N. W. 270.

Manner of preparing a bill of exceptions.

§ 1775. Our statutes regulating the manner of preparing bills of exceptions are very incomplete and misleading. Indeed, the actual practice does not conform to the statutes. It is provided in one section of the statutes that, "if, during the trial, any exception is taken to the ruling of the court, such exception may be forthwith taken and reduced to writing, and allowed and signed by the judge, together with so much of the testimony or charge as to make the ruling and exception intelligible, which shall be made a part of the record, so as to obviate a case or other bill of exceptions; and on appeal the court shall not infer that any other evidence was introduced to obviate the exceptions."[1] This provision is very rarely utilized in practice at the present time. Another section provides that "the point of the exception shall be particularly stated, and either delivered or added to until made conformable to the truth, or it may afterward be settled in a statement of the case."[2] It is

Digitized by Google

to be observed that this provision does not expressly authorize the settlement of a bill of exceptions after the trial but only the settlement of a statement of the case including exceptions noted in the minutes of the judge. Neither does it expressly authorize the settlement of a bill of exceptions after trial when the exceptions are merely noted in the stenographer's notes. In truth these provisions of the statutes have no application to existing conditions, and they are materially affected by Laws 1901 ch. 113. They were enacted long before the court stenographer came into existence and are now little more than relics. In actual practice at the present time bills of exceptions are always settled after the trial upon exceptions noted by the stenographer on the trial. This practice is not as explicitly authorized by statute as one would expect. It is based on the section of the statutes regulating the time of presenting cases and bills of exceptions for settlement.

[1] G. S. 1894 § 5399. [2] G. S. 1894 § 5396.

Testimony.

§ 1776. Testimony should ordinarily be given in a condensed and narrative form. In rare instances the exact words of the stenographic report should be given, as, for example, where the questions and answers in full would give the appellate court a better understanding of the relation and effect of a ruling or where nice shades of meaning in the testimony could not well be brought out by a narrative form or the exact bearing of the testimony presented. And when error is assigned to a ruling sustaining or overruling an objection to evidence it is good practice to state the question in the exact words of the stenographer's notes. In all cases immaterial testimony should be omitted.

State v. Otis, 71 Minn. 511, 74 N. W. 283.

Documentary evidence.

§ 1777. Documentary evidence may be incorporated in the body of a case or bill of exceptions or attached thereto with apt reference in the body thereof.[1] It is proper practice to abstract documentary evidence but the abstract must contain all of the essential contents of the originals.[2] Immaterial exhibits may be omitted altogether.[3] The clerk has no authority to certify up documentary evidence,[4] except where the appeal is from an order.[5] It is just as necessary to incorporate documentary evidence in a case or bill of exceptions as oral testimony and where the settled case or bill of exceptions shows that documentary evidence was introduced which might have had a bearing on the verdict or findings and is omitted from the return the supreme court will not review the sufficiency of the evidence to justify the verdict or finding,[6] or any ruling upon such evidence.[7] Maps, plans, charts, diagrams and the like, with reference to which material evidence was given, should be included in the return, if such evidence would be unintelligible to the supreme court without them.[8] If the party proposing a bill or case refuses to attach exhibits which were introduced in evidence the court may properly refuse to allow it.[9]

Digitized by Google

[1] Blake v. Lee, 38 Minn. 478, 38 N. W. 487; Acker Post v. Carver, 23 Minn. 567; Wintermute v. Stinson, 16 Minn. 468 Gil. 420.
[2] Waldorf v. Kipp, 81 Minn. 379, 84 N. W. 568.
[3] In re Lyons, 42 Minn. 19, 43 N. W. 568.
[4] Blake v. Lee, 38 Minn. 478, 38 N. W. 487; Acker Post v. Carver, 23 Minn. 567.
[5] See § 1748.
[6] Blake v. Lee, 38 Minn. 478, 38 N. W. 487; Clarke v. Cold Spring Opera House Co. 58 Minn. 16, 59 N. W. 632; Sage v. Rudnick, 67 Minn. 362, 69 N. W. 1096. But see, Dunham v. Messing, 68 Minn. 257, 70 N. W. 1128.
[7] Acker Post v. Carver, 23 Minn. 567; Wintermute v. Stinson, 16 Minn. 468 Gil. 420; Sanborn v. Muller, 38 Minn. 27, 35 N. W. 666.
[8] Sage v. Rudnick, 67 Minn. 362, 69 N. W. 1096; Larson v. Northern Pacific Ry. Co. 33 Minn. 20, 21 N. W. 836; Baxter v. Great Northern Ry. Co. 73 Minn. 189, 75 N. W. 1114.
[9] State v. Otis, 71 Minn. 511, 74 N. W. 283.

Matters not occurring on the trial.

§ 1778. The office of a bill of exceptions or case is to place in the record what occurs before the court on the trial and which is not made a part of the record by statute. Matters occurring out of court, or on the trial of another action have no place in a bill of exceptions or case, but, for the purposes of a motion for a new trial or an appeal, should be presented by affidavit.

Perry v. Miller, 61 Minn. 412, 63 N. W. 1040.

Transcripts of the evidence.

§ 1779. "Transcripts of the stenographic reporter's minutes shall be made in the exact words and in the form of the original minutes. * * * The party procuring the transcript shall, at or before the time of serving the proposed case or bill of exceptions, file the same with the clerk for the use of parties and the court, and the failure so to file said transcript shall be deemed good and sufficient reason for extending the time within which proposed amendments may be served by the opposite party. After the settled case or bill of exceptions has been filed in the clerk's office, the stenographer's transcript may be withdrawn."[1] In practice the transcript is not commonly filed but is handed over to the attorney of the adverse party to aid him in considering the proposed case. It is a matter which is not regulated by fixed rules but rests in reciprocal accommodation. It is not necessary to file or have prepared a transcript of all the testimony before serving a proposed bill of exceptions.[2] Only so much of the testimony should be included in a bill of exceptions as may be necessary to enable the supreme court to pass intelligently upon the questions raised. It follows that a party preparing a bill cannot be required to secure a complete transcript in the first instance. The stenographer is bound, as a public official, to prepare a transcript of any designated portion of his notes. If the adverse party wishes to propose amendments requiring for their

Digitized by Google

preparation an additional transcript, he is bound to secure such transcript at his own expense; and he should either file it at the time of serving the proposed amendments or hand it over to the opposing counsel for his use in considering the amendments. If, when the bill and amendments are presented to him for settlement and allowance, the judge desires further testimony he should direct the stenographer to transcribe and file such testimony without charge. The stenographer is an officer of the court for such purpose.[3]

[1] Rule 48, District Court.

[2] Baxter v. Coughlan, (District Court of Hennepin Co.) File No. 78,678.

[3] See Cole v. Ingham Circuit Judge, 77 Mich. 619.

Notice of settlement.

§ 1780. The statute provides that the case or bill shall be presented for settlement and allowance upon a notice of five days. If not presented within such time or such time as may be stipulated or granted it is deemed abandoned.[1] It is common practice to notice a motion for a new trial to be heard at the time of presenting the bill of exceptions or case for settlement and allowance.[2] It is also common practice for the parties to agree upon a case or bill of exceptions and stipulate that it may be settled and allowed by the judge without notice.[3] A stipulation of the parties that the case or bill shall be settled and allowed at a specified time is equivalent to notice and it cannot afterwards be objected that due notice was not given.[4] In the absence of a stipulation a case or bill cannot be settled and allowed ex parte without notice.[5]

[1] See § 1767.

[2] Baxter v. Coughlan, 80 Minn. 322, 83 N. W. 190.

[3] See § 1767.

[4] Yule v. Ely, 21 Wis. 326.

[5] Dayton v. Craik, 26 Minn. 133, 1 N. W. 813; Daniels v. Winslow, 2 Minn. 116 Gil. 93.

Filing.

§ 1781. "The party procuring a case or bill of exceptions, shall cause the same to be filed within ten days after the case shall be settled, or the same or the amendments thereto shall have been adopted, otherwise it shall be deemed abandoned."

[Rule 47 District Court]

How far conclusive on trial court.

§ 1782. A case properly settled and allowed cannot be disregarded by the trial court in determining a motion for a new trial made thereon although the court may be of the opinion that the case does not correctly set forth the facts.[1] But upon due notice [2] a case or bill of exceptions may be amended by the trial judge.[3] The judge should act with caution in making amendments and proceed only where the amendment is essential and clearly appropriate.[4] After the decision on a motion for a new trial a case cannot be

Digitized by Google

amended for use on appeal from the order.[5] The district court cannot amend a case settled by a referee. If it is made to appear to the district court that the case as settled by the referee is incorrect on account of an error in engrossing or some oversight the proper practice is to send the case back to the referee for correction.[6]

[1] Steinkraus v. Minneapolis etc. Ry. Co. 39 Minn. 135.
[2] State v. Laliyer, 4 Minn. 379 Gil. 286; Dayton v. Craik, 26 Minn. 133, 1 N. W. 813. See Jaspers v. Lano, 17 Minn. 296 Gil. 273.
[3] State v. Macdonald, 30 Minn. 98, 14 N. W. 459.
[4] Roblin v. Yaggy, 35 Ill. App. 537; Harris v. Tomlinson, 130 Ind. 426.
[5] Riley v. Chicago etc. Ry. Co. 71 Minn. 425, 74 N. W. 425; Dayton v. Craik, 26 Minn. 133, 1 N. W. 813; Anderson v. St. Croix Lumber Co. 47 Minn. 24, 49 N. W. 407.
[6] Taylor v. Parker, 18 Minn. 79 Gil. 63.

Discretionary power of trial court.

§ 1783. The matter of settling and allowing a case or bill of exceptions rests, aside from statutory regulation, almost wholly in the discretion of the trial court and its action will not be reversed on appeal except for a gross abuse of discretion.

Irvine v. Myers, 6 Minn. 558 Gil. 394; Nickerson v. Wells Stone Mercantile Co. 71 Minn. 230, 73 N. W. 959, 74 N. W. 891; State v. Powers, 69 Minn. 429, 72 N. W. 705; Baxter v. Coughlan, 80 Minn. 322, 83 N. W. 190; Phoenix v. Gardner, 13 Minn. 294 Gil. 272.

Amendment by court.

§ 1784. When an appeal is taken to the supreme court the district court has jurisdiction to correct the record or settle and allow a case or bill of exceptions until the return is made.[1] When the return is made the district court loses jurisdiction and can act further only upon an order from the supreme court.[2]

[1] Loveland v. Cooley, 59 Minn. 259, 61 N. W. 138; Pratt v. Pioneer Press Co. 32 Minn. 217, 18 N. W. 836, 20 N. W. 87; Bahnsen v. Gilbert, 55 Minn. 334, 56 N. W. 1117; United States Investment Corp. v. Ulrickson, 84 Minn. 14, 86 N. W. 613, 1004.
[2] Chesley v. Mississippi etc. Ry. Co. 39 Minn. 83, 38 N. W. 769.

Amendment by parties.

§ 1785. The parties have no right to alter by stipulation the record settled and allowed by the judge, but if they do so they will not be heard to complain of the alteration on appeal.

Selser Bros. Co. v. Minneapolis Cold-Storage Co. 77 Minn. 186, 79 N. W. 680.

Effect of hearing motion for new trial on unsettled case.

§ 1786. The hearing of a motion for a new trial on a case or bill of exceptions agreed to by the parties is an approval of it and it is the duty of the court thereafter to allow it as a matter of course.[1]

Digitized by Google

Where a statement of the case, to which amendments had been proposed and allowed, had not been duly approved and certified by the district judge, but a motion for a new trial thereon had been heard and determined by him without objection it was held that it was thereby approved by him and that he might properly certify it at any time nunc pro tunc; and that inasmuch as the defect was merely formal, and the objection might have been obviated if it had been seasonably taken, it should be disregarded in the supreme court.[2]

[1] State v. Cox, 26 Minn. 214, 2 N. W. 494.

[2] Sherman v. St. Paul etc. Ry. Co. 30 Minn. 227, 15 N. W. 239.

Appeals.

§ 1787. An order refusing an application to settle or certify a case or bill of exceptions is not appealable. The remedy is mandamus.[1] An order granting an application to settle and allow a case or bill of exceptions after the statutory time is not reviewable on an appeal from the final judgment. The remedy is a motion to strike from the return.[2] Irregularities in the settlement and allowance of a case or bill of exceptions cannot be taken advantage of on a motion for a new trial [3] or on appeal from an order granting or denying a new trial. An order denying a motion to strike from the files a settled case or bill of exceptions for irregularities in the settlement thereof is not reviewable on an appeal from an order granting a new trial. Such an order is one "involving the merits of the action or some part thereof" and reviewable by direct appeal or on appeal from the final judgment.[4]

[1] State v. Cox, 26 Minn. 214, 2 N. W. 494; State v. Macdonald, 30 Minn. 98, 14 N. W. 459; Schumann v. Mark, 35 Minn. 379, 28 N. W. 927; Richardson v. Rogers, 37 Minn. 461, 35 N. W. 270.

[2] Bahnsen v. Gilbert, 55 Minn. 334, 56 N. W. 1117; Arine v. Minneapolis etc. Ry. Co. 76 Minn. 201, 78 N. W. 1108.

[3] Shumann v. Mark, 35 Minn. 379, 28 N. W. 927.

[4] Baxter v. Coughlan, 80 Minn. 322, 83 N. W. 190.

Construction and conclusiveness of case on appeal.

§ 1788. A case cannot be impeached on appeal.[1] The certificate of the trial judge is conclusive except when it is inconsistent with the record. The record is to be construed as a whole [2] and the certificate of the trial judge that the settled case contains all the evidence is not conclusive if the case itself clearly shows the contrary.[3] The supreme court has no authority to amend or to allow the parties to amend a case or bill of exceptions on appeal; [4] but it may remand a cause with leave to apply to the trial judge for an amendment,[5] if a timely application is made.[6] A case being certified as containing all the material evidence, it will not be presumed that there was other evidence which could have affected the result of the trial.[7] When a case is attached to the judgment roll it will be presumed that it was regularly and properly attached.[8]

[1] Hemstad v. Hall, 64 Minn. 136, 66 N. W. 366. See Mudd v. Home Ins. Co. 25 Minn. 100.

Digitized by Google

[2] Vassau v. Campbell, 79 Minn. 167, 81 N. W. 829.
[3] Acker Post v. Carver, 23 Minn. 567; Sage v. Rudnick, 67 Minn. 362, 69 N. W. 1096; Vassau v. Campbell, 79 Minn. 167, 81 N. W. 829; Lundell v. Cheney, 50 Minn. 470, 52 N. W. 918; Dunham v. Messing, 68 Minn. 257, 70 N. W. 1128; In re Post, 33 Minn. 478, 24 N. W. 184; Hill v. Gill, 40 Minn. 441, 42 N. W. 294.
[4] Gluck v. State, 40 Ind. 263; Ashley v. Root, 4 Allen (Mass.) 504. See Anderson v. St. Croix Lumber Co. 47 Minn. 24, 49 N. W. 407; Selser Bros. Co. v. Minneapolis Cold Storage Co. 77 Minn. 186, 79 N. W. 680.
[5] Phoenix v. Gardner, 13 Minn. 294 Gil. 272; Chesley v. Mississippi etc. Co. 39 Minn. 83, 38 N. W. 769; Anderson v. St. Croix Lumber Co. 47 Minn. 24, 49 N. W. 407.
[6] Anderson v. St. Croix Lumber Co. 47 Minn. 24, 49 N. W. 407.
[7] Reiff v. Bakken, 36 Minn. 333, 31 N. W. 348.
[8] Teich v. Board of Court Com'rs, 11 Minn. 292 Gil. 201.

§ 1789. The supreme court will give a case or bill of exceptions a reasonably liberal construction but it will not, by construction, supply omissions or remedy material defects.[1] A case or bill of exceptions will always be construed most strongly against the appellant and in support of the order or judgment.[2]

[1] Board of Trustees v. Brown, 66 Minn. 179, 68 N. W. 837; Baxter v. Coughlan, 80 Minn. 322, 83 N. W. 190.
[2] Price v. Powell, 3 N. Y. 322.

Improper case stricken out.

§ 1790. A case or bill of exceptions improperly settled or allowed or included in the return will be stricken from the record by the supreme court on motion of the aggrieved party. Affidavits are admissible to show the irregularity. A dismissal of the appeal does not follow as a matter of course.

Mower v. Hanford, 6 Minn. 535 Gil. 372; Daniels v. Winslow, 2 Minn. 116 Gil. 93; Dayton v. Craik, 26 Minn. 133, 1 N. W. 133; Arine v. Minneapolis etc. Ry. Co. 76 Minn. 201, 78 N. W. 1108.

ASSIGNMENTS OF ERROR

Rule of court.

§ 1791. "Prefixed to the brief of the appellant, but stated separately, shall be an assignment of errors intended to be urged. Each specification of error shall be separately, distinctly and concisely stated, without repetition, and they shall be numbered consecutively. When the error specified is that the finding of the court below or referee is not sustained by the evidence, it shall specify particularly the finding complained of. No error not affecting the jurisdiction over the subject matter will be considered unless stated in the assignment of errors."

[Rule 9, Supreme Court]

Digitized by Google

Object of rule.

§ 1792. The primary object of assignments of error is to apprise the appellate court and the respondent, in a concise and convenient manner, of the specific questions presented for determination. It enables opposing counsel to ascertain readily and certainly just what points he has to meet in the preparation of his brief, and the court to see just what points it is to consider, and to confine discussion to them. The rule applies to all cases.

Duncan v. Kohler, 37 Minn. 379, 34 N. W. 594; Adams v. Thief River Falls, 84 Minn. 30, 86 N. W. 767; Herbert v. Dutur, 23 Or. 462.

General rules.

§ 1793. Only the appellant can assign errors. In this state it is the rule that a party waives all objections to a verdict, finding, judgment or order by failing to appeal.[1] An appellant can only assign errors which were prejudicial to himself; he cannot take advantage of errors as to other parties.[2] When there are several parties uniting in an appeal there should be separate assignments of error unless the errors were common to all.[3] Each assignment must be single, concise, certain and complete in itself without reference to other assignments or to the record.[4] Two or more distinct allegations of error cannot be included in one assignment; otherwise all the rulings during the trial might be grouped under one assignment and the purpose of the rule defeated.[5] An omnibus assignment is unavailing; counsel must put his finger on the specific error.[6] But a single assignment may embrace several rulings involving the same error.[7] An assignment so general and indefinite as not to indicate the specific error asserted is a mere evasion of the rule. On the other hand the practice of multiplying assignments by repetition and unnecessary subdivision is a perversion of the rule which defeats the very purposes for which it was adopted.[8] Argument and the citation of authorities have no place in an assignment of errors.[9] At the end of each assignment the number of the folio of the paper-book where the error may be found should be given.[10] Assignments cannot be predicated on rulings in a justice court.[11]

[1] Watson v. Ward, 27 Minn. 29, 6 N. W. 407; Edgerton v. Jones, 10 Minn. 427 Gil. 341; New v. Wheaton, 24 Minn. 406; Whitely v. Mississippi etc. Co. 38 Minn. 523, 38 N. W. 753; Clarkin v. Brown, 80 Minn. 361, 83 N. W. 351; Winona etc. Ry. Co. v. Denman, 10 Minn. 267 Gil. 208; Henderson v. Kendrick, 72 Minn. 253, 75 N. W. 127; In re Allen, 41 Minn. 430, 43 N. W. 382; Wheeler v. Merriman, 30 Minn. 372, 15 N. W. 665; Kelly v. Clow Reaper Mfg. Co. 20 Minn. 88 Gil. 74.

[2] Clark v. Stanton, 24 Minn. 232; Borman v. Baker, 68 Minn. 213, 70 N. W. 1075; Marshall & Ilsley Bank v. Cady, 76 Minn. 112, 78 N. W. 978; Seibert v. Minneapolis etc. Ry. Co. 58 Minn. 39, 59 N. W. 822.

[3] Nelson v. Munch, 28 Minn. 314, 9 N. W. 863. See Barr v. Kloos, 81 Minn. 218, 83 N. W. 980; McKasy v. Huber, 65 Minn. 9, 67 N. W. 650.

Digitized by Google

[4] Herbert v. Dufur, 23 Or. 462; Trammel v. Chipman, 74 Ind. 474; Landis v. Evans, 113 Pa. St. 322.
[5] Columbia Mill Co. v. Nat. Bank of Commerce, 52 Minn. 224, 53 N. W. 1061; Christian v. Bowman, 49 Minn. 99, 51 N. W. 663; Woodbury v. Day, 24 Minn. 463; Seibert v. Minneapolis etc. Ry. Co. 58 Minn. 39, 59 N. W. 822.
[6] London etc. Co. v. McMillan, 78 Minn. 53, 80 N. W. 841; Malmgren v. Phinney, 65 Minn. 25, 67 N. W. 649.
[7] Columbia Mill Co. v. Nat. Bank of Commerce, 52 Minn. 224, 53 N. W. 1061.
[8] Duncan v. Kohler, 37 Minn. 379, 34 N. W. 594; Carpenter v. Eastern Ry. Co. 67 Minn. 188, 69 N. W. 720.
[9] Duncan v. Kohler, 37 Minn. 379, 34 N. W. 594; Crandall v. Slate, 10 Conn. 370.
[10] Fidelity & Casualty Co. v. Crays, 76 Minn. 450, 79 N. W. 531; St. Barnabas Hospital v. Minneapolis etc. Co. 68 Minn. 254, 70 N. W. 1126.
[11] Chamberlain v. Bradley, 79 Minn. 232, 82 N. W. 311.

Assignments relating to findings and conclusions.

§ 1794. An assignment must show whether it is taken to the findings of fact or to the conclusions of law.[1] The particular error in a finding must be pointed out.[2] If the court makes a general finding that all the allegations of a particular pleading are true it is incumbent on an appellant to specify the fact or facts the finding of which he deems erroneous.[3] The following assignments have been held insufficient: that "the decision was not justified by the evidence and is contrary to law";[4] that "the evidence does not sustain the findings of fact";[5] that "the court below erred in finding the affirmative allegations of the answer to be true";[6] that "the court erred in finding that the material facts alleged in the answer are true";[7] that "the court erred in its findings and order for judgment";[8] that "the findings of fact and conclusions of law of the trial court are not justified by the evidence, and are contrary to law";[9] that "the finding of the court is not justified by the evidence and is contrary to law";[10] that the court erred "in granting order for judgment for plaintiffs in any sum whatever";[11] that "the decision of the court herein is not justified by the evidence."[12] An assignment that the court erred in denying a motion for a new trial is not sufficient to raise the objection that the court erred in refusing to amend its findings.[13] An assignment that "the conclusions of law are not justified or supported by the findings of fact" is sufficient.[14]

[1] Lytle v. Prescott, 57 Minn. 129, 58 N. W. 688.
[2] Albrecht v. City of Ct. Paul, 56 Minn. 99, 57 N. W. 330; Clark v. B. B. Richards Lumber Co. 72 Minn. 397, 75 N. W. 605.
[3] Albrecht v. City of St. Paul, 56 Minn. 99, 57 N. W. 330; Adolph v. Minneapolis etc. Ry. Co. 58 Minn. 178, 59 N. W. 959; Moody v. Techabold, 52 Minn. 51, 53 N. W. 1023.
[4] Smith v. Kipp, 49 Minn. 119, 51 N. W. 656; Butler-Ryan Co. v. Silvey, 70 Minn. 509, 73 N. W. 406, 510; Parrish v. City of St.

Digitized by Google

Paul, 84 Minn. 426, 87 N. W. 1124. See also, Thiele v. Berge, 81 Minn. 505, 84 N. W. 320.

[8] Union Cash Register Co. v. John, 49 Minn. 481, 52 N. W. 48.

[9] Albrecht v. City of St. Paul, 56 Minn. 99, 57 N. W. 330.

[7] Moody v. Tschabold, 52 Minn. 51, 53 N. W. 1023.

[8] Dallemand v. Swensen, 54 Minn. 32, 55 N. W. 815; Cook v. Kittson, 68 Minn. 474, 71 N. W. 670.

[9] Mahler v. Merchants Nat. Bank, 65 Minn. 37, 67 N. W. 655.

[10] Lytle v. Prescott, 57 Minn. 129, 58 N. W. 688.

[11] Mickelson v. Duluth Building & Loan Assoc. 68 Minn. 535, 71 N. W. 703.

[12] Hunt v. O'Leary, 84 Minn. 200, 87 N. W. 611; Petzenka v. Dallimore, 64 Minn. 472, 67 N. W. 365.

[13] Christianson v. City of Owatonna, 83 Minn. 52, 85 N. W. 909.

[14] Mahler v. Merchants' Nat. Bank, 65 Minn. 37, 67 N. W. 655.

Assignments relating to rulings on evidence.

§ 1795. A single assignment may cover several rulings involving the same error but when the rulings involve different points they cannot be included in a single assignment.[1] A general assignment that the court erred in admitting or excluding evidence is unavailing. The particular evidence must be pointed out by apt reference.[2] It is proper practice to give the name of the witness, and the question asked, in full. The following assignments have been held insufficient: that "the court erred in overruling plaintiff's objections to the evidence of divers defendants to the effect that subsequent to the execution of the note sued upon they settled their liability by the execution of their individual notes";[3] that "the court erred in overruling defendants' objections to the introduction of evidence";[4] that "the court erred in admitting improper and in excluding proper evidence";[5] that "the decision of the court is not supported by the findings of fact, and is contrary to law";[6] that the court erred in finding certain facts.[7]

[1] Columbia Mill Co. v. Nat. Bank of Commerce, 52 Minn. 224, 53 N. W. 1061; Christian v. Bowman, 49 Minn. 99, 51 N. W. 663.

[2] American Express Co. v. Piatt, 51 Minn. 568, 53 N. W. 877; Fredericksen v. Singer Mfg. Co. 38 Minn. 356, 37 N. W. 453; Hall v. City of St. Paul, 56 Minn. 431, 57 N. W. 928; In re Granstrand, 49 Minn. 438, 52 N. W. 41; Cook v. Kittson, 68 Minn. 474, 71 N. W. 670.

[3] Yellow Medicine County Bank v. Wiger, 59 Minn. 384, 61 N. W. 452.

[4] American Express Co. v. Piatt, 51 Minn. 568, 53 N. W. 877.

[5] Kretzschmar v. Meehan, 81 Minn. 434, 84 N. W. 220.

[6] Hewetson v. Dossett, 71 Minn. 358, 73 N. W. 1089.

[7] Ellison v. Fox, 38 Minn. 454, 38 N. W. 358.

Assignments relating to new trials.

§ 1796. An assignment that the court erred in denying a motion for a new trial is too general if the motion was made on more than

Digitized by Google

one ground.[1] If the motion was made exclusively on one ground, such a general assignment might in some cases sufficiently indicate the error complained of; as, for example, when the motion was made exclusively on the ground of newly discovered evidence, or that the evidence did not justify the verdict. On the other hand, if the motion was made on the ground of errors of law occurring at the trial, an assignment would not be sufficient unless it specified the particular errors relied on.[2] A general assignment that the court erred in granting a new trial is always sufficient.[3] An assignment that the court erred in denying a new trial does not raise the objection that the damages are excessive.[4]

[1] Wilson v. Minnesota etc. Ins. Co. 36 Minn. 112, 30 N. W. 401; State v. Hays, 38 Minn. 475, 38 N. W. 365; Stevens v. City of Minneapolis, 42 Minn. 136, 43 N. W. 842; In re Granstrand, 49 Minn 438, 52 N. W. 41; Moody v. Tschabold, 52 Minn. 51, 53 N. W. 1023; Selover v. Bryant, 54 Minn. 434, 56 N. W. 58; First Nat. Bank v. Holan, 63 Minn. 525, 65 N. W. 952; Mahler v. Merchants Nat. Bank, 65 Minn. 37, 67 N. W. 655; Cook v. Kittson, 68 Minn. 474, 71 N. W. 670; Ingalls v. Oberg, 70 Minn. 102, 72 N. W. 841; Sharpe v. Larson, 67 Minn. 428, 70 N. W. 1, 554; Keough v. Wendelschafer, 73 Minn. 352; 76 N. W. 46; Larson v. Kelly, 72 Minn. 116, 75 N. W. 13; Ingalls v. Holmgren, 81 Minn. 278, 83 N. W. 980; Carpenter v. Eastern Ry. Co. 67 Minn. 188, 69 N. W. 720; Bates v. B. B. Richards Lumber Co. 56 Minn. 14, 57 N. W. 218; Thiele v. Berge, 81 Minn. 505, 84 N. W. 320; County of Chisago v. Nelson, 81 Minn. 443, 84 N. W. 301; Hughes v. Meehan, 84 Minn. 226, 87 N. W. 768; Parrish v. City of St. Paul, 84 Minn. 426, 87 N W. 1124; Adams v. City of Thief River Falls, 84 Minn. 30, 86 N. W. 767; J. I. Case Threshing Machine Co. v. Hoffman, (Minn.) 90 N W. 5.

[2] Stevens v. City of Minneapolis, 42 Minn. 136, 43 N. W. 842.

[3] Wilcox v. Mutual Fire Ins. Co. 81 Minn. 478, 84 N. W. 334.

[4] Sharpe v. Larson, 67 Minn. 428, 70 N. W. 1, 554; Adams v. City of Thief River Falls, 84 Minn. 30, 86 N. W. 767.

Assignments relating to instructions.

§ 1797. An assignment of error, "that the court erred in its instructions to the jury, to which the defendant excepted" and one "that the court erred in refusing the instructions requested by the defendant," where there are several exceptions and requests, are insufficient.[1] The particular instruction must be pointed out.[2] A single assignment as to several different parts of a charge, relating to entirely different and distinct propositions is unavailing.[3] Good practice requires that the alleged erroneous instructions should be given in hæc verba. There should be a separate assignment for each request erroneously refused and the only safe course is to give each request in hæc verba.[4]

[1] Carpenter v. Eastern Ry. Co. 67 Minn. 188, 69 N. W. 720.

[2] Hansen v. Gaar, Scott & Co. 68 Minn. 68, 70 N. W. 853.

Digitized by Google

[3] Watts v. Howard, 70 Minn. 122, 72 N. W. 840.
[4] Larson v. Kelly, 72 Minn. 116, 75 N. W. 13.

Assignments as to miscellaneous matters.

§ 1798. The following assignments have been held sufficient: that "the court below erred in granting the order vacating the judgment entered in said cause, and allowing the defendant to file his answer and defend therein";[1] that "the court erred in granting defendant's motion to dismiss the action";[2] that "the court erred in directing a verdict for plaintiff."[3]

[1] Fitzpatrick v. Campbell, 58 Minn. 20, 59 N. W. 629.
[2] Ermentrout v. American Fire Ins. Co. 60 Minn. 418, 62 N. W. 543.
[3] American Express Co. v. Piatt, 51 Minn. 568, 53 N. W. 877.

Effect of failure to make assignments.

§ 1799. If the appellant fails to make any assignments of error the order or judgment appealed from will ordinarily be affirmed.[1] Generally the court will refuse to consider errors not assigned.[2]

[1] Freeman v. Rhodes, 36 Minn. 297, 30 N. W. 891; Rushfeldt v. Shave, 37 Minn. 282, 33 N. W. 791; Day v. Eibert, 68 Minn. 499, 71 N. W. 615; Guiterman v. Saterlie, 76 Minn. 19, 78 N. W. 863.
[2] James v. City of St. Paul, 72 Minn. 138, 75 N. W. 5; Thiel v. Kennedy, 82 Minn. 142, 84 N. W. 657.

Waiver of assignments.

§ 1800. An assignment of error not urged by the appellant in his points and authorities is deemed waived;[1] and this is true although it was urged on the oral argument,[2] unless it is voluntarily discussed and submitted to the court by counsel for the respondent.[3] Where the appellant does nothing more in his brief than reiterate his assignment it will be deemed waived.[4] It is discretionary with the court to consider assignments not discussed.[5]

[1] Smith v. Bean, 46 Minn. 138, 48 N. W. 687; Minneapolis Co-operative Co. v. Williamson, 51 Minn. 53, 52 N. W. 986; Moody v. Techabold, 52 Minn. 51, 53 N. W. 1023; Johnson v. Johnson, 57 Minn. 100, 58 N. W. 824; Dodge v. McMahan, 61 Minn. 175, 63 N. W. 487; Minneapolis etc. Ry. Co. v. Firemen's Ins. Co. 62 Minn. 315, 64 N. W. 902; Keigher v. City of St. Paul, 73 Minn. 21, 75 N. W. 732; Dennis v. Pabst Brewing Co. 80 Minn. 15, 82 N. W. 978; Romer v. Conter, 53 Minn. 171, 54 N. W. 1052; Bates v. B. B. Richards Lumber Co. 56 Minn. 14, 57 N. W. 218; Hahn v. Bettingen, 81 Minn. 91, 83 N. W. 467; Boe v. Irish, 69 Minn. 493, 72 N. W. 842; State v. Hulder, 78 Minn. 524, 81 N. W. 532.
[2] Dodge v. McMahan, 61 Minn. 175, 63 N. W. 487; Minneapolis etc. Ry. Co. v. Firemen's Ins. Co. 62 Minn. 315, 64 N. W. 902; Cutting v. Weber, 77 Minn. 53, 79 N. W. 595.
[3] Cutting v. Weber, 77 Minn. 53, 79 N. W. 595.
[4] Romer v. Conter, 53 Minn. 171, 54 N. W. 1052.
[5] State v. Holden, 42 Minn. 350, 44 N. W. 123.

Digitized by Google

Amendment of assignments.

§ 1801. An appellant has no right to amend his assignments of error after the time for serving them has passed, except by consent of the respondent or by leave of court.

Greene v. Dwyer, 33 Minn. 403, 23 N. W. 546; Minneapolis etc. Ry. Co. v. Home Ins. Co. 64 Minn. 61, 66 N. W. 132; Carpenter v. Eastern Ry. Co. 67 Minn. 188, 69 N. W. 720; Swanson v. Mendenhall, 80 Minn. 56, 82 N. W. 1093.

NECESSITY OF OBJECTIONS AND RULINGS IN THE TRIAL COURT

Necessity of a ruling in the trial court.

§ 1802. Except in such remedial cases as may be prescribed by law our supreme court is only invested with an appellate jurisdiction. In the exercise of such jurisdiction it can only rightfully act as a court of review. The very nature of its jurisdiction confines the court to a consideration of such questions as, originating in another court, have been there actually or presumably considered and determined in the first instance.[1] The theory of the judicial system in this state is that the parties shall first have a decision of the district court and then a review of that decision in the supreme court.[2] The rule applies whether the question is one of fact or of law.[3]

[1] Johnson v. Howard, 25 Minn. 558; Babcock v. Sanborn, 3 Minn. 141 Gil. 86; White v. Western Assurance Co. 52 Minn. 352, 54 N. W. 195; Northwestern Railroader v. Prior, 68 Minn. 95, 70 N. W. 869; Smith v. Kipp, 49 Minn. 119, 51 N. W. 656; Holmes v. Campbell, 12 Minn. 221 Gil. 141; Keyes v. Clare, 40 Minn. 84, 41 N. W. 453; Masterson v. Le Claire, 4 Minn. 163 Gil. 108; State v. District Court, 52 Minn. 283, 53 N. W. 1157.

[2] Colvill v. Langdon, 22 Minn. 565.

[3] White v. Western Assurance Co. 52 Minn. 352, 54 N. W. 195.

§ 1803. In accordance with the general rule that the supreme court will refuse to consider questions not passed upon by the trial court it has been held that the following objections cannot be raised for the first time on appeal: that the verdict is not justified by the evidence;[1] that the damages assessed by the jury are excessive or inadequate;[2] that the judgment is not justified by the order or verdict or the clerk has otherwise entered judgment irregularly;[3] that the findings of the court are informal, indefinite, incomplete, or broader than authorized by the issues actually tried;[4] that there is a variance between the pleadings and the proof or that evidence is inadmissible under the pleadings;[5] that allegations of a pleading are not put in issue by a denial;[6] that there is a departure in the pleadings;[7] that a default should be opened and the defendant be allowed to answer;[8] that the action is barred by the statute of limitations;[9] that an intervener had no right to intervene;[10] that a notice of motion for a new trial is insufficient;[11] that a motion for a new trial ought not to be entertained on certain papers;[12] that costs were

Digitized by Google

improperly taxed by the clerk;[13] that a case of an equitable nature was improperly submitted to a jury;[14] that there was no formal order making a claimant a party to garnishment proceedings;[15] that there was an improper blank in a writ of attachment;[16] that there was a defect in the affidavit upon which a justice issued a writ of replevin;[17] that a default judgment was entered upon insufficient proof of service;[18] that the record does not show an order of reference where the cause was tried by a referee;[19] that the allegations of an answer were not put in issue by a reply;[20] that a judgment was improperly ordered on default at a postponed hearing of a motion to strike out defendant's answer as sham and for judgment;[21] that the verdict was for a greater amount than was claimed in the complaint;[22] that a demurrer was heard at an improper time and place;[23] that judgment, in an action tried by the court, was directed without findings of fact;[24] that the jury have made a miscalculation in arriving at their verdict;[25] that the court made a slight miscalculation in its findings;[26] that in an action to foreclose a mortgage one of the parties defendant was described by his full name in the pleadings, but in the report of sale and order of confirmation by his initials only;[27] that the court abused its discretion in overruling a demurrer without giving the demurrant the right to answer;[28] that the return of a justice on appeal to the district court is not complete;[29] that a bond upon which an attachment was discharged is defective;[30] that in an action to enforce a mechanic's lien there was no proof on the trial that the land did not exceed one acre in area;[31] that the return of an officer as to the service of a summons is insufficient;[32] that the verdict, in condemnation proceedings involving several tracts, is for a gross sum for all.[33]

[1] See § 953.
[2] Id.
[3] See § 1235.
[4] See §§ 522 et seq.
[5] See §§ 1810, 1825.
[6] Taylor v. Parker, 17 Minn. 469 Gil. 447; Merchants National Bank v. Barlow, 79 Minn. 234, 82 N. W. 364; Matthews v. Torinus, 22 Minn. 132; Lyford v. Martin, 79 Minn. 243, 82 N. W. 243.
[7] Abraham v. Holloway, 41 Minn. 163, 42 Minn. 870; Whitney v. National Masonic Accident Assoc. 57 Minn. 472, 59 N. W. 943.
[8] Keyes v. Clare, 40 Minn. 84, 41 N. W. 453.
[9] Hardwick v. Ickler, 71 Minn. 25, 73 N. W. 519; Gilbert v. Hewetson, 79 Minn. 326, 82 N. W. 655.
[10] Holcomb v. Stretch, 74 Minn. 234, 76 N. W. 1132; Dunnell, Minn. Pl. § 267.
[11] Nudd v. Home Ins. etc. Ry. Co. 24 Minn. 100; Chesley v. Mississippi etc. Co. 39 Minn. 83, 38 N. W. 769.
[12] Nudd v. Home Ins. etc. Ry. Co. 24 Minn. 100.
[13] Hurd v. Simonton, 10 Minn. 423 Gil. 340; Fay v. Davidson, 13 Minn. 298 Gil. 275; Barry v. McGrade, 14 Minn. 286 Gil. 214; Jensen v. Crevier, 33 Minn. 372, 23 N. W. 541; Coles v. Berry-

Digitized by Google

hill, 37 Minn. 56, 33 N. W. 213; Stevens v. McMillan, 37 Minn. 509, 35 N. W. 372; Kent v. Bown, 3 Minn. 347 Gil. 246; State v. District Court, 52 Minn. 283, 53 N. W. 1157; County of Hennepin v. Jones, 18 Minn. 199 Gil. 182.

[14] Davis v. Smith, 7 Minn. 414 Gil. 328; Finch v. Green, 16 Minn. 355 Gil. 315.

[15] Williams v. Minneapolis etc. Ry. Co. 27 Minn. 85, 6 N. W. 445.

[16] Brown v. Minneapolis Lumber Co. 25 Minn. 461.

[17] Goodell v. Ward, 17 Minn. 17 Gil. 1.

[18] Masterson v. Le Claire, 4 Minn. 163 Gil. 108.

[19] Spencer v. Levering, 8 Minn. 461 Gil. 410.

[20] Merchants Nat. Bank v. Barlow, 79 Minn. 234, 82 N. W. 364; Matthews v. Torinus, 22 Minn. 132; Lyford v. Martin, 79 Minn. 243, 82 N. W. 243.

[21] Gederhohm v. Davies, 59 Minn. 1, 60 N. W. 676.

[22] Amort v. Christofferson, 57 Minn. 234, 59 N. W. 304.

[23] Fallgatter v. Lammers, 71 Minn. 238, 73 N. W. 860.

[24] Williams v. Schembri, 44 Minn. 250, 46 N. W. 403.

[25] Bank of Commerce v. Smith, 57 Minn. 374, 59 N. W. 311; Fletcher v. German-American Ins. Co. 79 Minn. 337, 82 N. W. 647.

[26] Fithian v. Weidenborner, 72 Minn. 331, 75 N. W. 380.

[27] Piper v. Sawyer, 82 Minn. 474, 85 N. W. 206.

[28] Potter v. Holmes, 72 Minn. 153, 75 N. W. 591.

[29] Davies v. Von Berg, 79 Minn. 233, 82 N. W. 311.

[30] Gale v. Seifert, 39 Minn. 171, 39 N. W. 69.

[31] Egan v. Menard, 32 Minn. 273, 20 N. W. 197.

[32] Johnson v. Lough, 22 Minn. 203.

[33] Lake Superior etc. Ry. Co. v. Greve, 17 Minn. 322 Gil. 299.

General statement as to objections and exceptions.

§ 1804. The function of an objection is to provoke a ruling. The function of an exception is to apprise the court and opposing counsel in a timely and formal manner that the objector deems the ruling erroneous and will make it a ground for a new trial or carry the question to an appellate court. An objection always precedes a ruling and states the grounds or points upon which the ruling is asked. On the other hand an exception always follows a ruling and does not state the specific ground upon which it is based. At common law an exception is the only means of saving an objection for purposes of a review on appeal. By Laws 1901 ch. 113 it is provided that "every ruling, order or decision made by any judge of any court of record, in any action or proceeding, and every instruction to a jury, shall be deemed excepted to by any party aggrieved thereby, and the same may be reviewed upon a motion for a new trial, or upon appeal, as fully as if exception thereto had been taken at the time such ruling, order or decision was made or such instruction given." This statute does away with exceptions but of course it in no way relieves a party of the necessity of making objections. It is fundamental that an objection must be specific. The objector must clearly present the exact point upon which he desires a ruling. He must put his finger on

Digitized by Google

the error. Justice and orderly procedure require that the burden of pointing out objections should rest upon the party objecting. There may be several possible objections upon a given point, and unless the objection is specific the court and counsel might not have the same objection in mind. Again, objections should be specific in order that the adverse party may have an opportunity to obviate them if possible. A still further and more important reason for requiring objections to be specific lies in the necessity of having a record on appeal which shall clearly present the exact nature of the ruling made on the trial. For example, if there are several possible objections to the admission of evidence and only a general objection is interposed at the trial and a ruling thereon made the record on appeal will not disclose the grounds upon which the court based its ruling. An appellate court has no authority to pass upon points not passed upon by the lower court and for that reason it is indispensable that the record on appeal should disclose the exact nature and grounds of the ruling on the trial. Such a record can only be secured by requiring objections to be specific.

OBJECTIONS TO EVIDENCE

Necessity of objections—party limited to those made.

§ 1805. Objection to the admission or exclusion of evidence cannot be raised for the first time either on a motion for a new trial [1] or on appeal.[2] All such objections are deemed waived if not made in a timely and formal manner on the trial. On appeal a party cannot take advantage of any objection to the admission of evidence which he did not clearly and specifically raise on the trial.[3] All objections not specifically raised are deemed waived. A party is not only bound to make specific objections but on appeal he is strictly limited to those specified.[4] To permit a party to change his position on appeal would be unfair to the adverse party and would turn the appellate court into a court of first instance.

[1] State v. Mims, 26 Minn. 183, 2 N. W. 494, 683. But see Vanderlinde v. Canfield, 40 Minn. 541, 42 N. W. 538 (exception made because of mistake of counsel as to effect of evidence).

[2] Dufolt v. Gorman, 1 Minn. 301 Gil. 234; Daniels v. Winslow, 2 Minn. 116 Gil. 93; Dixon v. Merritt, 6 Minn. 160 Gil. 98; Chamberlain v. Porter, 9 Minn. 260 Gil. 244; McCormick v. Fitch, 14 Minn. 252 Gil. 185; Knauft v. St. Paul etc. Ry. Co. 22 Minn. 173; State v. Mims, 22 Minn. 183, 2 N. W. 494, 683; Torinus v. Buckham, 29 Minn. 128, 12 N. W. 348; Thoreson v. Minneapolis Harvester Works, 29 Minn. 341, 13 N. W. 156; Tierney v. Minneapolis etc. Ry. Co. 33 Minn. 311, 23 N. W. 229; Barnett v. St. Anthony Falls Water-Power Co. 33 Minn. 265.

[3] Bedal v. Spurr, 33 Minn. 207, 22 N. W. 390; Johnson v. Okerstrom, 70 Minn. 303, 73 N. W. 147; Gilbert v. Thompson, 14 Minn. 544 Gil. 414; Stillman v. Northern Pacific etc. Ry. Co. 34 Minn. 420, 26 N. W. 399; Mousseau v. Mousseau, 42 Minn. 212, 44 N. W. 193.

Digitized by Google

[4] Bond v. Corbett, 2 Minn. 248 Gil. 209; Smith v. Bean, 46 Minn. 138, 48 N. W. 687; Triggs v. Jones, 46 Minn. 277, 48 N. W. 1113; Towle v. Sherer, 70 Minn. 312, 73 N. W. 180; Levering v. Langley, 8 Minn. 107 Gil. 82.

When there are several parties.

1806. When there are several parties the objection must be limited to those against whom the evidence is inadmissible. A joint objection is unavailing to any one if the evidence is admissible as to any of the parties joining in the objection.

Appleton Mill Co. v. Warder, 42 Minn. 117, 43 N. W. 791; Cronfeldt v. Arrol, 50 Minn. 327, 52 N. W. 857.

When there are several causes of action.

§ 1807. When evidence is offered as to both of two causes of action on trial the objection that under the pleadings it is only admissible as to one should be made specifically so as to call the attention of the court to the ground of the objection.

Russell & Co. v. Davis, 51 Minn. 482, 53 N. W. 766; White v. Harrigan, 41 Minn. 414, 43 N. W. 89.

Before referee.

§ 1808. If evidence is taken and reported by a referee appointed solely for that purpose a party desiring to avail himself of any objection interposed before the referee must renew it in the district court and obtain a ruling.

Dartnell v. Davidson, 16 Minn. 530 Gil. 477; Gill v. Russell, 23 Minn. 362.

Objection to admission of any evidence under complaint.

§ 1809. A general objection to any evidence being received, upon the ground that the complaint does not state a cause of action, interposed at the commencement of the trial, no specific defect being pointed out, will not serve the purposes of a specific objection to particular items of evidence.

Thoreson v. Minneapolis Harvester Works, 29 Minn. 341, 13 N. W. 156; Bromberg v. Minnesota Fire Assoc. 45 Minn. 318, 47 N. W. 975.

Evidence inadmissible under pleadings.

§ 1810. The objection that evidence is inadmissible under the pleadings cannot be raised for the first time on appeal.

Lough v. Thornton, 17 Minn. 253 Gil. 230; Village of Wayzata v. Great Northern Ry. Co. 50 Minn. 438, 52 N. W. 913; Red River Valley Invest. Co. v. Cole, 62 Minn. 457, 64 N. W. 1149.

Ruling reserved.

§ 1811. If evidence is admitted subject to a future ruling on its admissibility a party should renew his objection at the proper time and secure a ruling;[1] and the record on appeal must show how the question was finally disposed of.[2]

[1] Herrick v. Morrill, 37 Minn. 250, 33 N. W. 849; Bitzer v. Bobo,

Digitized by Google

39 Minn. 18, 38 N. W. 607; Ambuehl v. Matthews, 41 Minn. 537, 43 N. W. 477; Voak v. National Invest. Co. 51 Minn. 450, 53 N. W. 708; Johanson v. Hoff, 67 Minn. 148, 69 N. W. 705; Perkins v. Morse, 30 Minn. 11, 13 N. W. 911, 14 N. W. 879; Lancashire Ins. Co. v. Callahan, 68 Minn. 277, 71 N. W. 261.

[2] National Investment Co. v. Schickling, 56 Minn. 283, 57 N. W. 663.

Necessity of repeating objections.

§ 1812. When a party has once interposed a definite objection to certain evidence it is not necessary for him to repeat his objection to substantially the same evidence from the same witness in reasonably close connection.[1] An objection "as above" indicates only such grounds of objection as are stated in the last preceding objection.[2]

[1] Carson v. Hawley, 82 Minn. 240, 84 N. W. 746; Griswold v. Edson, 32 Minn. 436, 21 N. W. 475.

[2] State v. Hyde, 27 Minn. 153, 6 N. W. 555.

Grounds of objection must be stated.

§ 1813. An objection to evidence must state the grounds therefor. Whatever may be the rule on a motion for a new trial a general objection is unavailing on appeal unless the evidence could not have been admitted under any view of the case or upon any state of the proof. If evidence is admissible for any conceivable purpose or for any of the parties offering it a general objection is unavailing. The objector must put his finger on the point of objection.

Craig v. Cook, 28 Minn. 232, 9 N. W. 712; Kanne v. Minneapolis etc. Ry. Co. 30 Minn. 423, 15 N. W. 871; Schell v. Second Nat. Bank, 14 Minn. 43, Gil. 34; Weide v. Davidson, 15 Minn. 327 Gil. 258; Califf v. Hillhouse, 3 Minn. 311 Gil. 217; Stearns v. Johnson, 17 Minn. 142 Gil. 116; Tozer v. Hershey, 15 Minn. 257 Gil. 197; State v. Hyde, 27 Minn. 153, 6 N. W. 555; Mousseau v. Mousseau, 42 Minn. 212, 44 N. W. 193.

§ 1814. A party objecting to the introduction of evidence must state his point so definitely that the court may intelligently rule upon it and the opposite party may, if the case will admit of it, remove the objection by other evidence.[1] Where the real objection to evidence is of such a character that if specifically pointed out when the evidence is offered the party offering it may remove the objection by further evidence, the general objection that the evidence is incompetent, irrelevant and immaterial will not cover it, but it must be specifically stated.[2]

[1] Gilbert v. Thompson, 14 Minn. 514 Gil. 414; Cannady v. Lynch, 27 Minn. 435, 8 N. W. 164; Craig v. Cook, 28 Minn. 232, 9 N. W. 712; Stillman v. Northern Pacific etc. Ry. Co. 34 Minn. 420, 26 N. W. 399; Nelson v. Chicago etc. Ry. Co. 35 Minn. 170, 28 N. W. 215; King v. Nichols & Shepard Co. 53 Minn. 453, 55 N. W. 604; Vaughan v. McCarthy, 63 Minn. 221, 65 N. W. 249; Union Register Co. v. John, 49 Minn. 481, 52 N. W. 48; Klotz v. Winona etc. Ry. Co. 68 Minn. 341, 71 N. W. 257; Hall v.

Digitized by Google

Connecticut etc. Ins. Co. 76 Minn. 401, 79 N. W. 497; Stahl v. City of Duluth, 71 Minn. 341, 74 N. W. 143; Johnson v. O'Kerstrom, 70 Minn. 303, 73 N. W. 147; Merchants' Nat. Bank v. Barlow, 79 Minn. 234, 82 N. W. 364.

[2] King v. Nichols & Shepard Co. 53 Minn. 453, 55 N. W. 604.

Effect of objection that evidence is incompetent, irrelevant and immaterial.

§ 1815. A lay visitor to the courts of this state would naturally suppose, from its frequent use by counsel, that there was wondrous potency in the phrase "objected to as incompetent, irrelevant and immaterial." As a matter of fact the phrase is rarely effectual for any purpose and its common employment is attributable to use and wont and mental indolence. It has been held insufficient to raise the following objections: that evidence is inadmissible under the pleadings;[1] that a question is too general and leading;[2] that preliminary proof of the execution of a written instrument has not been made;[3] that the signature to a written instrument has not been proved;[4] that evidence is secondary;[5] that an offer of evidence is too indefinite and uncertain;[6] that a witness is incompetent to testify as an expert;[7] that evidence as to the value of a machine related to a time too remote from the time of the contract in controversy;[8] that oral evidence would vary the terms of a written contract;[9] that a certificate of probate to certified copy of a will is not in proper form;[10] that written instruments offered in evidence as the acts or declarations of the adverse party were not sufficiently authenticated as his;[11] that a question is leading;[12] that evidence is immaterial unless obviously so;[13] that a question assumes a fact not in evidence;[14] that a resolution of a city council offered in evidence had not been properly published;[15] that a photograph of the locus in quo was taken long after the injury and when conditions had changed;[16] that a verdict was not properly identified;[17] that evidence tends to convict the defendant of a separate and independent crime.[18]

[1] Vaughan v. McCarthy, 63 Minn. 221, 65 N. W. 249; Smith v. Kingman & Co. 70 Minn. 453, 73 N. W. 253; Keigher v. City of St. Paul, 73 Minn. 21, 75 N. W. 21; Merchants' Nat. Bank v. Barlow, 79 Minn. 234, 82 N. W. 364.

[2] Clague v. Hodgson, 16 Minn. 329 Gil. 291; Alexander v. Thompson, 42 Minn. 498, 44 N. W. 534.

[3] McDonald v. Peacock, 37 Minn. 512, 35 N. W. 370; London etc. Co. v. St. Paul etc. Co. 84 Minn. 144, 86 N. W. 872.

[4] Schwartz v. Germania Life Ins. Co. 21 Minn. 215; Thompson v. Ellenz, 58 Minn. 301, 59 N. W. 1023; Johnson v. O'Kerstrom, 70 Minn. 303, 73 N. W. 147.

[5] Graves v. Backus, 69 Minn. 532, 72 N. W. 811. See Cullum v. Buttcher, 58 Minn. 381, 59 N. W. 971.

[6] Alexander v. Thompson, 42 Minn. 498, 44 N. W. 534.

[7] State v. Rue, 72 Minn. 296, 75 N. W. 235.

[8] King v. Nichols & Shepard, 53 Minn. 453, 55 N. W. 604.

[9] Union Cash Register Co. v. John, 49 Minn. 481, 52 N. W. 48.

[10] Hall v. Connecticut etc. Ins. Co. 76 Minn. 401, 79 N. W. 401.

Digitized by Google

[11] Craig v. Cook, 28 Minn. 232, 9 N. W. 712.
[12] Yanish v. Tarbox, 57 Minn. 245, 59 N. W. 300.
[13] Cannady v. Lynch, 27 Minn. 435, 8 N. W. 164.
[14] Stillman v. Northern Pacific etc. Ry. Co. 34 Minn. 420, 26 N. W. 399.
[15] Klotz v. Winona etc. Ry. Co. 68 Minn. 341, 71 N. W. 257.
[16] Attix v. Minnesota Sandstone Co. 85 Minn. 142, 88 N. W. 436.
[17] State v. Myers, 70 Minn. 179, 72 N. W. 969.
[18] State v. Lewis, (Minn.) 90 N. W. 318.

Effect of objection as an estoppel.

§ 1815a. A party whose objection is sustained to competent evidence to prove a fact is not estopped to say that the fact has not been proved.

People's Bank v. Rockwood, 59 Minn. 420, 61 N. W. 457. See § 1805.

STRIKING OUT EVIDENCE

The general rule.

§ 1816. The only way to object to evidence which has been introduced is to move to strike it out or to ask for instructions to the jury to disregard it. To object to evidence already admitted as inadmissible is unavailing.[1] An objection to a question does not extend to an answer not responsive. Specific objection must be made to the answer.[2] The proper practice is to move to strike it out [3] or to ask the court to instruct the jury to disregard it. The court on its own motion may strike out inadmissible evidence and instruct the jury to disregard it.[4] An objection to evidence, based on a fact not yet in evidence, is not good. If the fact afterwards appears, the party may move to strike out the objectionable evidence.[5]

[1] Pontius v. People, 82 N. Y. 339.
[2] Gould v. Day, 94 U. S. 405; Taylor v. City of Austin, 32 Minn. 247, 20 N. W. 157.
[3] Marsh v. Webber, 16 Minn. 418 Gil. 375.
[4] People v. Wilson, 141 N. Y. 191.
[5] Lake Superior etc. Ry. Co. v. Greve, 17 Minn. 322 Gil. 299.

When motion must be made.

§ 1817. A party may move to strike out inadmissible evidence at any time when its inadmissibility first becomes apparent to him and can be made to appear to the court.[1] But as soon as the admissibility of the evidence is apparent to him he must move to strike it out. He is not permitted to hold back his objection and speculate on the evidence being favorable to himself and then, if it prove otherwise, move to strike it out.[2]

[1] Wolford v. Farnham, 44 Minn. 159, 46 N. W. 295; Russell v. Schurmeier, 9 Minn. 28 Gil. 16; Lake Superior etc. Ry. Co. v. Greve, 17 Minn. 322 Gil. 299.
[2] C. Aultman & Co. v. Kennedy, 33 Minn. 339, 23 N. W. 528; Russell v. Schurmeier, 9 Minn. 28 Gil. 16; Barnes v. Christofferson, 62 Minn. 318, 64 N. W. 821.

Digitized by Google

Motion must specify the objectionable evidence.

§ 1818. A motion to strike out evidence must specify the objectionable evidence.[1] If any part of the evidence to which the motion is directed is admissible the motion may properly be denied.[2]

[1] Miller v. St. Paul City Ry. Co. 62 Minn. 216, 64 N. W. 554.

[2] Bennett v. Minneapolis etc. Ry. Co. 42 Minn. 245, 44 N. W. 10; State v. Tall, 43 Minn. 273, 45 N. W. 449; Smith v. Library Board, 58 Minn. 108, 59 N. W. 979; Towle v. Sherer, 70 Minn. 312, 73 N. W. 180; Roeller v. Hall, 62 Minn. 241, 64 N. W. 559.

When a matter of right.

§ 1819. When inadmissible evidence has been admitted the adverse party has a right to have it stricken out if its objectionable character could not have been foreseen from the question asked.

Davis v. Mendenhall, 19 Minn. 149 Gil. 113; Nichols v. Howe, 43 Minn. 181, 45 N. W. 14.

When a matter of discretion with the court.

§ 1820. If a party does not object to evidence offered, it is discretionary with the trial court to grant or refuse his motion after it is received, to strike it out, upon an objection which was apparent to him and which he might have made when the evidence was offered.[1] A party cross-examining on evidence which he knows to be inadmissible waives his right to have it stricken out.[2]

[1] State v. Johnson, 23 Minn. 569; Brady v. Brennan, 25 Minn. 210; Wilson v. Northern Pacific Ry. Co. 26 Minn. 278, 3 N. W. 333; Greene v. Minneapolis etc. Ry. Co. 31 Minn. 248, 17 N. W. 378; Stone v. Evans, 32 Minn. 243, 20 N. W. 149; Watts v. Howard, 70 Minn. 122, 72 N. W. 840; Larson v. Kelly, 72 Minn. 116, 75 N. W. 116.

[2] Brown v. Morrill, 45 Minn. 483, 48 N. W. 328; Barnes v. Christofferson, 62 Minn. 318, 64 N. W. 821.

Motion must state grounds of objection.

§ 1821. A party moving to strike out evidence must specify the grounds upon which he objects to the evidence and in the absence of such a specification there is no error in denying the motion.[1] The court need not consider objections not specified and on appeal the moving party is limited to the objections raised below.[2]

[1] Mousseau v. Mousseau, 42 Minn. 212, 44 N. W. 193; Nelson v. Chicago etc. Ry. Co. 35 Minn. 170, 28 N. W. 215; Towle v. Sherer, 70 Minn. 312, 73 N. W. 180.

[2] Smith v. Kingman & Co. 70 Minn. 453, 73 N. W. 253.

Motion by party introducing evidence.

§ 1822. A party has no absolute right to withdraw or have stricken out evidence which he has introduced over objection.[1] The matter rests in the discretion of the trial court.[2]

[1] Furst v. Second Ave. Ry. Co. 72 N. Y. 542; Wheelock v. Godfrey, 100 Cal. 578.

[2] Pontius v. People, 82 N. Y. 339.

Digitized by Google

Waiver of objection to evidence by motion to strike out.

§ 1823. A party waives his objections to evidence by moving or consenting to have it stricken out.[1] If his motion to strike out is denied his original objections to the introduction of the evidence are not waived.[2]

[1] Juergens v. Thom, 39 Minn. 458, 40 N. W. 559.

[2] Gasper v. Heimbach, 53 Minn. 414, 55 N. W. 559.

OBJECTIONS TO WITNESSES

General statement.

§ 1824. Objections to the competency of witnesses cannot be raised for the first time on appeal. Specific objection to the competency of witnesses must be made on the trial and it is not enough to object to their testimony.

Levering v. Langley, 8 Minn. 107 Gil. 82; Coles v. Shepard, 30 Minn. 446, 16 N. W. 153; State v. Rue, 72 Minn. 296, 75 N. W. 235; Parsons Band Cutter & Self Feeder Co. v. Haub, 83 Minn. 180, 86 N. W. 14.

OBJECTIONS TO VARIANCE

General statement.

§ 1825. Objection to a variance between the pleadings and proof cannot be made for the first time on appeal.[1] It must be made on the trial and if the variance is material but not fatal it must be made as soon as the evidence is offered.[2] It is ordinarily too late when plaintiff rests.[3] If the variance is fatal the objection may be made to the evidence [4] or by a motion for a dismissal [5] or by exception to instructions.[6]

[1] Washburn v. Winslow, 16 Minn. 33 Gil. 19; Village of Wayzata v. Great Northern Ry. Co. 50 Minn. 438, 52 N. W. 913; Nelson v. Thompson, 23 Minn. 508; Rogers v. Hastings & Dakota Ry. Co. 22 Minn. 25; Hartz v. St. Paul etc. Ry. Co. 21 Minn. 358; City of St. Paul v. Kuby, 8 Minn. 154 Gil. 125; Messerschmidt v. Baker, 21 Minn. 81; Merriam v. Pine City Lumber Co. 23 Minn. 314; O'Connor v. Delaney, 53 Minn. 247, 54 N. W. 1108; Almich v. Downey, 45 Minn. 460, 48 N. W. 197; Cushman v. Board County Com'rs, 19 Minn. 295 Gil. 252; Johnson v. Avery, 41 Minn. 485, 43 N. W. 340; Ambuehl v. Matthews, 41 Minn. 537, 43 N. W. 477; Clark v. City of Austin, 38 Minn. 487, 38 N. W. 615; Erickson v. Fisher, 51 Minn. 300, 53 N. W. 638; Lyons v. City of Red Wing, 76 Minn. 20, 78 N. W. 20; Hand v. Nat. Live Stock Ins. Co. 57 Minn. 519, 59 N. W. 538; Lough v. Thornton, 17 Minn. 253 Gil. 230; Red River Valley Invest. Co. v. Cole, 62 Minn. 457, 64 N. W. 1149; Madson v. Madson, 80 Minn. 501, 83 N. W. 396; Thomas v. Murphy, (Minn. 1902) 91 N. W. 1097.

[2] Adams v. Castle, 64 Minn. 505, 67 N. W. 637.

Digitized by Google

[3] Id.
[4] First Nat. Bank v. Strait, 71 Minn. 69, 73 N. W. 645.
[5] Cowles v. Warner, 22 Minn. 449; Irish-American Bank v. Bader, 59 Minn. 329, 61 N. W. 328; Gaar Scott & Co. v. Fritz, 60 Minn. 346, 62 N. W. 391.
[6] Benson v. Dean, 40 Minn. 445, 42 N. W. 207.

OBJECTIONS TO PLEADINGS

Objections that cannot be raised for first time on appeal.

§ 1826. It is the general rule, subject only to the exceptions stated in §§ 1827, 1828, that a pleading cannot be attacked for the first time on appeal.[1] In accordance with this general rule it has been held that the following objections cannot be urged for the first time in the supreme court: that a pleading is irrelevant, redundant, double, indefinite, sham, or frivolous;[2] that several distinct causes of action or defences are not separately stated;[3] that there is a misnomer;[4] that several causes of action are improperly united;[5] that there is a defect of parties;[6] that there is a misjoinder of parties;[7] that a cause of action is an improper subject of counterclaim;[8] that there is want of jurisdiction of the person;[9] that the cause of action alleged is barred by the statute of limitations;[10] that there is an adequate remedy at law;[11] that an intervention is unauthorized;[12] that a verification is defective;[13] that a complaint contains inconsistent causes of action;[14] that the parties are designated by initials;[15] that plaintiff is without legal capacity to sue.[16]

[1] Holmes v. Campbell, 12 Minn. 221 Gil. 141; Cock v. Van Etten, 12 Minn. 522 Gil. 431; Reed v. Pixley, 25 Minn. 482; Howland v. Fuller, 8 Minn. 50 Gil. 30; Taylor v. Parker, 17 Minn. 469 Gil. 447; Lowry v. Harris, 12 Minn. 255 Gil. 166.
[2] G. S. 1894 §§ 5240, 5248; Holmes v. Campbell, 12 Minn. 221 Gil. 141; Fish v. Berkey, 10 Minn. 199 Gil. 161; Russell v. Chambers, 31 Minn. 54, 16 N. W. 458; Cathcart v. Peck, 11 Minn. 45 Gil. 24; Loomis v. Youle, 1 Minn. 176 Gil. 150; Howland v. Fuller, 8 Minn. 50 Gil. 30; Barnsback v. Reiner, 8 Minn. 59 Gil. 37; Dean v. Leonard, 9 Minn. 190 Gil. 176; Hewitt v. Brown, 21 Minn. 163; Cock v. Van Etten, 12 Minn. 522 Gil. 431; Reed v. Pixley, 25 Minn. 482; Madden v. Minneapolis etc. Ry. Co. 30 Minn. 453, 16 N. W. 263; Welch v. Bradley, 45 Minn. 540, 48 N. W. 440; Peterson v. Ruhnke, 46 Minn. 115, 48 N. W. 768; King v. Nichols & Shepard Co. 53 Minn. 453, 55 N. W. 456.
[3] Craig v. Cook, 28 Minn. 232, 9 N. W. 712; Campbell v. Jones, 25 Minn. 155.
[4] French v. Donohue, 29 Minn. 111, 12 N. W. 354.
[5] James v. Wilder, 25 Minn. 305; Gardner v. Kellogg, 23 Minn. 463; Mulvehill v. Bates, 31 Minn. 364, 17 N. W. 959; Densmore v. Shepard, 46 Minn. 54, 48 N. W. 528, 681.

Digitized by Google

[6] Davis v. Chouteau, 32 Minn. 548, 21 N. W. 748; Mason v. St. Paul etc. Ins. Co. 82 Minn. 336, 85 N. W. 13. See Dunnell, Minn. Pl. §§ 196–198.

[7] Breault v. Merrill & Ring Lumber Co. 72 Minn. 143, 75 N. W. 122. See Dunnell, Minn. Pl. §§ 199–201.

[8] Walker v. Johnson, 28 Minn. 147, 9 N. W. 632; Mississippi etc. Co. v. Prince, 34 Minn. 71, 24 N. W. 344; Lace v. Fixen, 39 Minn. 46, 38 N. W. 762; Warner v. Foote, 40 Minn. 176, 41 N. W. 935; Talty v. Torling, 79 Minn. 386, 82 N. W. 632.

[9] See § 349.

[10] Hardwick v. Ickler, 71 Minn. 25, 73 N. W. 519; Gilbert v. Hewetson, 79 Minn. 326, 82 N. W. 655.

[11] St. Paul etc. Ry. Co. v. Robinson, 41 Minn. 394, 43 N. W. 75; Newton v. Newton, 46 Minn. 33, 48 N. W. 450.

[12] Holcomb v. Stretch, 74 Minn. 234, 76 N. W. 1132. See Dunnell, Minn. Pl. §§ 266, 267.

[13] Smith v. Mulliken, 2 Minn. 319 Gil. 273; Hayward v. Grant, 13 Minn. 165 Gil. 154; McMath v. Parsons, 26 Minn. 246, 2 N. W. 703; Taylor v. Parker, 17 Minn. 469 Gil. 447.

[14] Hawley v. Wilkinson, 18 Minn. 525 Gil. 468; Plummer v. Mold, 22 Minn. 15; Wagner v. Nagel, 33 Minn. 348, 23 N. W. 308; Rhodes v. Pray, 36 Minn. 392, 32 N. W. 86; Davis v. Severance, 49 Minn. 528, 52 N. W. 140.

[15] Kenyon v. Lemon, 43 Minn. 180, 45 N. W. 10.

[16] Tapley v. Tapley, 10 Minn. 448 Gil. 360; McNair v. Toler, 21 Minn. 175; Rich v. Rich, 12 Minn. 468 Gil. 369.

When jurisdiction of subject matter is wanting.

§ 1827. The objection that a pleading sets forth a subject matter of which the court has not jurisdiction is never waived and may be raised by either party for the first time on appeal.

Stratton v. Allen, 7 Minn. 502 Gil. 409; Ames v. Boland, 1 Minn. 365 Gil. 268; Hagemeyer v. Board County Com'rs, 71 Minn. 42, 73 N. W. 628. But see Lee v. Parrett, 25 Minn. 128; Anderson v. Hanson, 28 Minn. 402, 10 N. W. 429; Wrolson v. Anderson, 53 Minn. 508, 55 N. W. 597 (as to rule on appeal from justice court).

When complaint does not state cause of action.

§ 1828. In this state the objection that a complaint does not state facts sufficient to constitute a cause of action may be raised for the first time on appeal.[1] This is an exception to the general rule that the supreme court will only consider questions already passed upon by the lower court. It is apparently authorized by statute [2] in this state but independently of statute the supreme court undoubtedly has authority by virtue of its general supervisory jurisdiction to set aside a judgment which is not based on any actionable wrong.[3] The objection may be raised in the supreme court although the judgment was rendered on default and no application to set it aside has been made below.[4] Although the right exists to set aside a judgment on appeal because of the insufficiency of the complaint

Digitized by Google

it is rarely exercised. An objection to a pleading for insufficiency raised for the first time in the supreme court will be overruled if the defect is of such a nature that it might have been remedied by an amendment on the trial if the attention of the trial court and the adverse party had been called to it by a timely and specific objection;[5] or if the omission of essential allegations has been "aided" or cured by answer,[6] reply,[7] verdict[8] or the reception of evidence without objection;[9] or if it can be sustained by the most liberal construction.[10] It is always important on appeal to distinguish between a complaint which is defective because not predicated on an actionable wrong and a complaint which is defective by reason of the omission of essential allegations although predicated on an actionable wrong.[11] A complaint of the former character can always be successfully attacked for the first time on appeal; one of the latter character almost never. The sufficiency of a complaint cannot be questioned for the first time on appeal in the absence of a record containing all the evidence, except on appeal from a default judgment.[12]

[1] Holmes v. Campbell, 12 Minn. 221 Gil. 141; Lee v. Emery, 10 Minn. 187 Gil. 151; McArdle v. McArdle, 12 Minn. 98 Gil. 53; Stratton v. Allen, 7 Minn. 502 Gil. 409.

[2] G. S. 1894 § 5235.

[3] Slacum v. Pomeroy, 6 Cranch (U. S.) 221; Teal v. Walker, 111 U. S. 242; Maher v. Ashmead, 30 Pa. St. 344.

[4] Smith v. Dennett, 15 Minn. 81 Gil. 59; Northern Trust Co. v. Markell, 61 Minn. 271, 63 N. W. 735.

[5] See § 1829. [6] See § 1830. [7] See § 1835. [8] See § 1831.

[9] See § 1832. [10] See § 1833.

[11] See Helmuth v. Bell, 150 Ill. 263; Epley v. Epley, 111 N. C. 505; Halstead v. Mullen, 93 N. C. 252.

[12] Peach v. Reed, (Minn. 1902) 92 N. W. 229.

When pleading is amendable.

§ 1829. A defective pleading, clearly amendable in the discretion of the trial court, cannot be objected to in the supreme court by a party who had an opportunity to raise the objection in the trial court and neglected to do so.[1] It is not enough to object generally, at the opening of the case, to the introduction of any evidence because of the insufficiency of the complaint or to move for a dismissal of the action on that ground. If, subsequent to such objection at the opening of the case, evidence is admitted without objection proving a good cause of action, the objection is waived. In other words, where the complaint omits facts essential to a cause of action, but which might be supplied by amendment under G. S. 1894 § 5266, before or after judgment, and those facts are proved at the trial after the judge has refused to dismiss the complaint, the defect of statement is no ground for a reversal on appeal.[2] The statute[3] authorizing a party to attack a pleading for the first time on appeal must be construed in connection with the statute[4] which authorizes the court before or after judgment to insert "other alle-

Digitized by Google

gations material to the case" or to conform the pleading to the facts proved without objection and with the statute [5] which provides that "the court shall, in every stage of an action, disregard any error or defect in the pleadings or proceedings which does not affect the substantial rights of the adverse party; and no judgment can be reversed or affected by reason of such error or defect." These statutes, construed together, clearly make it a rule of code procedure that a judgment shall not be reversed on appeal for an omission in the complaint of allegations which might have been inserted on the trial by amendment if proper objection had been made.[6]

[1] Merriam v. Pine City Lumber Co. 23 Minn. 314; Hartz v. St. Paul etc. Ry. Co. 21 Minn. 358; Spencer v. St. Paul etc. Ry. Co. 21 Minn. 362; Wampach v. St. Paul etc. Ry. Co. 21 Minn. 364.

[2] Lounsbury v. Purdy, 18 N. Y. 515; Knapp v. Simon, 96 N. Y. 284; Tyng v. Commercial Warehouse Co. 58 N. Y. 308; Moffatt v. Fulton, 132 N. Y. 507.

[3] G. S. 1894 § 5235. [4] G. S. 1894 § 5266. [5] G. S. 1894 § 5269.

[6] Lounsbury v. Purdy, 18 N. Y. 515; Halstead v. Mullen, 93 N. C. 252; Hoffheimer v. Campbell, 59 N. Y. 269.

Aider by answer.

§ 1830. When objection is made on appeal that the complaint is lacking in essential allegations the objection will be overruled if the deficiencies are made good by the answer. If essential facts omitted in the complaint are alleged in the answer the defect is cured. The complaint is said to be "aided" by the answer.[1] But a party cannot rely on allegations in his adversary's pleadings to make out his cause of action and at the same time put such allegations in issue by denials.[2] An admission in an answer of a cause of action in favor of the plaintiff, wholly different from that alleged in the complaint, does not entitle the plaintiff to a recovery under such complaint.[3]

[1] Bennett v. Phelps, 12 Minn. 326 Gil. 216; Shartle v. City of Minneapolis, 17 Minn. 308 Gil. 284; Rollins v. St. Paul Lumber Co. 21 Minn. 5; Gibbens v. Thompson, 21 Minn. 398; Warner v. Lockerby, 28 Minn. 28, 8 N. W. 879; Lesher v. Getman, 30 Minn. 321, 15 N. W. 309; Hedderly v. Downs, 31 Minn. 183, 17 N. W. 274; McMahon v. Merrick, 33 Minn. 262, 22 N. W. 543; Monson v. St. Paul etc. Ry. Co. 34 Minn. 269, 25 N. W. 595; Ritchie v. Ege, 58 Minn. 291, 59 N. W. 1020.

[2] Mosness v. German-American Ins. Co. 50 Minn. 341, 52 N. W. 932.

[3] Brandt v. Shepard, 39 Minn. 454, 40 N. W. 521.

Aider by verdict.

§ 1831. When objection to the sufficiency of a pleading is made on appeal the objection will be overruled if the defect is of a nature to be cured by a verdict. "Where there is any defect, imperfection

Digitized by Google

or omission in any pleading, whether in substance or form, which would have been a fatal objection upon demurrer, yet, if the issue joined be such as necessarily required, on the trial, proof of the facts so defectively or imperfectly stated or omitted, and without which it is not to be presumed that either the judge would direct the jury to give or the jury would have given the verdict, such defect, imperfection or omission is cured by the verdict."

1 Williams' Saunders, 227; Coit v. Waples, 1 Minn. 134 Gil. 110; Daniels v. Winslow, 2 Minn. 113 Gil. 93; Lee v. Emery, 10 Minn. 187 Gil. 151; Chesterson v. Munson, 27 Minn. 498, 8 N. W. 593; Smith v. Dennett, 15 Minn. 81 Gil. 59.

Issues litigated by consent.

§ 1832. When objection to a complaint is made on appeal the objection will be overruled if a good cause of action was proved on the trial by evidence to which no objection was made on the ground that it was inadmissible under the pleadings. After having litigated a question of fact without objection it is too late on appeal to claim that the pleading of the adverse party did not sufficiently aver the fact in controversy. If the complaint fails to allege an essential fact but such fact is proved on the trial by evidence to which no objection is made the defect in the complaint is waived.

Almich v. Downey, 45 Minn. 460, 48 N. W. 197; Keene v. Masterman, 66 Minn. 72, 68 N. W. 771; Thoreson v. Minneapolis Harvester Works, 29 Minn. 341, 13 N. W. 156; Isaacson v. Minneapolis etc. Ry. Co. 27 Minn. 463; D. M. Osborne & Co. v. Williams, 37 Minn. 507, 35 N. W. 371; Butler v. Winona Mill Co. 28 Minn. 205, 9 N. W. 697; Madson v. Madson, 80 Minn. 501, 83 N. W. 396; Spencer v. St. Paul etc. Ry. Co. 21 Minn. 362; Daniels v. Winslow, 2 Minn. 113 Gil. 93.

Construction of pleadings on appeal.

§ 1833. When the sufficiency of a pleading is questioned for the first time on appeal every reasonable intendment is indulged in its support. It will be sustained if it contains the essential facts of a cause of action or defence even by remote inference. The test is not whether a demurrer would have been sustained. This rule rests upon the same reasons as the rule of liberal construction on the trial and upon the additional ground that an amendment might have been secured if the objection had been raised below.

Smith v. Dennett, 15 Minn. 81 Gil. 59; Piper v. Johnson, 12 Minn. 60 Gil. 27; Phœnix v. Gardner, 13 Minn. 430 Gil. 396; Holmes v. Campbell, 12 Minn. 221 Gil. 141; McArdle v. McArdle, 12 Minn. 98 Gil. 53; Hurd v. Simonton, 10 Minn. 423 Gil. 340; Howland v. Fuller, 8 Minn. 30 Gil. 30; Drake v. Barton, 18 Minn. 462 Gil. 414; Spencer v. St. Paul etc. Ry. Co. 21 Minn. 362; Cochrane v. Quackenbush, 29 Minn. 376, 13 N. W. 154; Soloman v. Vinson, 31 Minn. 205, 17 N. W. 340; Frankovitz v. Smith, 34 Minn. 403, 26 N. W. 225; Dorr v. McDonald, 43 Minn. 458, 45 N. W. 864; Bromberg v. Minnesota Fire Assoc. 45 Minn. 318, 47 N. W. 975; Trebby v

Digitized by Google

Simmons, 38 Minn. 508, 38 N. W. 693; Northern Trust Co. v. Markell, 61 Minn. 271, 63 N. W. 735; Campbell v. Worman, 58 Minn. 561, 60 N. W. 668; Minneapolis etc. Ry. Co. v. Home Ins. Co. 64 Minn. 61, 66 N. W. 132; Trustees of Macalester College v. Nesbitt, 65 Minn. 17, 67 N. W. 652; Bendikson v. Great Northern Ry. Co. 80 Minn. 332, 83 N. W. 194; Slater v. Olson, 83 Minn. 35, 85 N. W. 825; Miller v. Ganser, (Minn. 1902) 92 N. W. 3; Peach v. Reed, (Minn. 1902) 92 N. W. 3.

Sufficiency of answer.

§ 1834. It is generally laid down in the books that objection to the sufficiency of an answer cannot be made for the first time on appeal. This sweeping statement is misleading and inaccurate. It is necessary to distinguish between an answer which is not predicated on any legal defence and one which is defective by reason of the omission of essential allegations although predicated on a good legal defence. When the answer is of the former character, objection to its sufficiency may be made for the first time on appeal;[1] when of the latter character, the defect is waived if not taken in the trial court.[2]

[1] Bohm v. Dumphy, 1 Mont. 333; Raymond v. Wimsette, 12 Mont. 551.

[2] Howland v. Fuller, 8 Minn. 50 Gil. 30; Butler v. Winona Mill Co. 28 Minn. 205, 9 N. W. 697; D. M. Osborne & Co. v. Williams, 37 Minn. 507, 35 N. W. 371; White v. Spencer, 14 N. Y. 247; City of Evansville v. Martin, 103 Ind. 206; Smith etc. Mfg. Co. v. Mellon, 58 Fed. 705

Aider by reply.

§ 1835. A defective answer may be cured or "aided" by the reply in the same way and with the same effect as a defective complaint may be cured or aided by an answer.

Pye v. Bakke, 54 Minn. 107, 55 N. W. 904.

Amendable defects generally.

§ 1836. When the grounds of an objection urged in the trial court are not stated the objection will ordinarily be disregarded on appeal and especially where a specific objection might have been followed by an amendment which would have obviated the objection.

Hooper v. Chicago etc. Ry. Co. 37 Minn. 52, 33 N. W. 314.

Waiver of objection by proceeding to trial.

§ 1837. When a party raises an objection in the trial court and his objection is overruled he does not waive his right to raise the objection on appeal by proceeding in the trial of the cause.

Curtis v. Moore, 3 Minn. 29 Gil. 7; Board of County Com'rs v. Smith, 25 Minn. 131; State v. District Court, 26 Minn. 233, 2 N. W. 698; Hess v. Adamant Mfg. Co. 66 Minn. 79, 68 N. W. 774; Perkins v. Meilicke, 66 Minn. 409; May v. Grawert (Minn.) 90 N. W. 383.

Digitized by Google

PRESUMPTIONS ON APPEAL

General statement.

§ 1838. On appeal error will never be presumed; it must be made to appear affirmatively on the face of the record. It is always presumed that the trial court acted regularly and in accordance with the law unless the record affirmatively shows the contrary.[1] Our supreme court has indulged the following presumptions in the absence of a record showing error: that a challenge to the panel was tried and determined on legal and sufficient evidence;[2] that a referee was duly sworn;[3] that there were proper pleadings;[4] that an attachment was issued at a proper time;[5] that the records of the cause were brought to the attention of the court on a motion to vacate a judgment;[6] that the trial court was right in holding that issues submitted to the jury did not cover the whole case;[7] that interest was allowed on sufficient evidence;[8] that a grand juror excused by the court was in fact over age;[9] that special findings in answer to interrogatories were consistent with the general verdict;[10] that a complaint in a justice court was verified;[11] that the evidence established a several liability where a several judgment was entered against one of two defendants;[12] that counsel appearing "for the defendants" appeared for all the defendants who answered;[13] that the plaintiff elected to proceed upon the cause of action on which the findings and decision of the court were made, where the complaint contained inconsistent causes;[14] that the facts established by the evidence at the trial were fully litigated so that an amendment, conforming the pleadings to the facts proved, might be allowed without opening the case for the introduction of further evidence;[15] that attorney's fees allowed by the court were such only as were authorized by the mortgage;[16] that upon judgment by default whatever proofs were necessary were taken;[17] that in excusing a juror without a challenge the court acted within the provisions of G. S. 1894 § 7181;[18] that the district court had jurisdiction of an appeal in condemnation proceedings;[19] that an indictment found and properly filed was presented to the court;[20] that the officer in charge of a jury was duly sworn.[21]

[1] Davidson v. Farrell, 8 Minn. 258 Gil. 225; Chesley v. Mississippi etc. Co. 39 Minn. 83, 38 N. W. 769; Teller v. Bishop, 8 Minn. 226 Gil. 195; Phoenix v. Gardner, 13 Minn. 294 Gil. 272; Papke v. Papke, 30 Minn. 260, 15 N. W. 117; White v. Balch, 24 Minn. 264; Nudd v. Home Ins. etc. Co. 25 Minn. 100; Andrews v. Stone, 10 Minn. 72 Gil. 52; Pearce v. McGowan, 35 Minn. 507, 29 N. W. 176; Tune v. Sweeney, 34 Minn. 295, 25 N. W. 628; Jones v. Wilder, 28 Minn. 238, 9 N. W. 707; State v. Staley, 14 Minn. 105 Gil. 75; Mead v. Billings, 40 Minn. 505, 42 N. W. 472; State v. Brecht, 41 Minn. 50, 42 N. W. 602; Adamson v. Sundby, 51 Minn. 460, 53 N. W. 761; State v. Lessing, 16 Minn. 75 Gil. 64; Graves v. American Live Stock Ins. Co. 46 Minn. 130, 48 N. W. 684; State v.

Digitized by Google

Adamson, 43 Minn. 196, 45 N. W. 152; Davis v. Severance, 49 Minn. 528, 52 N. W. 140; Coons v. Lemieu, 58 Minn. 99, 59 N. W. 977; Pabst Brewing Co. v. Butchart, 68 Minn. 303, 71 N. W. 273; Bowers v. Mississippi etc. Co. 64 Minn. 474, 67 N. W. 362; Thomas v. West Duluth Light & Water Co. 51 Minn. 398, 53 N. W. 710; McGeagh v. Nordberg, 53 Minn. 235, 55 N. W. 117; Vaughan v. McCarthy, 63 Minn. 221, 65 N. W. 249; Von Hemert v. Taylor, 76 Minn. 386, 79 N. W. 319; Hempsted v. Cargill, 46 Minn. 141, 48 N. W. 686; State v. Brown, 41 Minn. 319, 43 N. W. 69; In re Rees, 39 Minn. 401, 40 N. W. 370.

[2] State v. Brecht, 41 Minn. 50, 42 N. W. 602.

[3] Young v. Young, 18 Minn. 90 Gil. 72; Leyde v. Martin, 16 Minn. 38 Gil. 24.

[4] Davidson v. Farrell, 8 Minn. 258 Gil. 225. See Libby v. Husby, 28 Minn. 40, 8 N. W. 903.

[5] Blake v. Sherman, 12 Minn. 420 Gil. 305; Blackman v. Wheaton, 13 Minn. 326 Gil. 299.

[6] Dow v. Northern Land & Loan Co. 51 Minn. 326, 53 N. W. 649.

[7] Piper v. Packer, 20 Minn. 274 Gil. 245.

[8] Woodbridge v. Sellwood, 65 Minn. 135, 67 N. W. 799.

[9] State v. Brown, 12 Minn. 538 Gil. 448.

[10] Dempsey v. Cogswell, 29 Minn. 100, 12 N. W. 148.

[11] Burt v. Bailey, 21 Minn. 403.

[12] Tune v. Sweeney, 34 Minn. 295, 25 N. W. 628.

[13] Adamson v. Lundby, 51 Minn. 460, 53 N. W. 761.

[14] Davis v. Severance, 49 Minn. 528, 52 N. W. 140.

[15] Dougan v. Turner, 51 Minn. 330, 53 N. W. 650.

[16] Seibert v. Minneapolis etc. Ry. Co. 58 Minn. 65, 59 N. W. 826.

[17] Hotchkiss v. Cutting, 14 Minn. 537 Gil. 408.

[18] Hill v. Winston, 73 Minn. 80, 75 N. W. 1030.

[19] Hempsted v. Cargill, 46 Minn. 141, 48 N. W. 686.

[20] State v. Beebe, 17 Minn. 241 Gil. 218.

[21] State v. Ryan, 13 Minn. 370 Gil. 343.

Presumptions as to return.

§ 1839. Where a return on appeal from a judgment of dismissal fails to show what became of a motion made by defendant to strike out a reply as sham, it cannot be assumed that the motion was granted. If, in fact, the reply was stricken out, it was defendant's duty to cause the return to be amended in conformity with the fact. Floberg v. Joslin, 75 Minn. 75, 77 N. W. 557.

Presumptions as to judgment.

§ 1840. In the absence of a return to the supreme court from which the contrary is made to appear, it will be presumed on appeal from a judgment, that it was duly authorized and regularly entered. That the judgment was irregularly entered, or was unauthorized or unwarranted, cannot be made to appear by a return which does not purport to contain a copy of the judgment roll, or of all the papers and files which should be made a part of such roll.[1] To justify a

Digitized by Google

reversal the error in the judgment must appear affirmatively of record and cannot be found by inference or intendment.[2]

[1] Pabst Brewing Co. v. Butchart, 68 Minn. 303, 71 N. W. 273. See Hempsted v. Cargill, 46 Minn. 141, 48 N. W. 686.

[2] Teller v. Bishop, 8 Minn. 226 Gil. 195; Floberg v. Joslin, 75 Minn. 75, 77 N. W. 557; Siman v. Rhoades, 24 Minn. 25; Eklund v. Martin, 92 N. W. 406.

Presumptions as to verdict.

§ 1841. On appeal a verdict is presumed to be correct. In the absence of a record containing all the evidence introduced on the trial it is presumed that sufficient evidence was properly admitted to justify the verdict.

Chesley v. Mississippi etc. Co. 39 Minn. 83, 38 N. W. 769 (leading case); Lynd v. Picket, 7 Minn. 184 Gil. 128; Barnsback v. Reiner, 8 Minn. 59 Gil. 37; Dorman v. Ames, 12 Minn. 451 Gil. 347; Cowley v. Davidson, 13 Minn. 92 Gil. 86; Rau v. Minnesota etc. Ry. Co. 13 Minn. 447 Gil. 407; Warner v. Myrick, 16 Minn. 91 Gil. 81; State v. Taunt, 16 Minn. 109 Gil. 99; Jaspers v. Lano, 17 Minn. 296 Gil. 273; Lake Superior & Mississippi Ry. Co. v. Greve, 17 Minn. 322 Gil. 299; Young v. Young, 18 Minn. 90 Gil. 72; Daly v. Proetz, 20 Minn. 411 Gil. 363; Butler v. Fitzpatrick, 21 Minn. 59; Plummer v. Mold, 22 Minn. 15, Hocum v. Weitherick, 22 Minn. 152; Trogden v. Winona etc. Ry. Co. 22 Minn. 198; State v. Owens, 22 Minn. 238; Anderson v. Morrison, 22 Minn. 274; Geer v. Smith, 25 Minn. 472; Kohn v. Tedford, 46 Minn. 146, 48 N. W. 686; Boright v. Springfield etc. Ins. Co. 34 Minn. 352, 25 N. W. 796; Brackett v. Cunningham, 44 Minn. 498, 47 N. W. 157; Koethe v. O'Brien, 32 Minn. 78, 19 N. W. 388; Lawrence v. Dalrymple, 59 Minn. 463, 61 N. W. 559; Brigham v. Paul, 64 Minn. 95, 66 N. W. 203; Anderson v. St. Croix Lumber Co. 47 Minn. 24, 49 N. W. 407; Thomas v. West Duluth Light & Water Co. 51 Minn. 398, 53 N. W. 710.

§ 1842. A cause having been submitted to a jury without objection to find upon several alleged causes of action the verdict will not be presumed to have been found upon one of such causes of action which was unsupported by sufficient evidence, but, unless it is apparent that such is not the case, will be deemed to have been made with regard to those causes of action which were sufficiently proved.

Pevey v. Schulenburg & Boeckeler Lumber Co. 33 Minn. 45, 21 N. W. 844.

§ 1843. Where it is apparent that, of two items, the jury have allowed one and disallowed one, and there is sufficient evidence to justify them in disallowing one of them, the presumption is that that is the one which they disallowed.

Newell v. Houlton, 22 Minn. 19.

Presumptions as to findings.

§ 1844. On appeal findings of fact by the trial court are presumed to be correct. In the absence of a record containing all the

Digitized by Google

evidence introduced on the trial it is presumed that sufficient evidence was properly admitted to justify the findings.[1] The same presumptions are entertained in favor of findings of fact by a referee.[2]

[1] Albee v. Hayden, 25 Minn. 267; Boright v. Springfield etc. Ins. Co. 34 Minn. 352, 25 N. W. 796; McDermid v. McGregor, 21 Minn. 111; Downer v. Foulhuber, 19 Minn. 179 Gil. 142; Thompson v. Lamb, 33 Minn. 196, 22 N. W. 443; Dickerman v. Ashton, 21 Minn. 538; Woodbridge v. Sellwood, 65 Minn. 135, 67 N. W. 799; Mickelson v. Duluth Building & Loan Assoc. 68 Minn. 535, 71 N. W. 703; State v. St. Paul etc. Ry. Co. 38 Minn. 246, 36 N. W. 870; Coons v. Lemieu, 58 Minn. 99, 59 N. W. 977; Bowers v. Mississippi etc. Co. 64 Minn. 474, 67 N. W. 362; Olson v. St. Paul etc. Ry. Co. 38 Minn. 479, 38 N. W. 490; Peach v. Reed, (Minn. 1902), 92 N. W. 229.

[2] Teller v. Bishop, 8 Minn. 226 Gil. 195; Brown v. Gurney, 20 Minn. 527 Gil. 473; City of St. Paul v. Kuby, 8 Minn. 154 Gil. 125; Bisbee v. Torinus, 26 Minn. 165, 2 N. W. 168.

§ 1845. Where a cause is tried by the court without a jury and there is neither a settled case nor bill of exceptions it is presumed on appeal that on the trial the parties voluntarily litigated all matters of fact in the findings although some of the facts were not within the issues made by the pleadings.

Baker v. Byerly, 40 Minn. 489, 42 N. W. 395; Abbott v. Morrissette, 46 Minn. 10, 48 N. W. 416; Olson v. St. Paul etc. Ry. Co. 38 Minn. 479, 38 N. W. 490; Jones v. Wilder, 28 Minn. 238, 9 N. W. 707; Deibner v. Loehr, 44 Minn. 451, 47 N. W. 50; Wyvell v. Jones, 37 Minn. 68, 33 N. W. 43; Salisbury v. Bartleson, 39 Minn. 365, 40 N. W. 265; St. Paul etc. Ry. Co. v. Bradbury, 42 Minn. 222, 44 N. W. 1; Ahlberg v. Swedish-American Bank, 51 Minn. 162, 53 N. W. 196; Yorks v. City of St. Paul, 62 Minn. 250, 64 N. W. 565; Stevens v. Stevens, 82 Minn. 1, 84 N. W. 457; Butler v. Winona Mill Co. 28 Minn. 205, 9 N. W. 697; Coons v. Lemieu, 58 Minn. 99, 59 N. W. 977.

§ 1846. The presumption on appeal that the verdict or finding is correct includes the assessment of damages. In the absence of a record containing all the evidence introduced on the trial or at least all the evidence bearing on the question of damages, it is presumed on appeal that sufficient evidence was properly admitted to justify the damages assessed.

Moran v. Mackey, 32 Minn. 266, 20 N. W. 159; City of St. Paul v. Kuby, 8 Minn. 154 Gil. 125.

§ 1847. On appeal from an order denying a new trial it is to be presumed that a proper judgment will be entered on the verdict.

Finch v. Green, 16 Minn. 355 Gil. 315.

Presumptions as to orders.

§ 1848. In the absence of a record affirmatively showing the contrary it will be presumed on appeal that orders of the court were properly made.

Digitized by Google

Vaughan v. McCarthy, 63 Minn. 221, 65 N. W. 249; In re Rees, 39 Minn. 401, 40 N. W. 370; Chesley v. Mississippi etc. Co. 39 Minn. 83, 38 N. W. 769.

Presumptions as to instructions.

§ 1849. On appeal it is presumed that the trial court fully and accurately instructed the jury as to the law applicable to the case unless the contrary affirmatively appears on the face of the record.[1] If instructions are abstractly correct it will be presumed that there was evidence introduced at the trial to which they were applicable, in the absence of a record containing all of the evidence.[2] If the record does not affirmatively show that it contains all the instructions given and the instructions in the record constitute an imperfect or misleading statement of the law applicable to the case, it will be presumed that additional instructions essential to a full and accurate presentation of the law of the case were given.[3] When an instruction is given which is open to two constructions, one of which is correct and the other incorrect as a proposition of law, the former will be presumed to have been the sense in which it was given and understood, unless the ambiguity was particularly called to the attention of the court with a request for a correction.[4]

[1] State v. Brown, 12 Minn. 538 Gil. 448; State v. Taunt, 16 Minn. 109 Gil. 99; Sheffield v. Ladue, 16 Minn. 388 Gil. 346; State v. Owens, 22 Minn. 238; Stearns v. Johnson, 17 Minn. 142 Gil. 116; Cogley v. Cushman, 16 Minn. 397 Gil. 354.

[2] Day v. Raguet, 14 Minn. 273 Gil. 203; State v. Taunt, 16 Minn. 109 Gil. 99; Sheffield v. Ladue, 16 Minn. 388 Gil. 346; State v. Owens, 22 Minn. 238; Desnoyer v. L'Hereux, 1 Minn. 17 Gil. 1; State v. Brown, 12 Minn. 538 Gil. 448 Blackman v. Wheaton, 13 Minn. 326 Gil. 299; Reed v. Pixley, 22 Minn. 540.

[3] Cogley v. Cushman, 16 Minn. 397 Gil. 354; Stearns v. Johnson, 17 Minn. 142 Gil. 116; State v. Taunt, 16 Minn. 109 Gil. 99; Connolly v. Davidson, 15 Minn. 519 Gil. 428.

[4] Erd v. City of St. Paul, 22 Minn. 443; Siebert v. Leonard, 21 Minn. 442.

§ 1850. When a request for instructions is refused and objection is raised on appeal it will be presumed that the court in its general charge properly instructed the jury on the point involved in the request, in the absence of a record purporting to contain the entire charge.

Stearns v. Johnson, 17 Minn. 142 Gil. 116.

§ 1851. Where the court gives an erroneous instruction but subsequently withdraws it and explicitly instructs the jury to disregard it, it will be presumed on appeal that the jury accepted and acted on the correction. The withdrawal must be absolute and in such explicit and unequivocal terms that there is no danger of the jury being confused or misled by contradictory instructions.

Goodsell v. Taylor, 41 Minn. 207, 42 N. W. 873; Dugan v. St. Paul etc. Ry. Co. 43 Minn. 414, 45 N. W. 851; Greenfield v.

Digitized by Google

State, 85 N. Y. 75; Eldridge v. Hawley, 115 Mass. 410; Com. v. Clifford, 145 Mass. 97; Buntin v. State, 68 Ind. 38.

Presumptions as to jurisdiction.

§ 1852. On appeal it will be presumed that the district court had jurisdiction both of the person and subject matter unless the want of such jurisdiction affirmatively appears on the face of the record.[1] The mere absence from the record of jurisdictional facts will not overcome the presumption of jurisdiction;[2] but when the record sets forth the manner in which the summons in an action was served, and this was ineffectual to confer jurisdiction, it will not be presumed that a valid service was made in some other way.[3] These presumptions of jurisdiction do not apply to justice courts. It is the general rule that the record of a justice of the peace must show facts which confer jurisdiction both of the person and the subject matter.[4] But if the record shows such jurisdiction the general presumption of the regularity of judicial proceedings applies and the appellant must affirmatively show error or irregularity.[5]

[1] Hempsted v. Cargill, 46 Minn. 141, 48 N. W. 686; Turrell v. Warren, 25 Minn. 9; Davis v. Hudson, 29 Minn. 27, 11 N. W. 136; Gemmel v. Rice, 13 Minn. 400 Gil. 371; Holmes v. Campbell, 12 Minn. 221 Gil. 141; Kipp v. Fullerton, 4 Minn. 473 Gil. 366; Pierro v. St. Paul etc. Ry. Co. 37 Minn. 314, 34 N. W. 38; Sandwich Mfg. Co. v. Earl, 56 Minn. 390, 57 N. W. 938; Kurtz v. St. Paul etc. Ry. Co. 61 Minn. 18, 63 N. W. 1; Gulickson v. Bodkin, 78 Minn. 33, 80 N. W. 783; Libby v. Husby, 28 Minn. 40, 8 N. W. 903. Most of these cases relate to collateral attack but the principle is the same. See Dunnell, Trial Book §§ 1128–1157.

[2] Herrick v. Butler, 30 Minn. 156, 14 N. W. 794; Nye v. Swan, 42 Minn. 243, 44 N. W. 9; McNamara v. Casserly, 61 Minn. 335, 63 N. W. 880; State v. Kilbourne, 68 Minn. 320, 71 N. W. 396; Sandwich Mfg. Co. v. Earl, 56 Minn. 390, 57 N. W. 938; Gulickson v. Bodkin, 78 Minn. 33, 80 N. W. 783.

[3] Barber v. Morris, 37 Minn. 194, 33 N. W. 559; Hempsted v. Cargill, 46 Minn. 141, 48 N. W. 686; Godfrey v. Valentine, 39 Minn. 336, 40 N. W. 163; Brown v. St. Paul etc. Ry. Co. 38 Minn. 506, 38 N. W. 698; Morey v. Morey, 27 Minn. 265, 6 N. W. 783; Jewett v. Iowa Land Co. 64 Minn. 531, 67 N. W. 639; Branland v. Calkins, 67 Minn. 119, 69 N. W. 699.

[4] Barnes v. Holton, 14 Minn. 357 Gil. 275. See Vaule v. Miller, 69 Minn. 440, 72 N. W. 452; Barber v. Kennedy, 18 Minn. 216 Gil. 196.

[5] Ellegaard v. Haukaas, 72 Minn. 246, 75 N. W. 128.

Presumptions as to issues tried.

§ 1853. Evidence is presumed to have been offered and received with reference to the issues made by the pleadings. Prima facie, the issues tried are those made by the pleadings. The parties may, by consent, try an issue not made by the pleadings—that is, they may, when they come to trial, waive the want of formal allegations

Digitized by Google

in the pleadings as to a particular fact or state of facts; and where they do so, the case is to be determined as it would be had such allegations been in the pleadings. Where there is no express or formal waiver, but it is to be gathered from the course of the trial, the record of the trial must make it appear very clearly that the parties did in fact, and without objection, litigate the issue not pleaded as though it were in the pleadings. Any other rule would be liable to operate as a surprise and to work injustice. A consent to try issues not made by the pleadings cannot be inferred merely from the fact that evidence pertinent to such issues was received without objection if such evidence was also pertinent to issues actually made by the pleadings.

City of Winona v. Minnesota etc. Ry. Co. 27 Minn. 415, 6 N. W. 795, 8 N. W. 148; O'Neil v. Chicago etc. Ry. Co. 33 Minn. 489, 24 N. W. 192; Livingston v. Ives, 35 Minn. 55, 27 N. W. 74; Payette v. Day, 37 Minn. 366, 34 N. W. 592; Fergestad v. Gjertsen, 46 Minn. 369, 49 N. W. 127; Mahoney v. St. Paul etc. Ry. Co. 35 Minn. 361, 29 N. W. 6; Farnham v. Murch, 36 Minn. 328, 31 N. W. 453; Bowen v. Thwing, 56 Minn. 177, 57 N. W. 468; Elston v. Fieldman, 57 Minn. 70, 58 N. W. 830.

Presumptions as to rulings on evidence.

§ 1854. Rulings of the trial court in admitting or excluding evidence are presumed correct on appeal unless the record affirmatively shows error.[1] If evidence admitted was admissible for any conceivable purpose within the issues it will be presumed to have been rightly admitted in the absence of a record purporting to contain all the evidence introduced on the trial.[2] Evidence omitted from the record is presumed to have been properly admitted.[3] If evidence is offered for two purposes at the same time, for one of which it is competent and for the other not, and it is received generally it will be presumed that it was received for the proper purpose.[4] If evidence is admissible only on condition of other evidence being admitted it will be presumed on appeal that the proper foundation was laid.[5] It will be presumed that the testimony of the defendant in a criminal action was voluntary.[6]

[1] Blackman v. Wheaton, 13 Minn. 326 Gil. 299; Conlan v. Grace, 36 Minn. 276, 30 N. W. 880; Wintermute v. Stinson, 16 Minn. 468 Gil. 420; Olson v. St. Paul etc. Ry. Co. 38 Minn. 479, 38 N. W. 490; Sheffield v. Ladue, 16 Minn. 388 Gil. 346; Acker Post v. Carver, 23 Minn. 567; Hewetson v. Dossett, 71 Minn. 358, 73 N. W. 1089; White v. Balch, 24 Minn. 264.

[2] Conlan v. Grace, 36 Minn. 276, 30 N. W. 880; State v. Shettleworth, 18 Minn. 208 Gil. 191; St. Paul etc. Ry. Co. v. Murphy, 19 Minn. 500 Gil. 433.

[3] Sumner v. Sawtelle, 8 Minn. 309 Gil. 272.

[4] Van Brunt v. Greaves, 32 Minn. 68, 19 N. W. 345; State v. Shuttleworth, 18 Minn. 208 Gil. 191.

[5] Blackman v. Wheaton, 13 Minn. 326 Gil. 299; State v. Shettleworth, 18 Minn. 208 Gil. 191.

[6] State v. Lessing, 16 Minn. 75 Gil. 64.

Digitized by Google

Presumptions that jury followed instructions to disregard evidence.

§ 1855. When evidence is improperly admitted and the court orders it stricken out or instructs the jury to disregard it, the error, according to the great weight of authority, is presumptively cured. It is true, in some instances, there may be such strong impressions made upon the minds of a jury by illegal and improper testimony, that its subsequent withdrawal will not remove the effect caused by its admission. In such cases a new trial should be granted. But such instances are exceptional. The trial of a case is not to be suspended, the jury discharged, a new one summoned, and the evidence retaken, when an error in the admission of testimony can be corrected by its withdrawal with proper instructions from the court to disregard it.[1] In criminal cases the same rule applies. Our supreme court has never laid down a satisfactory rule on this subject. In one case it was held that "where, during the course of a trial, improper testimony is allowed to go before the jury, and its receipt is duly excepted to, it is error for which a new trial will be granted, notwithstanding subsequent instructions to disregard it, unless from the whole case it is reasonably clear that the party objecting was not prejudiced."[2] It is perhaps doubtful if this very unsatisfactory case would be followed upon full consideration. The New York cases upon which it is based have since been overruled. In another case our supreme court said that "where improper evidence bearing on the facts of a case has once been admitted, the courts are very slow to hold that the error is remedied by subsequently withdrawing it from the consideration of the jury, and will never do so unless it is very clear, from the nature of the case, that the party could not have been prejudiced. The reason for this is that it is usually impossible to say that the impression once made upon the minds of the jury by the objectionable testimony was wholly removed by its subsequent withdrawal, or by instructions from the court to disregard it."[4] This is a wholly misleading statement of the law. Indeed, the exact contrary is true. Courts are very slow to hold that the error is not remedied by subsequently withdrawing it from the consideration of the jury and will never do so unless it is very clear that the appellant was materially prejudiced.[5] To grant a new trial in such cases should be the rare exception, and not the general rule as suggested by our court.

[1] Hopt v. Utah, 120 U. S. 430; Waldron v. Waldron, 156 U. S. 361; Gall v. Gall, 114 N. Y. 109; Goodnow v. Hill, 125 Mass. 587; Holmes v. Moffatt, 120 N. Y. 159; People v. Schooley, 149 N. Y. 99; People v. Wilson, 141 N. Y. 185; Pireaux v. Simon, 79 Wis. 392; Anthony v. Travis, 148 Mass. 53; Shepard v. Chicago etc. Ry. Co. 77 Iowa, 54; Com. v. Ham, 150 Mass. 122; Bedford v. State, 36 Neb. 702; Toole v. Toole, 112 N. C. 152; Kinsley v. Morse, 40 Kans. 577; Rowland v. Carmichael, 77 Ga. 350.

[2] Com. v. Ham, 150 Mass. 122; People v. Wilson, 141 N. Y. 185.

[3] Juergens v. Thom, 39 Minn. 458, 40 N. W. 559. See, however, Hillestad v. Hostetter, 46 Minn. 393, 49 N. W. 192; Dugan v.

Digitized by Google

St. Paul & Duluth Ry. Co. 43 Minn. 414, 45 N. W. 851; Williams v. Wood, 55 Minn. 323, 56 N. W. 1066.

[4] Dugan v. St. Paul & Duluth Ry. Co. 43 Minn. 414, 45 N. W. 851.

[5] Hopt v. Utah, 120 U. S. 430; Waldron v. Waldron, 156 U. S. 361; Anthony v. Travis, 148 Mass. 53; Rowland v. Carmichael, 77 Ga. 350.

Presumptions as to pleadings.

§ 1856. Unless the record on appeal affirmatively shows the contrary it will be presumed that there were proper pleadings;[1] that the issues litigated were the issues made by the pleadings;[2] that the evidence was in accordance with the pleadings;[3] that no facts were proved which were not justified by the issues formed by the pleadings;[4] that omissions in the complaint were remedied by proof on the trial, if the verdict for the plaintiff could not reasonably have been reached except on such proof.[5]

[1] Davidson v. Farrell, 8 Minn. 258 Gil. 225.

[2] See § 1853.

[3] Sumner v. Sawtelle, 8 Minn. 309 Gil. 272.

[4] Id.

[5] Thomas v. West Duluth Light & Water Co. 51 Minn. 398, 53 N. W. 710; Daniels v. Winslow, 2 Minn. 113 Gil. 93; Coit v. Waples, 1 Minn. 134 Gil. 110; Hurd v. Simonton, 10 Minn. 423 Gil. 340; Lee v. Emery, 10 Minn. 187 Gil. 151; Smith v. Dennett, 15 Minn. 81 Gil. 59; Chesterson v. Munson, 27 Minn. 498, 8 N. W. 593.

HARMLESS ERROR

General rule.

§ 1857. It is fundamental that an appellate court will not reverse the action of a lower court except for clear error materially prejudicial to the substantial rights of the appellant.[1] It is the general policy of the law to discourage appeals based on formal, technical and immaterial errors.[2] An appellate court sits only to remedy manifest injustice and error. Where it is obvious that an error did not affect the determination of the court, referee, or jury, it will be disregarded on appeal. An immaterial error is not a ground for reversal. The maxim, De minimis non curat lex, is of constant application.[3]

[1] Lancaster v. Collins, 115 U. S. 222.

[2] Bixby v. Wilkinson, 27 Minn. 262, 6 N. W. 801; Friesenhahn v. Merrill, 52 Minn. 55, 53 N. W. 1024.

[3] Coit v. Waples, 1 Minn. 134 Gil. 110, 120; Lynd v. Picket, 7 Minn. 184 Gil. 128; Cole v. Maxfield, 13 Minn. 235 Gil. 220; Prosser v. Hartley, 35 Minn. 340, 29 N. W. 156; Friesenhahn v. Merrill, 52 Minn. 55, 53 N. W. 1024; D. M. Osborne & Co. v. Johnson, 35 Minn. 300, 28 N. W. 510; Fithian v. Weidenborner, 72 Minn. 331, 75 N. W. 380; Lundberg v. Single Men's Endowment Assoc. 41 Minn. 508, 43 N. W. 394; Menzel v. Tubbs, 51 Minn. 364, 53 N. W. 653, 1017; Anderson v. Burlington etc. Ry. Co.

Digitized by Google

82 Minn. 293, 84 N. W. 145, 1021; London etc. Co. v. Gibson, 77 Minn. 394, 80 N. W. 205, 777; Smith v. Nat. Credit Ins. Co. 65 Minn. 283, 68 N. W. 28; Dobbin v. McDonald, 60 Minn. 380, 62 N. W. 437; Palmer v. Degan, 58 Minn. 505, 60 N. W. 342; Van Norman v. N. W. etc. Ins. Co. 51 Minn. 57, 52 N. W. 988; Robbins v. St. Paul etc. Ry. Co. 22 Minn. 286; Mannheim v. Carleton College, 68 Minn. 531, 71 N. W. 705.

Presumption as to prejudice.

§ 1858. Error will never be presumed on appeal.[1] The burden rests upon the appellant to prove error.[2] Is it necessary for the appellant to go further and prove prejudice? Is all error presumptively prejudicial? Our supreme court has never formulated a general rule on this object, being content, apparently, to decide each case upon its own facts. Still, it is undoubtedly the rule in this state that an error is presumptively prejudicial.[3] An appellant does not have to point out prejudice; all that he need do is to point out an error which might, conceivably, have prejudiced him materially.[4] When error is pointed out a reversal follows as a matter of course unless it appears obvious, from a consideration of the entire record, that the error was not materially prejudicial. To justify an affirmance upon an appearance of error the harmlessness of the error must be perfectly obvious; any doubt must be resolved in favor of a reversal.[5] Prejudice from error must be presumed unless the record shows the contrary affirmatively.[6] It is frequently said that when the appellant has pointed out error the burden rests on the respondent to show that the error was not in fact prejudicial.[7] This is true, but it must not be supposed that a reversal will inevitably follow if the respondent fails to point out that the error was harmless. It is the duty of the appellate court, on its own motion, to examine the whole record and determine whether, in view of the whole case, the error was prejudicial or harmless.

[1] See § 1838.

[2] See § 1647.

[3] Lowry v. Harris, 12 Minn. 255 Gil. 166; State v. Etheridge, 15 Minn. 501 Gil. 413; State v. Spaulding, 34 Minn. 361, 25 N. W. 793; Allen v. Fortier, 37 Minn. 218, 34 N. W. 21. See § 1855.

[4] Allen v. Fortier, 37 Minn. 218, 34 N. W. 21.

[5] Mexia v. Oliver, 148 U. S. 664; St. Paul etc. Ry. Co. v. McDonald, 34 Minn. 182, 25 N. W. 57.

[6] Cahill v. Murphy, 94 Cal. 29; Dubois v. Perkins, 21 Or. 189; State v. Security Bank, 2 S. D. 538.

[7] Greene v. White, 37 N. Y. 405; Clark v. Fairley, 30 Mo. App. 335; Cox v. People, 109 Ill. 457.

Error favorable to the appellant.

§ 1859. An appellant cannot complain that a judgment or order was more favorable to him than the case warranted.[1] An appellant must be an "aggrieved party," [2] and he cannot complain of errors that operated to his own advantage,[3] or did not operate to his disadvantage.[4]

Digitized by Google

[3] Bausman v. Faue, 45 Minn. 412, 48 N. W. 13; Mealey v. Finnegan, 46 Minn. 507, 49 N. W. 207; McLaughlin v. Nicholson, 70 Minn. 71, 72 N. W. 827, 73 N. W. 1; Borman v. Baker, 68 Minn. 213, 70 N. W. 1075; Johnson v. Deforge, 61 Minn. 72, 63 N. W. 174.

[3] Seibert v. Minneapolis etc. R. Co. 58 Minn. 39, 59 N. W. 822; Rogers v. Gross, 75 Minn. 441, 78 N. W. 12; Hoey v. Ellis, 78 Minn. 1, 80 N. W. 693 (judgment satisfied).

[3] Nichols v. City of St. Paul, 44 Minn. 494, 47 N. W. 168; Huntsman v. Hendricks, 44 Minn. 423, 46 N. W. 910; Torinus v. Matthews, 21 Minn. 99; Commonwealth Ins. Co. v. Pierro, 7 Minn. 569 Gil. 404; Fallman v. Gilman, 1 Minn. 179 Gil. 153; State v. Grear, 29 Minn. 221, 13 N. W. 140.

[4] Menzel v. Tubbs, 51 Minn. 364, 53 N. W. 653, 1017; Hunt v. O'Leary, 78 Minn. 281, 80 N. W. 1120; Clark v. B. B. Richards Lumber Co. 72 Minn. 397, 75 N. W. 605; Poehler v. Reese, 78 Minn. 71, 80 N. W. 847; Marshall & Ilsley Bank v. Cady, 76 Minn. 112, 78 N. W. 978; Jones v. Snow, 56 Minn. 214, 57 N. W. 478; Adamson v. Sundby, 51 Minn. 460, 53 N. W. 761.

§ 1860. A party who appeals from an order setting aside a verdict and granting a new trial cannot impeach the verdict in the appellate court or be heard there on exceptions taken by him to rulings on the trial which terminated in such verdict.

Whitely v. Mississippi etc. Boom Co. 38 Minn. 523, 38 N. W. 753.

§ 1861. The findings of fact, conclusions of law, and order for judgment are merged in the judgment, and are immaterial, so far as they awarded the prevailing party any greater relief than the judgment awards him.

Johnson v. Deforge, 61 Minn. 72, 63 N. W. 174.

Error caused by the appellant.

§ 1862. An appellant cannot complain of the consequences of his own acts.[1] He cannot take advantage of errors into which he himself led the court.[2] Thus it is held that an erroneous instruction given at the request of the appellant [3] or in accordance with the theory on which the trial was conducted is no ground for a new trial.[4]

[1] Poehler v. Reese, 78 Minn. 71, 80 N. W. 847.

[2] Mealey v. Finnegan, 46 Minn. 507, 49 N. W. 207; Simmons v. St. Paul etc. Ry. Co. 18 Minn. 184 Gil. 168; Bennett v. Syndicate Ins. Co. 43 Minn. 45, 44 N. W. 794; Poehler v. Reese, 78 Minn. 71, 80 N. W. 847; Sours v. Great Northern Ry. Co. 81 Minn. 337, 84 N. W. 114; McCarvel v. Phenix Ins. Co. 64 Minn. 193, 66 N. W. 367; Gale v. Birmingham, 64 Minn. 555, 67 N. W. 659.

[3] Cummings v. Baars, 36 Minn. 350, 31 N. W. 449.

[4] See § 1124.

§ 1863. A party cannot object to the admission or exclusion of evidence on the trial and then, if his objection is sustained, complain of the ruling on appeal.[1] Nor can a party complain of evidence elicited by his own cross-examination.[2] If evidence is erroneously

Digitized by Google

excluded on objection urged by appellant he cannot object that the verdict or finding is not justified by the evidence if such excluded evidence would clearly have justified it.[3]

[1] Earl Fruit Co. v. Thurston etc. Co. 60 Minn. 351, 62 N. W. 439; McGillin v. Bennett, 132 U. S. 445.

[2] Chicago etc. Ry. Co. v. Fietsam, 24 Ill. App. 210.

[3] Jobbins v. Gray, 34 Ill. App. 208; Garst v. Good, 50 Mo. App. 149.

Estoppel to complain.

§ 1864. A party may by stipulation [1] or by his conduct on the trial [2] estop himself from assigning errors on appeal.

[1] Ames v. Mississippi Boom Co. 8 Minn. 467 Gil. 417.

[2] Burns v. Maltby, 43 Minn. 161, 45 N. W. 3; McArthur v. Craigie, 22 Minn. 351; Bennett v. Syndicate Ins. Co. 43 Minn. 45, 44 N. W. 794; Twaddle v. Mendenhall, 80 Minn. 177, 83 N. W. 135; Allis v. Day, 14 Minn. 516 Gil. 388; St. Paul etc. Ry. Co. v. Gardner, 19 Minn. 132 Gil. 99; Poehler v. Reese, 78 Minn. 71, 80 N. W. 847.

Wrong reasons for right decision.

§ 1865. It is the function of an appellate court to review the judicial acts of lower courts and not their judicial opinions. It follows that a correct decision of a trial court will not be reversed on appeal merely because it was based on wrong reasons.

Bunday v. Dunbar, 5 Minn. 444 Gil. 362; Zimmerman v. Lamb, 7 Minn. 421 Gil. 336; Wieland v. Shillock, 23 Minn. 227; Morrow v. St. Paul City Ry. Co. 65 Minn. 382, 67 N. W. 1002; McCord v. Knowlton, 76 Minn. 391, 79 N. W. 397; Moquist v. Chapel, 62 Minn. 258, 64 N. W. 567; Voge v. Penny, 74 Minn. 525, 77 N. W. 422; State v. Probate Court, 79 Minn. 257, 82 N. W. 580; National Fire Ins. Co. v. Broadbent, 77 Minn. 175, 79 N. W. 676; Ackerson v. Svea Assurance Co. 75 Minn. 135, 77 N. W. 419; Porter v. Baxter, 71 Minn. 195, 73 N. W. 856. But see Northwestern Railroader v. Prior, 68 Minn. 95, 70 N. W. 869.

Miscellaneous cases of harmless error.

§ 1866. An appellate court will not reverse for harmless error in admitting or excluding evidence; [1] in granting or refusing requests for instructions; [2] in the charge; [3] in refusing to dismiss for insufficiency of the evidence; [4] in the findings of fact; [5] in the submission of questions to the jury; [6] or in the entry of judgment.[7]

[1] See §§ 1084 et seq.

[2] See § 887.

[3] See §§ 1113 et seq.

[4] Berkey v. Judd, 22 Minn. 287; Deakin v. Chicago etc. Ry. Co. 27 Minn. 303, 7 N. W. 268; Keith v. Briggs, 32 Minn. 185, 20 N. W. 91.

[5] Leonard v. Green, 34 Minn. 137, 24 N. W. 915; Quinn v. Olson, 34 Minn. 422, 26 N. W. 230; Snell v. Snell, 54 Minn. 285, 55

Digitized by Google

N. W. 1131; Giertsen v. Giertsen, 58 Minn. 213, 59 N. W. 1004; Donnelly v. Cunningham, 61 Minn. 110, 63 N. W. 246.

[6] McArthur v. Craigie, 22 Minn. 351; Hooper v. Webb, 27 Minn. 485, 8 N. W. 589; Gross v. Deller, 33 Minn. 424, 23 N. W. 837.

[7] Bixby v. Wilkinson, 27 Minn. 262, 6 N. W. 801; Libby v. Mikelborg, 28 Minn. 38, 8 N. W. 903; D. M. Osborne & Co. v. Johnson, 35 Minn. 300, 28 N. W. 510.

SCOPE OF REVIEW ON APPEAL FROM JUDGMENT

Review limited to the return.

§ 1867. It is fundamental that the review on appeal must be limited to the record certified up from the lower court.[1] To justify a reversal of a judgment the record must show affirmatively material error.[2]

[1] Lundberg v. Single Men's Endowment Assoc. 41 Minn. 508, 43 N. W. 394.

[2] State v. Staley, 14 Minn. 105 Gil. 75; Teller v. Bishop, 8 Minn. 226 Gil. 195.

When review limited to the judgment roll.

§ 1868. When the record on appeal does not contain a bill of exceptions, or case or its equivalent, the supreme court can review only such questions as appear upon the judgment roll.

Keegan v. Peterson, 24 Minn. 1; Brown v. Brown, 28 Minn. 501, 11 N. W. 64. See § 1754.

Review of verdict or findings.

§ 1869. If the record contains all the evidence introduced on the trial the supreme court may review the sufficiency of the evidence to justify the findings of a court or referee, on an appeal from the judgment entered thereon, although no motion for a new trial was made below.[1] When the trial is by jury the sufficiency of the evidence to justify the verdict cannot be reviewed on appeal from the judgment unless a motion was made in the trial court for a new trial, and the motion was denied.[2] The only way in which to secure a review on appeal of an order granting a new trial is a direct appeal from the order.

[1] See § 954.

[2] See § 953.

Review of intermediate orders.

§ 1870. Our statute provides that upon an appeal from a judgment the supreme court may review any intermediate order involving the merits or necessarily affecting the judgment.[1] This, of course, is subject to the proviso that the record is sufficiently full in the particular case to warrant the review.[2] An intermediate order, within the meaning of this provision, is one which is intermediate the commencement of the action and the entry of judgment. Orders made subsequent to the entry of judgment cannot be reviewed on an appeal

Digitized by Google

from the judgment.[3] It is the general policy of the law that intermediate orders shall be reviewed on appeal from a final judgment or an order granting or refusing a new trial rather than by direct appeal. Any other policy would result in vexatious and dilatory appeals.[4] In many jurisdictions no appeal is allowed from an intermediate order. Our statute authorizes an appeal from certain classes of such orders with the result of much confusion and uncertainty in the cases. Any distinction in intermediate orders made for the purpose of determining appealability must inevitably be more or less arbitrary. Of course any order which is itself appealable may be reviewed on an appeal from the final judgment, and it matters not that the time for appealing from the order expired before the appeal from the judgment.[5] Our statute defines an order as a direction of a court or judge, made or entered in writing, and not included in a judgment.[6] This is not broad enough to define what may be reviewed on an appeal from a final judgment for it does not include mere rulings on the trial. Of course it is unquestioned law that every ruling on the trial on a question of law,[7] as, for example, a ruling admitting or excluding evidence, is reviewable on an appeal from the final judgment.[8]

[1] G. S. 1894 § 6140.
[2] See §§ 1752 et seq.
[3] Leary v. Leary, 68 Wis. 668; Jenness v. Bowen, 77 Cal. 310; Weis v. Schorner, 53 Wis. 72. But see, Fall v. Moore, 45 Minn. 517, 48 N. W. 404.
[4] See Hulett v. Matteson, 12 Minn. 349 Gil. 227; Myrick v. Pierce, 5 Minn. 65 Gil. 47; American Book Co. v. Kingdom Publishing Co. 71 Minn. 363, 73 N. W. 1089.
[5] Mower v. Hanford, 6 Minn. 535 Gil. 372.
[6] G. S. 1894 § 5224.
[7] Teick v. Commissioners, 11 Minn. 292 Gil. 201.
[8] Sanborn v. Mueller, 38 Minn. 27, 35 N. W. 666; De Blois v. Great Northern Ry. Co. 71 Minn. 45, 73 N. W. 637.

§ 1871. The following intermediate orders have been held reviewable on appeal from the final judgment: an order denying a new trial,[1] if it is made prior to the entry of judgment;[2] an order made on demurrer;[3] an order allowing an amendment of the pleadings before trial;[4] an order for judgment notwithstanding a demurrer, the demurrer not being stricken out;[5] an order assessing damages where the defendant withdrew his answer and submitted the assessment of damages to the court;[6] an order submitting a case to arbitrators;[7] an order directing a delivery to the sheriff for sale, of property involved in the action;[8] an order of reference;[9] an order granting or denying a motion for a change of venue;[10] an order denying a motion to have a complaint made more definite and certain;[11] an order made on an appeal to the trial court from a taxation of costs by the clerk;[12] an order striking out an answer;[13] an order refusing to strike out a bill of exceptions;[14] an order before trial refusing to strike out irrelevant matter in a pleading;[15] an order affirming the clerk's refusal to allow and insert costs in the judgment

Digitized by Google

after the entry of judgment;[16] an order allowing an amendment of the pleadings on the trial;[17] an order appointing commissioners in condemnation proceedings;[18] an order denying a motion to set aside the service of summons;[19] an order dismissing an action on the trial;[20] an order refusing to strike a case from the calendar.[21]

[1] Mower v. Hanford, 6 Minn. 535 Gil. 372.
[2] Leary v. Leary, 68 Wis. 662.
[3] State v. St. Croix County, 83 Wis. 340; Thornton v. St. Paul etc. Ry. Co. 6 Daly (N. Y.) 511. But see Coit v. Waples, 1 Minn. 134 Gil. 110; Becker v. Sandusky City Bank, 1 Minn. 311 Gil. 243; Thompson v. Ellenz, 58 Minn. 301, 59 N. W. 1023; Cook v. Kittson, 68 Minn. 474, 71 N. W. 670.
[4] City of Winona v. Minnesota Ry. Const. Co. 29 Minn. 68, 11 N. W. 228; Minneapolis etc. Ry. Co. v. Home Ins. Co. 64 Minn. 61, 66 N. W. 132; Hanley v. Board of County Com'rs, (Minn.) 91 N. W. 756.
[5] Keegan v. Peterson, 24 Minn. 1.
[6] Kent v. Bown, 3 Minn. 347 Gil. 246.
[7] Heglund v. Allen, 30 Minn. 38, 14 N. W. 57.
[8] Mower v. Hanford, 6 Minn. 535 Gil. 372.
[9] Bond v. Welcome, 61 Minn. 46, 63 N. W. 3.
[10] Schoch v. Winona etc. Ry. Co. 55 Minn. 479, 57 N. W. 208; Carpenter v. Comfort, 22 Minn. 539; State v. District Court, 77 Minn. 302, 79 N. W. 960; Hinds v. Backus, 45 Minn. 172, 47 N. W. 655; Jones v. Swank, 54 Minn. 259, 55 N. W. 1126.
[11] State v. O'Brien, 83 Minn. 6, 85 N. W. 1035.
[12] Herrick v. Butler, 30 Minn. 156, 14 N. W. 794; Felber v. Southern Minnesota Ry. Co. 28 Minn. 156, 9 N. W. 635.
[13] Harlan v. St. Paul etc. Ry. Co. 31 Minn. 427, 18 N. W. 147.
[14] Baxter v. Coughlin, 80 Minn. 322, 83 N. W. 190.
[15] Haug v. Haugan, 51 Minn. 558, 53 N. W. 874.
[16] Fall v. Moore, 45 Minn. 517, 48 N. W. 404.
[17] Macauley v. Ryan, 55 Minn. 507, 57 N. W. 151.
[18] Duluth Transfer Ry. Co. v. Duluth Terminal Ry. Co. 81 Minn. 62, 83 N. W. 497.
[19] State v. District Court, 26 Minn. 233, 2 N. W. 698.
[20] Thorp v. Lorenz, 34 Minn. 350, 25 N. W. 712.
[21] Chadbourne v. Reed, 83 Minn. 447, 86 N. W. 415.

§ 1872. If an appeal is taken from an order denying a new trial and the order is affirmed, all questions which were in fact, or might have been determined on such appeal are res judicata on a subsequent appeal from the final judgment.

Schleuder v. Corey, 30 Minn. 501, 16 N. W. 401; Adamson v. Sundby, 51 Minn. 460, 53 N. W. 761; Tilleny v. Wolverton, 54 Minn. 75, 55 N. W. 822; Hibbs v. Marpe, 84 Minn. 178, 87 N. W. 363.

Review on appeal from a part of a judgment.

§ 1873. On an appeal from a part of a judgment the review is strictly limited to the part from which the appeal is taken.

Digitized by Google

Hall v. McCormick, 31 Minn. 280, 17 N. W. 620; In re Davis, 149 N. Y. 539; Union Trust Co. v. Trumbull, 137 Ill. 159; Walker v. Pritchard, 121 Ill. 221. See Dodge v. Allis, 27 Minn. 376, 7 N. W. 732.

Review limited to the particular judgment.

§ 1874. While an appeal from a judgment carries up for review prior rulings or orders it does not carry up for review a prior judgment. Thus, upon an appeal from the final "decree" in foreclosure proceedings, it was held that error in the judgment adjudging the amount due and directing the sale, could not be reviewed.

Dodge v. Allis, 27 Minn. 376, 7 N. W. 732.

Review of questions not determined below.

§ 1875. On appeal from a judgment the supreme court will not ordinarily review questions not considered and determined by the trial court.

See §§ 1802, 1803.

Review of orders subsequent to judgment.

§ 1876. On appeal from a final judgment the supreme court is not authorized to review orders made subsequent to the entry of judgment.

Leary v. Leary, 68 Wis. 668; Jenness v. Bowen, 77 Cal. 310.

Review of conclusions of law.

§ 1877. On appeal from the judgment the supreme court will consider whether the conclusions of law are justified by the findings of fact. It is not necessary that the record should include a case or bill of exceptions or that a motion should have been made in the trial court for a new trial or an amendment. The supreme court may determine the question on the judgment roll alone.

City of St. Paul v. Kuby, 8 Minn. 154 Gil. 125; Burpe v. Van Eman, 11 Minn. 327 Gil. 231; Wheadon v. Mead, 71 Minn. 322, 73 N. W. 975; Brigham v. Paul, 64 Minn. 95, 66 N. W. 203; Morrison v. March, 4 Minn. 422 Gil. 325; Teller v. Bishop, 8 Minn. 226 Gil. 195; Thompson v. Howe, 21 Minn. 98; First Nat. Bank v. Parsons, 19 Minn. 289 Gil. 246; Jones v. Wilder, 28 Minn. 238, 9 N. W. 707; Rich v. Rich, 12 Minn. 468 Gil. 369; Stevens v. Stevens, 82 Minn. 1, 84 N. W. 457.

SCOPE OF REVIEW ON APPEAL FROM ORDER DENYING A NEW TRIAL

Review limited to grounds stated in notice.

§ 1878. On an appeal from an order denying a new trial the supreme court is limited in its review to the grounds or errors assigned in the notice of motion.

Searles v. Thompson, 18 Minn. 316 Gil. 285; Smith v. Welch, 10 Wis. 91.

Digitized by Google

Review of orders made prior to the trial.

§ 1879. As observed elsewhere the cases are in a state of confusion as to whether an order made prior to the trial is a ground for a new trial.[1] There is a corresponding confusion as to whether such orders may be reviewed on an appeal from an order denying a new trial. Thus it has been held that on such an appeal the supreme court may review an order of reference [2] and also an order granting or denying a motion for a change of venue.[3] On the other hand it has been held that an order made prior to the trial allowing an amendment of the pleadings could not be reviewed on such an appeal.[4]

[1] See § 988.

[2] Bond v. Welcome, 61 Minn. 43, 63 N. W. 3.

[3] Wilson v. Richards, 28 Minn. 337, 9 N. W. 872; Carpenter v. Comfort, 22 Minn 539; State v. District Court, 77 Minn. 302, 79 N. W. 960; Lehmicke v. St. Paul etc. Ry. Co. 19 Minn. 464 Gil. 406 (overruled).

[4] Manwarring v. O'Brien, 75 Minn. 542, 78 N. W. 1.

Review of orders made subsequent to the trial.

§ 1880. An order made subsequent to the trial is no ground for a new trial and consequently cannot be reviewed on an appeal from an order denying a new trial.

See Schumann v. Mark, 35 Minn. 379, 28 N. W. 927; Baxter v. Coughlin, 80 Minn. 322, 83 N. W. 190.

Review of error on judgment roll.

§ 1881. On an appeal from an order denying a new trial error apparent on the face of the judgment roll cannot be reviewed. It is only on appeal from a judgment that such review is permissible.

In re Westerfield's Estate, 96 Cal. 113; Thompson v. Patterson, 54 Cal. 543.

Review of conclusions of law.

§ 1882. Whether the conclusions of law of a court or referee are justified by the findings of fact may be raised on a motion for a new trial and reviewed on an appeal from the order made thereon.

Ames v. Richardson, 29 Minn. 330, 13 N. W. 137; Coolbaugh v. Roemer, 32 Minn. 445, 21 N. W. 472; Farnham v. Thompson, 34 Minn. 330, 26 N. W. 9; Wilson v. Richards, 28 Minn. 537, 9 N. W. 872; Tilleny v. Wolverton, 54 Minn. 75, 55 N. W. 822; Griffin v. Jorgenson, 22 Minn. 92; Hibbs v. Marpe, 84 Minn. 178, 87 N. W. 363; Lumbermen's Ins. Co. v. City of St. Paul, 82 Minn. 497, 85 N. W. 525.

Rulings favorable to prevailing party.

§ 1883. If, upon an appeal from an order denying a new trial, the supreme court determines to affirm the order it will not consider exceptions of the respondent to rulings that were favorable to the appellant.

Winona etc. Ry. Co. v. Denman, 10 Minn. 267 Gil. 208.

Digitized by Google

SCOPE OF REVIEW ON APPEAL FROM AN ORDER GRANTING A NEW TRIAL

Not limited to grounds assigned by trial court.

§ 1884. On appeal from an order granting a new trial the supreme court is not limited in its review to the specific grounds upon which the trial court based its order. A wrong reason for a right decision is no ground for a reversal. It is the duty of the appellant on such an appeal to show that the order was erroneous on every ground stated in the notice of motion. If the order was justifiable on any one of the grounds stated it will be sustained on appeal regardless of the opinion of the trial court.

Langan v. Iverson, 78 Minn. 299, 80 N. W. 1051; Marsh v. Webber, 13 Minn. 109 Gil. 99; Morrow v. St. Paul City Ry. Co. 65 Minn. 382, 67 N. W. 1002; Jenkinson v. Koester, (Minn.) 90 N. W. 382.

General rule.

§ 1885. Any question that may properly be raised on a motion for a new trial may be considered on an appeal from an order granting the motion.

Alpers v. Hunt, 86 Cal. 78. See Macauley v. Ryan, 55 Minn. 507, 57 N. W. 151; Baxter v. Coughlin, 80 Minn. 322, 83 N. W. 190.

No presumption as to ground upon which motion was granted.

§ 1886. It is provided by statute that on appeal "it shall not be presumed that a new trial was granted upon the ground that the verdict, report or decision was not justified by the evidence, unless so expressly stated in the order granting such new trial or in a memorandum attached thereto."

Laws 1901 ch. 46. See Park v. Electric Thermostat Co. 75 Minn. 349, 77 N. W. 988.

Estoppel of appellant.

§ 1887. A party who appeals from an order setting aside a verdict and granting a new trial cannot impeach the verdict in the appellate court or be heard there on exceptions taken by him to rulings on the trial which terminated in such verdict.

Whitely v. Mississippi etc. Boom Co. 38 Minn. 523, 38 N. W. 753.

SCOPE OF REVIEW ON APPEAL FROM INTERMEDIATE ORDERS GENERALLY

General rule.

§ 1888. It is a general principle that on an appeal from an intermediate order the review is strictly limited to the matters directly involved in the order or upon which it is based. An appeal from an order does not, like an appeal from a judgment, carry up for review the regularity of prior orders or rulings of the court.

Griffin v. Jorgenson, 22 Minn. 92; Lehmicke v. St. Paul etc. Ry.

Digitized by Google

Co. 19 Minn. 464 Gil. 406; Curtis v. St. Paul etc. Ry. Co. 20 Minn. 28 Gil. 19; Flowers v. Bartlett, 66 Minn. 213, 68 N. W. 976; Menage v. Lustfield, 30 Minn. 487, 16 N. W. 398; State v. Probate Court, 28 Minn. 381, 10 N. W. 209; Papke v. Papke, 30 Minn. 260, 15 N. W. 117; Baxter v. Coughlin, 80 Minn. 322, 83 N. W. 190; Hospes v. N. W. Mfg. & Car Co. 41 Minn. 256, 43 N. W. 180; Potter v. Holmes, 72 Minn. 153, 75 N. W. 153; Huron Water Works Co. v. Huron City, 4 S. D. 102.

Orders subsequent to judgment.

§ 1889. Upon an appeal from an order subsequent to judgment the judgment cannot be reviewed.

Papke v. Papke, 30 Minn. 260, 15 N. W. 117. See Dodge v. Allis, 27 Minn. 376, 7 N. W. 732.

REVIEW OF MATTERS RESTING IN THE DISCRETION OF THE TRIAL COURT

General rule.

§ 1890. It is a fundamental rule of appellate procedure that the determination of a trial court of a matter resting in its discretion will not be reversed on appeal except to remedy gross injustice.[1] Judicial discretion is defined as "that part of the judicial power which depends, not upon the application of rules of law or the determination of questions of strict right, but upon personal judgment to be exercised in view of the circumstances of each case, and which therefore is not usually reviewed by an appellate tribunal, unless abused." [2] This discretionary power of the trial court must be exercised judicially, with close regard to all the facts of the particular case and in furtherance of justice. If it is clearly apparent that the court has acted wilfully, arbitrarily or capriciously or contrary to well established legal usage, its action may be reversed on appeal, for the power is not absolute but judicial.[3] It is sometimes said that judicial discretion must be guided and controlled by fixed legal principles.[4] This is misleading and inaccurate.[5] Judicial discretion presupposes the absence of fixed legal principles as regards the matter in hand. It would be nearer the mark to say that judicial discretion should be exercised in accordance with well established legal usage and in harmony with legal conceptions of right and expediency. "The term discretion implies the absence of a hard and fast rule. The establishment of a clearly defined rule would be the end of discretion. And yet discretion should not be a word for arbitrary will or unstable caprice." [6] The duty of an appellate court in this regard is to keep the trial court within the bounds of reason.[7] The abuse of discretion does not necessarily involve moral obliquity in the court.[8] It may result from a misapprehension of a rule of law or from a failure to weigh evidence properly or from an unwarranted departure from established legal usage. The term discretion is applied to many different matters and an appellate court will reverse in some cases far more readily than in others. The order of proof on the trial and the granting of a new trial are both said to rest in the discretion of

Digitized by Google

the trial court and yet its action in the two cases is not supervised to the same degree by the appellate court. There are degrees of discretion, varying with the subject matter. The matter of allowing leading questions to be put to a witness rests in the discretion of the trial court and also the matter of granting a new trial, and yet the two questions are treated very differently on appeal. Our supreme court has never granted a new trial for an alleged abuse of discretion in allowing leading questions.[9] Practically the control of the trial court over the matter is absolute.

[1] Myrick v. Pierce, 5 Minn. 65 Gil. 47; Fowler v. Atkinson, 5 Minn. 505 Gil. 399; Haug v. Haugman, 51 Minn. 558, 53 N. W. 874; Sheldon v. Risedorph, 23 Minn. 518; Olson v. State Bank, 72 Minn. 320, 75 N. W. 378; Le Mere v. McHale, 30 Minn. 410, 15 N. W. 682.

[2] Austin Abbott in Century Dictionary.

[3] Potter v. Holmes, 74 Minn. 508, 77 N. W. 416. See Rice v. Longfellow Bros. Co. 78 Minn. 394, 81 N. W. 206.

[4] Potter v. Holmes, 74 Minn. 508, 77 N. W. 416.

[5] See Howell v. Mills, 53 N. Y. 332; Tripp v. Cook, 26 Wend. (N. Y.) 143; Judges v. People, 18 Wend. (N. Y.) 99; Platt v. Munroe, 34 Barb. (N. Y.) 293; People v. Superior Court, 5 Wend. (N. Y.) 115.

[6] Norris v. Clinkscales, 47 S. C. 488.

[7] See Murray v. Buell, 74 Wis. 18.

[8] Voge v. Penney, 74 Minn. 525, 77 N. W. 422; Martin v. Courtney, 75 Minn. 255, 77 N. W. 813.

[9] Couch v. Steele, 63 Minn. 504, 65 N. W. 946.

§ 1891. If relief lying within the sound discretion of the trial court is refused on the ground of want of power to grant it, or upon any other ground that proves the non-exercise of that discretion, such decision is erroneous and will be reversed on review and the case remanded with directions to the trial court to exercise its discretion.[1] The memorandum of the judge cannot be used to show that discretion was not exercised.[2]

[1] Seibert v. Minneapolis etc. Ry. Co. 58 Minn. 58, 59 N. W. 826; Leonard v. Green, 30 Minn. 496, 16 N. W. 399; Ashton v. Thompson, 28 Minn. 330, 9 N. W. 876; Nornborg v. Larson, 69 Minn. 344, 72 N. W. 564.

[2] Boen v. Evans, 72 Minn. 169, 75 N. W. 116.

§ 1892. A writ of mandamus will issue to compel a trial court to exercise its discretion.

State v. Otis, 58 Minn. 275, 59 N. W. 1015.

§ 1893. On an application addressed to the discretion of the trial court it may disregard any failure to comply with its own rules governing such applications.

Sheldon v. Risedorph, 23 Minn. 518.

§ 1894. The supreme court will not review the action of the trial court upon a matter lying in the discretion of the latter unless all

Digitized by Google

the facts and circumstances which may have actuated the court in its act is presented by the record.

Gibson v. Brennan, 46 Minn. 92, 48 N. W. 460.

Matters of discretion before the trial.

§ 1895. The following matters, arising before the trial, rest in the discretion of the trial court and its action will not be reversed on appeal except for abuse of discretion: changing the place of trial for convenience of witnesses or to secure a fair trial;[1] granting a continuance;[2] allowing a party to serve a supplemental pleading if he has not moved promptly;[3] requiring a pleading to be made more definite and certain;[4] allowing an amendment of pleadings;[5] imposing terms in case of an amendment of pleadings;[6] bringing in additional parties;[7] compelling a party in a personal injury case to submit to a surgical examination;[8] granting an extension of time to plead;[9] striking out irrelevant or redundant matter in a pleading;[10] refusing to order substitution of heirs of deceased defendant;[11] awarding temporary alimony.[12]

[1] See § 282.

[2] See § 383.

[3] Lough v. Bragg, 19 Minn. 357 Gil. 309; Reilly v. Bader, 50 Minn. 199, 52 N. W. 522; Stickney v. Jordain, 50 Minn. 258, 52 N. W. 861; Voak v. National Invest. Co. 51 Minn. 450, 53 N. W. 708; Lathrop v. Dearing, 59 Minn. 234, 61 N. W. 24; Malmsten v. Berryhill, 63 Minn. 1, 65 N. W. 88.

[4] Cathcart v. Peck, 11 Minn. 45 Gil. 24; Madden v. Minneapolis etc. Ry. Co. 30 Minn. 453, 16 N. W. 263; Fraker v. St. Paul etc. Ry. Co. 30 Minn. 103, 14 N. W. 366; Lehnertz v. Minneapolis etc. Ry. Co. 31 Minn. 219, 17 N. W. 376; Tierney v. Minneapolis etc. Ry. Co. 31 Minn. 234, 17 N. W. 377; American Book Co. v. Kingdom Publishing Co. 71 Minn. 363, 73 N. W. 1089.

[5] See § 1898.

[6] Caldwell v. Bruggerman, 8 Minn. 286 Gil. 252.

[7] See Dunnell, Minn. Pl. § 194.

[8] See § 427.

[9] G. S. 1894 § 5267.

[10] Brisbin v. American Express Co. 15 Minn. 43 Gil. 43; Haug v. Haugan, 51 Minn. 558, 53 N. W. 874.

[11] St. Paul etc. Ry. Co. v. Eckel, 82 Minn. 278, 84 N. W. 1008 (discretionary nature of order undetermined).

[12] Stiehm v. Stiehm, 69 Minn. 461, 72 N. W. 708; Wagner v. Wagner, 39 Minn. 394, 40 N. W. 360.

Matters of discretion on the trial.

§ 1896. The conduct of the trial is necessarily left almost wholly to the discretion of the presiding judge and the supreme court will only interfere to correct manifest injustice or prejudicial irregularity.

See cases under §§ 496–545; 590–933.

Digitized by Google

Matters of discretion in special proceedings.

§ 1897. The following matters, arising in special or ancillary proceedings, rest in the discretion of the trial court and its action will not be reversed on appeal except for abuse of discretion: granting or dissolving a temporary injunction;[1] dissolving an attachment;[2] requiring a further disclosure in garnishment proceedings;[3] citing in other representatives of the garnishee under G. S. 1894 § 5311;[4] awarding custody of children upon divorce;[5] vacating a village plat.[6]

[1] Hart v. Marshall, 4 Minn. 294 Gil. 211; Pineo v. Heffelfinger, 29 Minn. 183, 12 N. W. 522; Myers v. Duluth Transfer Ry. Co. 53 Minn. 335, 55 N. W. 140; Gorton v. Town of Forest City, 67 Minn. 36, 69 N. W. 478; McGregor v. Case, 80 Minn. 214, 83 N. W. 140.

[2] Blandey v. Raguet, 14 Minn. 243 Gil. 179; Rand v. Getchell, 24 Minn. 319; Brown v. Minneapolis Lumber Co. 25 Minn. 461; Knight v. Alexander, 38 Minn. 384, 37 N. W. 799; Jones v. Swank, 51 Minn. 285, 53 N. W. 634; Finance Company v. Hursey, 60 Minn. 17, 61 N. W. 672; Rosenberg v. Burnstein, 60 Minn. 18, 61 N. W. 684; First Nat. Bank v. Buchan, 76 Minn. 54, 78 N. W. 878.

[3] Milliken v. Mannheimer, 49 Minn. 521, 52 N. W. 139.

[4] Johnson v. Bergman, 80 Minn. 73, 82 N. W. 1108.

[5] State v. Flint, 63 Minn. 187, 65 N. W. 272.

[6] Fowler v. Vandal, 84 Minn. 392, 87 N. W. 1021.

Amendment of pleadings.

§ 1898. The amendment of pleadings is a matter lying almost wholly in the discretion of the trial court and its action will not be reversed on appeal except for a clear abuse of discretion manifestly prejudicial to the appellant.

(1) Granting or refusing leave to amend on the trial:

Morrison v. Lovejoy, 6 Minn. 319 Gil. 224; Brazil v. Moran, 8 Minn. 236 Gil. 205; Butler v. Paine, 8 Minn. 324 Gil. 284; White v. Culver, 10 Minn. 192 Gil. 155; Kiefer v. Rogers, 19 Minn. 32 Gil. 14; D. M. Osborne & Co. v. Williams, 37 Minn. 507, 35 N. W. 371; Iltis v. Chicago etc. Ry. Co. 40 Minn. 273, 41 N. W. 1040; Bitzer v. Campbell, 47 Minn. 221, 49 N. W. 691; Stensgaard v. St. Paul etc. Ins. Co. 50 Minn. 429, 52 N. W. 910; Kennedy v. McQuaid, 56 Minn. 450, 58 N. W. 35; Niven v. Craig, 63 Minn. 20, 65 N. W. 86; Luse v. Reed, 63 Minn. 5, 65 N. W. 91; St. Paul Trust Co. v. St. Paul Chamber of Commerce, 70 Minn. 486, 73 N. W. 408; Boen v. Evans, 72 Minn. 169, 75 N. W. 116; Fidelity Mutual Life Assoc. v. Germania Bank, 74 Minn. 154, 76 N. W. 968; Board of County Com'rs v. American Loan & Trust Co. 75 Minn. 489, 78 N. W. 113; Dennis v. Pabst Brewing Co. 80 Minn. 15, 82 N. W. 978; Brown v. Radebaugh, 87 N. W. 937; Porter v. Winona etc. Co. 78 Minn. 210, 80 N. W. 965; Rice v. Longfellow Bros. Co. 78 Minn. 394, 81 N. W.

Digitized by Google

206 (refusal held an abuse of discretion); Byard v. Palace Clothing House Co. 85 Minn. 363, 88 N. W. 998.

(2) Granting or refusing leave to amend before trial:

City of Winona v. Minnesota Ry. Const. Co. 29 Minn. 68, 11 N. W. 228; Fowler v. Atkinson, 5 Minn. 505 Gil. 399; Boen v. Evans, 72 Minn. 169, 75 N. W. 116.

(3) Granting or refusing leave to amend after verdict:

City of Winona v. Minnesota Ry. Const. Co. 29 Minn. 68, 11 N. W. 228; Burke v. Baldwin, 54 Minn. 514, 56 N. W. 173; Nichols & Shepard Co. v. Dedrick, 61 Minn. 513, 63 N. W. 1110.

(4) Conforming the pleadings to the proof:

Cairncross v. McGrann, 37 Minn. 130, 33 N. W. 548; Erickson v. Bennet, 39 Minn. 326, 40 N. W. 157; Almich v. Downey, 45 Minn. 460, 48 N. W. 197; Dougan v. Turner, 51 Minn. 330, 53 N. W. 650; Minneapolis Stock Yards & Packing Co. v. Cunningham, 59 Minn. 325, 61 N. W. 329; Adams v. Castle, 64 Minn. 505, 67 N. W. 637; Board of County Com'rs v. American Loan & Trust Co. 75 Minn. 489, 78 N. W. 489; First Nat. Bank v. Strait, 71 Minn. 69, 73 N. W. 645; Aultman & Taylor Co. v. O'Dowd, 73 Minn. 58, 75 N. W. 756; Klein v. Funk, 82 Minn. 3, 84 N. W. 460; Nichols & Shepard Co. v. Dedrick, 61 Minn. 513, 63 N. W. 1110.

THEORY OF CASE

General rule.

§ 1899. A party cannot shift his position on appeal. To permit him to do so would be unfair to the opposite party and turn the appellate court into a court of first instance. It is a general rule of wide and frequent application that a case will be considered on appeal in accordance with the theory on which the action was conducted on the trial, both as regards the law and the facts.[1] A party cannot try a cause as arising ex delicto and then, on appeal, contend that it was properly a cause ex contractu.[2] So where a party tries an action in accordance with equitable principles it is too late on appeal to object that there was an adequate remedy at law.[3]

[1] Davis v. Jacoby, 54 Minn. 144, 55 N. W. 908; White v. Western Assurance Co. 52 Minn. 352, 54 N. W. 195; Moquist v. Chapel, 62 Minn. 258, 64 N. W. 567; Haslam v. First Nat. Bank, 79 Minn. 1, 81 N. W. 535; Green v. St. Paul etc. Ry. Co. 55 Minn. 192, 56 N. W. 752; Thoreson v. Minneapolis Harvester Works, 29 Minn. 341, 13 N. W. 156; Humphrey v. Merriam, 32 Minn. 197, 20 N. W. 138; Ambuel v. Matthews, 41 Minn. 537, 43 N. W. 477 (action for conversion tried as an action for accounting); Powell v. Heisler, 45 Minn. 549, 48 N. W. 411; Johnson v. Sherwood, 44 Minn. 9, 47 N. W. 262; Earl Fruit Co. v. Thurston etc. Co. 60 Minn. 351, 62 N. W. 439; Shea v. Chicago etc. Ry. Co. 66 Minn. 102, 68 N. W. 608; Engler v. Schneider, 66 Minn. 388, 69 N. W. 139; Anchor Invest. Co. v. Kirkpatrick, 59 Minn. 378, 61 N. W. 29; Hove

Digitized by Google

v. Bankers' Exchange Bank, 75 Minn. 286, 77 N. W. 967; Woodbridge v. Sellwood, 65 Minn. 135, 67 N. W. 799; Perkins v. Thorson, 50 Minn. 85, 52 N. W. 272; Bates v. B. B. Richards Lumber Co. 56 Minn. 14, 57 N. W. 218; Stensgaard v. St. Paul etc. Ins. Co. 50 Minn. 429, 52 N. W. 910; Densmore v. Shepard, 46 Minn. 54, 48 N. W. 528, 681; Redmond v. St. Paul etc. Ry. Co. 39 Minn. 248, 40 N. W. 64; Kraemer v. Deustermann, 40 Minn. 469, 35 N. W. 276; James v. City of St. Paul, 72 Minn. 138, 75 N. W. 5; Engstad v. Syverson, 72 Minn. 188, 75 N. W. 125; Urquhart v. Scottish-American Mortgage Co. 85 Minn. 69, 88 N. W. 264; Cumbey v. Lovett, 76 Minn. 227, 79 N. W. 99.

[2] Peteler Portable Ry. Mfg. Co. v. N. W. Adamant Mfg. Co. 60 Minn. 127, 61 N. W. 1024.

[3] St. Paul etc. Ry. Co. v. Robinson, 41 Minn. 394, 43 N. W. 75; Newton v. Newton, 46 Minn. 33, 48 N. W. 450.

Appeal from order granting new trial.

§ 1900. When a party appeals from an order setting aside a verdict and granting a new trial he cannot impeach the verdict or be heard on objections to rulings of the court on the trial.

Whitely v. Mississippi etc. Co. 38 Minn. 523, 38 N. W. 753.

Grounds of motion.

§ 1901. Where a motion in the trial court is made and determined on special grounds stated in the notice of motion the moving party will not be heard in the appellate court upon new or additional grounds.

State v. District Court, 56 Minn. 56, 57 N. W. 319; Johnson v. Lough, 22 Minn. 203.

As to the law of the case.

§ 1902. Where parties consent to try their cause below upon a particular theory of what the law of the case is, they cannot complain on appeal if the result is correct according to that theory, however incorrect the theory may be.[1] This is the general rule but it is not applicable where the record shows conclusively that the party recovering is not entitled to recover under any view of the law, as where a complaint shows conclusively, so that it cannot be helped by proof or amendment, that there is no cause of action, or where it appears by evidence incapable of being rebutted or explained away that there is no cause of action, or that there is a defence.[2] A party cannot object on appeal to an instruction given at his own request [3] or in accordance with the theory upon which he conducted his case.[4] An instruction unobjected to becomes the law of the case, however erroneous it may be; the jury are bound to accept the law as given to them by the court and by not objecting to the charge a party consents that the weight and sufficiency of the evidence and the issues in the case shall be determined by the jury in accordance with the law as given by the court; and whether the charge is right or wrong it must, for the purposes of an appeal,

Digitized by Google

be taken as the law of the case. There are, however, ill-defined limitations to this rule.[5]

[1] Davis v. Jacoby, 54 Minn. 144, 55 N. W. 908; White v. Western Assurance Co. 52 Minn. 352, 54 N. W. 195; Engler v. Schneider, 66 Minn. 388, 69 N. W. 139.

[2] White v. Western Assurance Co. 52 Minn. 352, 54 N. W. 195.

[3] See § 1125.

[4] See § 1126.

[5] See § 1128.

As to evidence.

§ 1903. The doctrine that a party cannot shift his position on appeal is constantly applied to rulings on evidence. It is a general rule that where evidence is offered for a specific purpose and it is objected to, the court, in ruling on its admissibility, is not obliged to take into consideration any other view than the one advanced by the party offering it. Further or different grounds for the admission of the evidence cannot be urged on appeal.[1] The appellate court will place itself, so far as possible, in the exact position of the trial court. The same principle is applied to objections. On appeal a party cannot take advantage of any objection to the admission of evidence which he did not clearly and specifically raise on the trial. A party is not only bound to make specific objections at the time the evidence is offered but he is also limited on appeal to the objections he raised below.[2]

[1] Bond v. Corbett, 2 Minn. 248 Gil. 209; Rhodes v. Pray, 36 Minn. 392, 32 N. W. 86; Meyer v. Berlandi, 53 Minn. 59, 54 N. W. 937.

[2] Bond v. Corbett, 2 Minn. 248 Gil. 209; Bedal v. Spurr, 33 Minn. 207, 22 N. W. 390; Johnson v. Okerstrom, 70 Minn. 303, 73 N. W. 147; Gilbert v. Thompson, 14 Minn. 544 Gil. 414; Stillman v. Northern Pacific etc. Ry. Co. 34 Minn. 420, 26 N. W. 399; Mousseau v. Mousseau, 42 Minn. 212, 44 N. W. 193, Smith v. Bean, 46 Minn. 138, 48 N. W. 687; Triggs v. Jones, 46 Minn. 277, 48 N. W. 1113; Towle v. Sherer, 70 Minn. 312, 73 N. W. 180; Levering v. Langley, 8 Minn. 107 Gil. 82; Cannady v. Lynch, 27 Minn. 435, 8 N. W. 164; Craig v. Cook, 28 Minn. 232, 9 N. W. 712; Nelson v. Chicago etc. Ry. Co. 35 Minn. 170, 28 N. W. 215; King v. Nichols & Shepard Co. 53 Minn. 453, 55 N. W. 604; Vaughan v. McCarthy, 63 Minn. 221, 65 N. W. 249; Union Register Co. v. John, 49 Minn. 481, 52 N. W. 48; Klotz v. Winona etc. Ry. Co. 68 Minn. 341, 71 N. W. 257; Hall v. Connecticut etc. Ins. Co. 76 Minn. 401, 79 N. W. 497; Stahl v. City of Duluth, 71 Minn. 341, 74 N. W. 143; Merchants Nat. Bank v. Barlow, 79 Minn. 234, 82 N. W. 364; Le May v. Brett, 81 Minn. 506, 84 N. W. 339.

As to the pleadings.

§ 1904. Where a case is tried by the parties and submitted to the jury by the court without objection upon a certain construction of the pleadings such construction will be followed on appeal.

Digitized by Google

Keyes v. Minneapolis etc. Ry. Co. 36 Minn. 290, 30 N. W. 888; Fritz v. McGill, 31 Minn. 536, 18 N. W. 753; Peteler Portable Ry. Mfg. Co. v. N. W. Adamant Mfg. Co. 60 Minn. 127, 61 N. W. 1024.

As to the issues.

§ 1905. When the trial is conducted on the theory that allegations of the answer are in issue without a formal reply, that theory will be followed in the appellate court.[1] If the parties on the trial voluntarily consent to the trial of issues not made by the pleadings the appellate court will consider such issues as properly in the case.[2] When the court charges the jury without objection that certain questions are the only ones in the case the supreme court will adopt that theory.[3]

[1] Matthews v. Torinus, 22 Minn. 132; Merchants Nat. Bank v. Barlow, 79 Minn. 234, 82 N. W. 364; Lyford v. Martin, 79 Minn. 243, 82 N. W. 479.

[2] See §§ 1845, 1853.

[3] Bates v. B. B. Richards Lumber Co. 56 Minn. 14, 57 N. W. 218; Engstad v. Syverson, 72 Minn. 188, 75 N. W. 125.

§ 1906. Where in an action triable by the court without a jury the court submits certain issues to the jury such issues will be considered on appeal as they were considered by the court, counsel and jury at the trial, without arbitrarily applying technical legal rules of interpretation.

McAlpine v. Resch, 82 Minn. 523, 85 N. W. 545.

As to the facts.

§ 1907. Where it is manifest that a general verdict was rendered upon a particular theory of the facts, rulings and exceptions which could not in any way affect that theory will not be considered on appeal.

Kraemer v. Deustermann, 40 Minn. 469, 35 N. W. 276.

How theory of case disclosed.

§ 1908. The theory on which the action was conducted may be disclosed by requests for instructions;[1] by instructions to which no objections were made;[2] by statements of counsel on the trial;[3] by objections to evidence;[4] by the nature of the evidence introduced;[5] by admissions of the parties on the trial.[6]

[1] Davis v. Jacoby, 54 Minn. 144, 55 N. W. 908.

[2] See § 1128.

[3] Moquist v. Chapel, 62 Minn. 258, 64 N. W. 567. But see, Stewart v. Cooley, 23 Minn. 347.

[4] Matthews v. Matthews, 133 N. Y. 679.

[5] Davis v. Jacoby, 54 Minn. 144, 55 N. W. 908; Taylor v. Parker, 17 Minn. 469 Gil. 447.

[6] Moquist v. Chapel, 62 Minn. 258, 64 N. W. 567.

Digitized by Google

DISMISSAL OF APPEAL

For defective return.

§ 1909. The supreme court on its own motion will dismiss an appeal when the return does not include a copy of the order or judgment from which the appeal is taken.

Granite Savings Bank & Trust Co. v. Weinberg, 62 Minn. 202, 64 N. W. 380. See Pabst Brewing Co. v. Butchart, 68 Minn. 303, 71 N. W. 273.

For want of merit.

§ 1910. The supreme court has power to dismiss an appeal which is manifestly frivolous and without merit; but this will only be done where it is perfectly apparent, without argument, that the appeal is frivolous.

Johnson v. St. Paul City Ry. Co. 68 Minn. 408, 71 N. W. 619.

For failure to prosecute.

§ 1911. The supreme court has inherent power to dismiss an appeal which is not prosecuted with reasonable diligence. It is provided by rule of court that either party may apply for a dismissal if the other party shall neglect to appear and argue the cause.[1] Dismissal may also follow a failure to cause a proper return to be made.[2]

[1] Rule 14, Supreme Court.

[2] Rule 4, Supreme Court; G. S. 1894 § 6139.

For want of real controversy.

§ 1912. Courts do not sit for the purpose of determining purely academical questions. There must be a substantial and real controversy between the parties. The supreme court will not entertain a case and review a judgment where it appears satisfactorily that the subject matter of the action has been settled by the parties, and the judgment satisfied.[1] The supreme court will not ordinarily review a case where the only practical effect would be to determine which party should pay the costs. But there are ill-defined exceptions to this general rule.[2]

[1] Babcock v. Banning, 3 Minn. 191 Gil. 123. See James v. Wilder, 25 Minn. 305.

[2] James v. Wilder, 25 Minn. 305; Harrington v. Town of Plainview, 27 Minn. 224, 6 N. W. 777; Thomas v. Craig, 60 Minn. 501, 62 N. W. 1133.

For failure to serve paper-book and brief.

§ 1913. It is provided by rule of court that a motion may be made for dismissal for "neglect to furnish and deliver cases and points as required" by the rules of the court.[1]

[1] Rule 14, Supreme Court.

Appellant cannot dismiss as of right.

§ 1914. The appellant has no absolute right to dismiss an appeal. Where an appellate court has once acquired jurisdiction of a cause

Digitized by Google

it cannot be deprived of that jurisdiction and the respondent of a decision, at the mere will of the appellant. He should make application to the court for leave to dismiss. A mere notice that he dismisses is a nullity.

Merrill v. Dearing, 24 Minn. 179; Schleuder v. Corey, 30 Minn. 501, 16 N. W. 401; Briggs v. Shea, 48 Minn. 218, 50 N. W. 1037.

Scope of review on motion to dismiss.

§ 1915. Questions touching the merits cannot be considered on a motion to dismiss.[1] Whether an appeal properly lies in the given case must be determined on the record alone.[2] But facts occcurring since the appeal which render a review improper may be shown by affidavits.[3]

[1] Hines v. Cochran, 35 Neb. 828; Hill v. Chicago etc. Ry. Co. 129 U. S. 170.

[2] O'Brien v. Smith, 37 N. Y. St. Rep. 43.

[3] Babcock v. Banning, 3 Minn. 191 Gil. 123; Waddingham v. Waddingham, 27 Mo. App. 596.

Dismissal does not preclude subsequent appeal.

§ 1916. "No discontinuance or dismissal of an appeal in the supreme court shall preclude the party from taking another appeal in the same cause, within the time limited by law."

[G. S. 1894 § 6152] See Culliford v. Gadd, 135 N. Y. 632; Evans v. State Bank, 134 U. S. 330; In re Rose's Estate, 80 Cal. 166; French v. Row, 77 Hun (N. Y.) 380.

Dismissal on court's own motion.

§ 1917. Where an appeal has been taken from a non-appealable order or judgment it will be dismissed by the court notwithstanding the failure of the respondent to move for a dismissal.

United States Savings etc. Co. v. Ahrens, 50 Minn. 332, 52 N. W. 898; Gottstein v. St. Jean, 79 Minn. 232, 82 N. W. 311; Thomas v. Craig, 60 Minn. 501, 62 N. W. 1133; Johnson v. Northern Pacific etc. Ry. Co. 39 Minn. 30, 38 N. W. 804; Croft v. Miller, 26 Minn. 317, 4 N. W. 45.

Motion to dismiss distinguished from a motion to strike from the records.

§ 1918. If an appeal is ineffective for any reason, that is, if a case is put on the docket of the supreme court without the appeal being properly perfected, the proper practice is to move to strike the case from the records and not to dismiss the appeal, for, in contemplation of law, there is no appeal to dismiss.[1] The distinction is rather technical and is not closely observed in our practice. The supreme court, on motion will always purge its records of improper matter, but a dismissal of the appeal does not necessarily follow.[2]

[1] See Raymond v. Richmond, 76 N. Y. 107.

[2] Daniels v. Winslow, 2 Minn. 113 Gil. 93; Mower v. Hanford, 6 Minn. 535 Gil. 372; Mayall v. Burke, 10 Minn. 285 Gil. 224; Robinson v. Bartlett, 11 Minn. 410 Gil. 302; Page v. Mille

Digitized by Google

Lacs Lumber Co. 53 Minn. 492, 55 N. W. 608; Bahnsen v. Gilbert, 55 Minn. 334, 56 N. W. 1117.

Costs on motion.

§ 1919. The supreme court is authorized by statute to allow the prevailing party, in case of a dismissal, ten dollars costs.[1] This statute is sufficient to authorize costs even when the appeal is dismissed for want of jurisdiction.[2] Where the parties proceed with an appeal which would have been dismissed on the application of either the supreme court will dismiss it on its own motion without costs to either party.[3]

[1] G. S. 1894 § 5515. See also Rule 29, Supreme Court.

[2] See Cary v. Daniels, 5 Met. (Mass.) 236.

[3] Thomas v. Craig, 60 Minn. 501, 62 N. W. 1133.

Reinstatement of appeal.

§ 1920. The supreme court has authority, under G. S. 1895 § 6153, to reinstate an appeal where it has been dismissed.

Baldwin v. Rogers, 28 Minn. 68, 9 N. W. 79.

Effect of dismissal on status of case below.

§ 1921. When a cause was called for trial in the district court the defendant, objecting to the trial, moved to strike it from the calendar on the ground that the action had, by appeal, been removed to and was pending in the supreme court. The appeal referred to had already been dismissed. It was held proper to refuse to strike the cause from the calendar in the district court.

Fay v. Davidson, 13 Minn. 523 Gil. 491.

Notice of motion.

§ 1922. A motion for dismissal is regularly brought on by a written notice, usually, though perhaps not necessarily, of eight days.[1] It may be noticed orally in open court on the call of the calendar on the first day of the term.[2]

[1] Rule 2, Supreme Court; Com. Ins. Co. v. Pierro, 6 Minn. 569 Gil. 404.

[2] Rule 10, Supreme Court.

Form of motion.

§ 1923. Ordinarily the motion is oral, being made on the records and files of the court.[1] If not made exclusively on the records and files it should be in writing, accompanied with the papers on which it is founded, and filed with the clerk.[2]

[1] See Olinger v. Liddle, 55 Wis. 621.

[2] Rule 2, Supreme Court.

Dismissal by judge in vacation—statute.

§ 1924. "Any judge of the supreme court shall, during vacation, have the same power as the court at term to dismiss any appeal and remand the cause to the court below, upon the stipulation of the parties to such appeal consenting to such dismissal, to be filed with the clerk of said court."

[G. S. 1894 § 6137]

Digitized by Google

POWERS OF SUPREME COURT IN DISPOSING OF CASE ON APPEAL

The statute.

§ 1925. "Upon an appeal from a judgment or order, the appellate court may reverse, affirm or modify the judgment or order appealed from, in the respect mentioned in the notice of appeal, and as to any or all of the parties, and may, if necessary or proper, order a new trial. When the judgment is reversed or modified, the appellate court may make complete restitution of all the property and rights lost by the erroneous judgment."

[G. S. 1894 § 6136]

As to different parties.

§ 1925a. Upon a joint appeal by several parties the supreme court may reverse, affirm or modify the judgment or order as to any one or more of the parties.[1] In an action against joint defendants, if only one appeals and he is entitled to a reversal, if the judgment cannot be reversed as to him alone without prejudicing the rights of the others it will be reversed as to all.[2] Those parties who have not appealed and assigned errors cannot, as a matter of right, ask the court to modify or reverse the judgment as to them.[3]

[1] Nelson v. Munch, 28 Minn. 314, 9 N. W. 863. See Brazil v. Moran, 8 Minn. 236 Gil. 205; Burns v. Phinney, 53 Minn. 431, 55 N. W. 540.

[2] Wood v. Cullen, 13 Minn. 394 Gil. 365.

[3] New v. Wheaton, 24 Minn. 409; Edgerton v. Jones, 10 Minn. 427 Gil. 341; Whitely v. Mississippi etc. Co. 38 Minn. 523, 38 N. W. 753; Winona etc. Ry. Co. v. Denman, 10 Minn. 267 Gil. 208; Clarkin v. Brown, 80 Minn. 361, 83 N. W. 351.

Modification of judgment.

§ 1926. It is everyday practice for the supreme court to remand a cause with directions to the trial court to modify its judgment in certain specified particulars;[1] but where an error goes to the whole judgment or order and not to a distinct and severable part thereof a new trial should be granted.[2] If a judgment cannot stand on account of error upon the trial affecting the amount of the recovery the right to recover substantial damages upon a future trial should not be barred by reducing the judgment to nominal damages instead of reversing it.[3] A judgment may be modified on appeal as to costs improperly taxed in the district court on appeal from a justice court.[4] Where findings of fact would support a judgment for limited divorce and the trial court decrees an absolute divorce the supreme court cannot modify the judgment so as to grant a limited divorce.[5]

[1] Coolbaugh v. Roemer, 32 Minn. 445, 21 N. W. 472; Dodge v. Chandler, 13 Minn. 114 Gil. 105; Dorr v. McDonald, 43 Minn. 458, 45 N. W. 864; Merritt v. Byers, 46 Minn. 74, 48 N. W. 417; Carlton v. Hulett, 49 Minn. 308, 51 N. W. 1053; Minneapolis etc. Ry. Co. v. Chisholm, 55 Minn. 374, 57 N. W. 63;

Digitized by Google

Ramaley v. Ramaley, 69 Minn. 491, 72 N. W. 694; Carlton v Carey, 61 Minn. 318, 63 N. W. 611; Crane v. Knauf, 65 Minn. 447, 68 N. W. 79; Salzbrun v. Salzbrun, 81 Minn. 287, 83 N. W. 1088.

[2] Sanborn v. Webster, 2 Minn. 323 Gil. 277; Kelly v. Rogers, 21 Minn. 146.

[3] Stout v. McMasters, 37 Minn. 185, 33 N. W. 558.

[4] Anderson v. Hanson, 28 Minn. 400, 10 N. W. 429.

[5] Salzbrun v. Salzbrun, 81 Minn. 287, 83 N. W. 1088.

Directing judgment.

§ 1927. The supreme court will not direct the entry of judgment unless such disposition of the case is manifestly just.

Coolbaugh v. Roemer, 30 Minn. 424, 15 N. W. 869; Radke v. Kolbe, 79 Minn. 440, 82 N. W. 977; Lesher v. Getman, 28 Minn. 93, 9 N. W. 585; Winona etc. Ry. Co. v. Randall, 29 Minn. 283, 13 N. W. 127; Donnelly v. Cunningham, 58 Minn 376, 59 N. W. 1052; State v. Galusha, 26 Minn. 238, 2 N. W. 939, 3 N. W. 350; Sanborn v. Webster, 2 Minn. 323 Gil. 277.

Granting a new trial.

§ 1928. Where there is material error in the record a new trial is granted as a matter of course unless the error may be corrected by a modification of the judgment.[1] But a new trial will not be granted if it is obvious from an examination of the whole case that it would not change the result. A new trial will not be granted if the complaint does not state a cause of action and the verdict is for the defendant.[2]

[1] See § 1926.

[2] Jenness v. School District, 12 Minn. 448 Gil. 337

On appeal from order on demurrer.

§ 1929. On appeal from an order sustaining or overruling a demurrer the supreme court has power, upon affirming or reversing the order appealed from, to grant leave to answer or amend. But it will rarely exercise such power, as it is more just to leave it to the court below to grant or refuse leave to amend, after the case is remanded.

Farley v. Kittson, 27 Minn. 102, 6 N. W. 450, 7 N. W. 267; Haven v. Place, 28 Minn. 551, 11 N. W. 117.

Remitting parties to trial court for relief.

§ 1930. Ordinarily the supreme court, on reversal, affirmance, or modification of the judgment or order appealed from will remit the parties to the court below for the affirmative relief to which under the decision they may be entitled.

Everest v. Ferris, 17 Minn. 466 Gil. 445.

Digitized by Google

EFFECT OF A REVERSAL

Reversal of judgment without directions.

§ 1931. As, under Rule 18 of the supreme court, a remittitur to the district court follows a reversal, as of course, unless otherwise ordered, the inquiry is, what is the effect of the reversal upon the case after the remittitur? "The answer to this question depends upon the grounds upon which the reversal is based, as expressed in the opinion of the court. A judgment may be reversed upon grounds which show that it is impossible for plaintiff to recover. In such case a new trial would be useless, and the reversal is in its effect an end of the case, though some formal action of the court below may be necessary to finally dispose of it. So a judgment may be reversed because not in due form, because it does not pursue the verdict or finding, and for analogous grounds, which show not any necessity for a new trial, but one for correction or modification of the judgment, so that it shall answer the familiar definition of a judgment as the sentence of the law upon the record. In other cases a judgment is reversed upon grounds which show that there has been a mistrial, and that the party in whose favor it is reversed is entitled to a new trial. In such cases it is quite usual formally to direct a new trial, as might very properly have been done in this instance. But in case such formal direction is omitted, the opinion of the court is to be consulted for the purpose of determining the effect of the reversal." [1]

[1] Jordan v. Humphrey, 32 Minn. 522, 21 N. W. 713. See also: Kurtz v. St. Paul & Duluth Ry. Co. 65 Minn. 60, 67 N. W. 808; Minneapolis Mill Co. v. Minneapolis etc. Ry. Co. 58 Minn. 512, 60 N. W. 341; Gerdtzen v. Cockrell, 52 Minn. 501, 55 N. W. 58; Cool v. Kelly, 85 Minn. 359, 88 N. W. 988; Canosia Township v. Grand Lake Township, (Minn. 1902) 92 N. W. 215.

§ 1932. Where a judgment is reversed solely upon the ground that it is not the one which should have been rendered upon the verdict or findings of fact, the effect of a simple reversal is to send the case back, not for a new trial, but merely for the correction of the judgment.

National Investment Co. v. National Savings etc. Assoc. 51 Minn. 198, 53 N. W. 546; Cool v. Kelly, 85 Minn. 359, 88 N. W. 988.

§ 1933. Where a judgment is reversed on the ground that the findings of fact on which such judgment is based (be they one or many) are not justified by the evidence a new trial must inevitably follow.

Backus v. Burke, 52 Minn. 109, 53 N. W. 1013; Cool v. Kelly, 85 Minn. 359, 88 N. W. 988.

§ 1934. A reversal of a judgment without directions must be given the least effect consistent with the opinion and the grounds upon which the reversal is placed.

Babcock v. Murray, 61 Minn. 408, 63 N. W. 1076; Cool v. Kelly, 85 Minn. 359, 88 N. W. 988.

Digitized by Google

Granting a new trial of part of the issues.

§ 1935. The supreme court may, under its general power to modify as well as affirm or reverse, grant a new trial of a part only of the issues in a cause.

Chicago etc. Ry. Co. v. Porter, 43 Minn. 527, 46 N. W. 75; Crich v. Williamsburg City Fire Ins. Co. 45 Minn. 441, 48 N. W. 198; Sauer v. Traeger, 56 Minn. 364, 57 N. W. 935; Williams v. Wood, 55 Minn. 323, 56 N. W. 1066. See also Coolbaugh v. Roemer, 32 Minn. 445, 21 N. W. 472; Cobb v. Cole, 44 Minn. 278, 46 N. W. 364.

§ 1936. Where there is an appeal from an order denying a new trial, and another from the judgment subsequently entered, and the former is reversed, the latter will be vacated.

Minnesota Valley Ry. Co. v. Doran, 15 Minn. 240 Gil. 186.

Effect of a reversal of an order with suggestions that other relief would be appropriate.

§ 1937. A decision of the supreme court reversing an order of the district court, on the ground that the form of relief granted was not warranted, does not preclude a renewal of the application, upon the same facts and record, for the appropriate relief. The decision of the supreme court is not necessarily final in respect to other relief. It may expressly provide for a renewal of the motion, or the authority to do so may be implied from the nature of the case and the grounds of the decision, where the appeal does not finally dispose of the whole matter on the merits. In such cases the second application is to be deemed a continuation of the original proceeding if necessary to save the rights of the respondent in the appeal.

Gerdtzen v. Cockrell, 52 Minn. 501, 55 N. W. 58.

Effect of granting a new trial without restriction.

§ 1938. Where the supreme court grants a new trial without restrictions either party is entitled to a retrial of all the controverted issues contained in the pleadings.

Minneapolis Mill Co. v. Minneapolis etc. Ry. Co. 58 Minn. 512, 60 N. W. 341.

Effect of granting a new trial with restrictions as to the issues to be tried.

§ 1939. Where the supreme court grants a new trial with restrictions as to the issues to be retried the district court has no discretion but is bound to restrict the new trial to such issues.

See § 1969.

Miscellaneous rules.

§ 1940. While it is the general rule that parties not appealing are held to waive objections to a verdict, finding or decision,[1] yet the benefits of a reversal are sometimes shared by such parties.[2]

[1] See § 1793.

[2] Smith v. National Credit Ins. Co. 79 Minn. 486, 82 N. W. 976.

Digitized by Google

§ 1941. It does not follow that because an order of the trial court directing judgment for the plaintiff upon the pleadings is reversed that the defendant is entitled to a like judgment.

Conway v. Elgin, 38 Minn. 469, 38 N. W. 370.

§ 1942. Upon the reversal of an order directing the entry of judgment the judgment entered pursuant to the order falls with it.

Frazer v. Sherrerd, 6 Minn. 576 Gil. 410.

COSTS ON APPEAL

The statutes.

§ 1943. "Costs in the supreme court may be allowed, in the discretion of said court, as follows:

(1) To the prevailing party, upon a judgment in his favor on the merits, not exceeding twenty-five dollars;

(2) Upon dismissal, not exceeding ten dollars."

[G. S. 1894 § 5515]

§ 1944. "In all cases the prevailing party shall be allowed his disbursements necessarily paid or incurred."

[G. S. 1894 § 5516]

§ 1945. "In an action for the recovery of money only, said court may, if of opinion that the appeal was taken for delay merely, allow the plaintift, in addition to costs and disbursements, a sum not exceeding three per cent. on the judgment in the district court; and in all cases, except where it is otherwise ordered by the court, the costs and disbursements provided for in this and the two preceding sections, together with the fees and charges of the clerk of said court, shall be paid before any remittitur of the case shall be made or had, and as a condition precedent to any further proceedings in the cause by the adverse or losing party in the district court or court below: provided, that whenever it appears, to the satisfaction of said court, that such party is unable to pay such costs in full, it shall be the duty of said court to remit the case to the court below upon payment of the clerk's fees only."

[G. S. 1894 § 5517]

Costs a creature of statute.

§ 1946. The authority of the supreme court to award costs is regulated and limited by statute and it has no equitable or discretionary power over the subject, other than the statute itself confers.

Atwater v. Russell, 49 Minn. 57, 51 N. W. 629, 52 N. W. 26. See also, Kroshus v. County of Houston, 46 Minn. 162, 48 N. W. 770.

No costs to the defeated party.

§ 1947. The supreme court has no power to grant costs to the defeated party or to relieve him from the payment of the costs allowed to the prevailing party, except in the exercise of the discretion which the statute allows.

Atwater v. Russell, 49 Minn. 57, 51 N. W. 629, 52 N. W. 26.

Digitized by Google

The rule of court.

§ 1948. "Unless otherwise ordered the prevailing party shall recover costs as follows: (1) upon a judgment in his favor on the merits, twenty-five dollars; (2) upon dismissal, ten dollars."

[Rule 29, Supreme Court]

Who is the prevailing party.

§ 1949. When the supreme court reverses, overrules or modifies the judgment or order from which the appeal is taken the appellant is the prevailing party and entitled to costs in the absence of special circumstances rendering the appeal improper.[1] Where several plaintiffs or defendants join in an appeal and the judgment or order is modified as to some of the appellants and affirmed as to the others, the respondent is entitled to costs and disbursements against those as to whom it is affirmed, and those as to whom it is modified are entitled to costs and disbursements against the respondent.[2] Where the rights of several parties defendant, as related to the subject of the action, are conflicting, and the judgment is in favor of some and against others, a defeated party may serve his notice of appeal upon his co-defendants as well as upon the plaintiff, and have the rights of the defendants, as between themselves, finally adjudicated in the supreme court. And if the judgment is affirmed, the respondents, whether plaintiffs or defendants, will be deemed prevailing parties for the purposes of the adjustment of costs.[3]

[1] Sanborn v. Webster, 2 Minn. 323 Gil. 277; Moody v. Stephenson, 1 Minn. 401 Gil. 289; Coit v. Waples, 1 Minn. 134 Gil. 110; Allen v. Jones, 8 Minn. 202 Gil. 172; Nelson v. Munch, 30 Minn. 132, 14 N. W. 578; Henry v. Meighen, 46 Minn. 548, 49 N. W. 323, 646.

[2] Nelson v. Munch, 30 Minn. 132, 14 N. W. 578.

[3] Atwater v. Russell, 49 Minn. 57, 52 N. W. 26.

Disbursements—what allowable.

§ 1950. Where a bill of exceptions or case is prepared for and used on a motion for a new trial which is granted, with costs of motion, the expense of preparing the same is not taxable as a disbursement in the supreme court on an appeal from the order granting the new trial. But where a bill of exceptions or case is prepared exclusively for use on appeal and is in fact so used the expenses incurred may be taxed in the supreme court.[1] Where matter that is irrelevant to any issue involved in the appeal is brought into the record, the appellant, though the prevailing party, will not be allowed to recover his disbursements for printing such matter.[2] In one case the court said, "the practice of including in the paper book a crude and undigested mass of irrelevant and immaterial matter has become so common in this day of stenographers and type-writers as to become a positive abuse, which adds greatly to the labors of this court; and we will not hesitate, whenever the subject is called to our attention to disallow any disbursements for the printing of all such unnecessary matter."[3] Objection that an excessive price

Digitized by Google

was paid for printing the paper book will not be considered in the absence of an affidavit.[4]

[1] Linne v. Forrestal, 51 Minn. 249, 53 N. W. 547; 653; In re Pinney's Will, 27 Minn. 280, 6 N. W. 791, 7 N. W. 144.

[2] Henry v. Meighen, 46 Minn. 548, 49 N. W. 323, 646; Hefferen v. Northern Pac. Ry. Co. 45 Minn. 471, 48 N. W. 7, 526; Winston v. Hart, 65 Minn. 439, 68 N. W. 72.

[3] Henry v. Meighen, 46 Minn. 548, 49 N. W. 323, 646; Winston v. Hart, 65 Minn. 439, 68 N. W. 72.

[4] Hefferen v. Northern Pac. Ry. Co. 45 Minn. 471, 48 N. W. 1, 526.

§ 1951. Disbursements will not be allowed for the printing of papers not required by statute or rule of court. As to the amount of matter that may be introduced into the briefs no hard and fast rule can be laid down. Wide latitude must necessarily be given counsel in the presentation of their cases but the unsuccessful party should not be charged with the cost of printing long duplicate arguments.[1] Unless papers are printed as required by rule of court the cost of preparing them cannot be recovered.[2]

[1] Hart v. Marshall, 4 Minn. 552 Gil. 434.

[2] Cooper v. Stinson, 5 Minn. 522 Gil. 416.

§ 1952. When several cases, involving precisely the same question, are briefed and argued together as one and by the same counsel, on records differing merely in names, dates, and amounts, counsel for appellant is bound to ask the court to dispense with a paper book in each case, and costs will be allowed appellant for only one.

Fitzgerald v. Hennepin County etc. Assoc. 56 Minn. 424, 57 N. W. 1066, 59 N. W. 191.

§ 1953. If a brief contains improper reflections on the trial court it will be stricken from the files and no disbursements for printing the same be allowed in the taxation of costs.

Wood v. Chicago etc. Ry. Co. 66 Minn. 49, 68 N. W. 462.

How recovered.

§ 1954. The statute makes no provision for the recovery of costs. It was intended that the supreme court should provide the means and this has been done by the adoption of certain rules. In all cases the prevailing party may have a judgment in the supreme court for his costs and execution thereon out of that court.[1] It is also provided that "the clerk of the court below may tax the costs of the prevailing party in this, when the same are to be inserted in the judgment."[2] The costs and disbursements of the prevailing party, in a cause in the supreme court, are recoverable only in that cause, in the manner prescribed by the rules of court. By neglect to have the costs taxed and inserted in the judgment, the adverse party may cause judgment to be entered, under Rule 30, without provision being made for costs, and the right to recover the same is forfeited.[3]

[1] Rules 19, 20, 21, 22, Supreme Court.

[2] Rule 23, Supreme Court.

[3] D. M. Osborne & Co. v. Paulson, 37 Minn. 46, 33 N. W. 12.

Digitized by Google

Where there are several prevailing parties.

§ 1955. Where there are several prevailing parties each is entitled to statutory costs except where several appear by the same attorney or attorneys, in which case but one bill can be allowed to all so appearing.

Menzel v. Tubbs, 51 Minn. 364, 53 N. W. 653, 1017.

Certified case in tax proceedings.

§ 1956. No costs or disbursements are allowed to either party upon a case certified to the supreme court in tax proceedings under G. S. 1894 § 1589.

County of Olmsted v. Barber, 31 Minn. 256, 17 N. W. 473.

Setting off costs against judgment.

§ 1957. On motion the costs of the prevailing party may be set off against an equal amount of the adverse party's recovery of damages.

Doud, Sons & Co. v. Duluth Milling Co. 55 Minn. 53, 56 N. W. 463.

Cases in which costs not allowed.

§ 1958. Costs are not a matter of right but rest in the discretion of the court. They are not allowed if the appeal was improper under the circumstances. In the following cases the supreme court withheld costs from the prevailing party: where the amount involved was small and the prevailing party secured a reversal mainly by having induced the court to exclude competent evidence;[1] where an order overruling a demurrer was reversed but admissions were made at the argument showing a liability;[2] where an order sustaining a demurrer was reversed but there was little merit in the cause of action set up in the complaint;[3] where an order denying a new trial was affirmed but with directions to the lower court to allow the complaint to be amended to conform to the facts proved, there having been no application for leave to amend on the trial although objection to the variance was made by the defendant;[4] where there was no substantial error in the judgment;[5] where an order overruling a demurrer was reversed but it was considered that the demurrer was unnecessary for the protection of any of defendant's substantial rights;[6] where the court was of the opinion that the litigation was needless and would prove fruitless;[7] where a case was improperly set down for oral argument in violation of Rule 15, Supreme Court;[8] where paper book and brief were not filed three days before the argument as required by Rule 9, Supreme Court;[9] where the case went off on an important question of practice not only new but difficult;[10] where the only question involved was the right to costs in the court below and each party improperly proceeded with the appeal instead of applying promptly to have it dismissed;[11] where the amount involved was less than ten dollars and no important questions were involved;[12] where the only error in the judgment was the inclusion of certain trifling costs;[13] where an order was affirmed on grounds not urged by respondent;[14] where the

Digitized by Google

decision went off on a point not clearly made by the appellant and was probably not considered by the trial court;[15] where the appellant failed to call the attention of the trial court to the fact that the damages assessed by the court were more than authorized by the complaint;[16] where the defeated party was justified in relying on a former decision of the court.[17]

[1] Sauer v. Flynt, 61 Minn. 109, 63 N. W. 252.
[2] Marine Nat. Bank v. Humphreys, 62 Minn. 141, 64 N. W. 148; Vaule v. Steenerson, 63 Minn. 110, 65 N. W. 257.
[3] Plano Mfg. Co. v. Hallberg, 61 Minn. 528, 63 N. W. 1114.
[4] Adams v. Castle, 64 Minn. 505, 67 N. W. 637.
[5] Coit v. Waples, 1 Minn. 134 Gil. 110.
[6] Topping v. Clay, 62 Minn. 3, 63 N. W. 1038.
[7] Nally v. Maley, 62 Minn. 372, 64 N. W. 927.
[8] Vaule v. Steenerson, 63 Minn. 110, 65 N. W. 257; Ford v. Berg, 79 Minn. 464, 82 N. W. 1118; Olson v. Hanson, 74 Minn. 337, 77 N. W. 231; Larson v. Dukleth, 74 Minn. 402, 77 N. W. 220; Ramgren v. McDermott, 73 Minn. 368, 76 N. W. 47; J. Thompson & Sons Mfg. Co. v. Ferch, 78 Minn. 520, 81 N. W. 520; Taylor v. St. Paul City Ry. Co. 80 Minn. 331, 83 N. W. 189; Powell v. Luders, 84 Minn. 372, 87 N. W. 940; Dickerman v. City of St. Paul, 72 Minn. 332, 75 N. W. 591; Jenkinson v. Koester (Minn.) 90 N. W. 382.
[9] Lehigh Coal & Iron Co. v. Scallen, 61 Minn. 63, 63 N. W. 245.
[10] State v. Probate Court, 28 Minn. 381, 10 N. W. 209.
[11] Thomas v. Craig, 60 Minn. 501, 62 N. W. 1133.
[12] Danahey v. Pagett, 74 Minn. 20, 76 N. W. 949; Nally v. Maley, 62 Minn. 372, 64 N. W. 927; Dunn v. Barton, 40 Minn. 415, 42 N. W. 289.
[13] Berryhill v. Carney, 76 Minn. 319, 79 N. W. 170.
[14] Duxbury v. Shanahan, 84 Minn. 353, 87 N. W. 944; Bergh v. Warner, 47 Minn. 250, 50 N. W. 77.
[15] Jones v. Chicago etc. Ry. Co. 80 Minn. 488, 83 N. W. 446.
[16] Campbell v. Loeb, 72 Minn. 76, 74 N. W. 1024.
[17] State v. Nelson, 41 Minn. 25, 42 N. W. 548.

Payment of costs a condition of remittitur.

§ 1959. It is provided by statute that in all cases, except where it is otherwise ordered by the court, the costs and disbursements together with the fees and charges of the clerk shall be paid before any remittitur of the case shall be made and such payment shall be a condition precedent to any further proceedings in the cause by the adverse or losing party in the district court.[1] It is held under this provision that whether the costs in any given case shall be paid as a condition precedent to remitting the case and its further prosecution in the court below, is a question exclusively for the supreme court. If the case is remitted without the costs being paid, no matter whether it is on the application of the defendant or appellant, it goes down for further proceedings in accordance with the opinion of the court, without reference to the question whether the costs have been paid or not.[2]

Digitized by Google

[1] See § 1945.
[2] Fonda v. St. Paul City Ry. Co. 72 Minn. 1.

Appeal for delay.

§ 1960. In an action for the recovery of money only, the supreme court may, if of opinion that the appeal was taken for delay merely, allow the plaintiff, in addition to his costs and disbursements, a sum not exceeding three per cent. on the judgment in the district court.

See § 1945; West v. Eureka Improvement Co. 40 Minn. 394, 42 N. W. 87; Maxwell v. Schwartz, 55 Minn. 414, 57 N. W. 141; Burr v. Chrichton, 51 Minn. 343, 53 N. W. 645; Bardwell-Robinson Co. v. Brown, 57 Minn. 140, 58 N. W. 872.

Actions against railroads for killing stock.

§ 1961. The statute authorizing double costs in actions against railroads for the killing of stock is not applicable to costs in the supreme court.

Croft v. Chicago etc. Ry. Co. 72 Minn. 47, 74 N. W. 898.

Bastardy proceedings.

§ 1962. There is no statute authorizing the defendant to tax costs and disbursements against a county or complaining witness in bastardy proceedings.

State v. Spencer, 73 Minn. 101, 76 N. W. 48, 893.

Statutory costs when appeal from judgment and order.

§ 1963. Where appeals were taken from certain judgments and also from orders made thereafter directing an amendment of the findings it was held that the respondent, being the prevailing party, should be allowed statutory costs only on the appeals from the orders.

State Sash & Door Mfg. Co. v. Adams, 47 Minn. 399, 50 N. W. 360.

Violations of city ordinances.

§ 1963a. Upon appeals in suits for violations of the ordinances of the city of Minneapolis, although such suits are, under the charter, brought in the name of the state, and although in some respects quasi criminal, yet, as the state is only a nominal party, costs are recoverable as in civil actions between private persons.

State v. Harris, 50 Minn. 128, 52 N. W. 387, 531.

REMITTITUR AND PROCEEDINGS THEREON

Definition.

§ 1964. To remit a cause is to send it back to the same court from which it was removed by appeal or otherwise for further proceedings in accordance with the opinion of the appellate court.[1] "Remittitur" and "mandate" are used interchangeably in this state to designate the order of the supreme court sending a cause back to the lower court upon the determination of the appellate proceed-

Digitized by Google

ings.[2] A remittitur contains a certified copy of the judgment of the supreme court, sealed with the seal thereof and signed by the clerk.[3] The filing and docketing of a transcript of a judgment of the supreme court in pursuance of Rule 25 is not a remittitur.[4]

[1] Irvine v. Marshall, 3 Minn. 72 Gil. 33.
[2] Caldwell v. Bruggerman, 8 Minn. 286 Gil. 252.
[3] Rule 17, Supreme Court.
[4] La Crosse etc. Co. v. Reynolds, 12 Minn. 213 Gil. 135.

Necessity of remittitur.

§ 1965. As the remittitur is the only official mode of transmitting the determination of the appellate court to the lower court no proceeding should be had in the latter court intermediate the appeal and the filing of the remittitur.

See La Crosse etc. Co. v. Reynolds, 12 Minn. 213 Gil. 135; McArdle v. McArdle, 12 Minn. 122 Gil. 70.

To what court directed.

§ 1966. The remittitur should be directed to the court from which the appeal was taken,[1] except in the case of an improper change of venue.[2]

[1] Irvine v. Marshall, 3 Minn. 72 Gil. 33.
[2] McCracken v. Webb, 36 Iowa 551.

Time of issuance.

§ 1967. The remittitur shall be transmitted to the clerk of the court below as soon as may be after judgment is entered.[1] But unless otherwise ordered there is no remittitur until after the costs and disbursements of the prevailing party and the fees of the clerk are paid.[2]

[1] Rule 17, Supreme Court. See Caldwell v. Bruggerman, 8 Minn. 286 Gil. 252.
[2] See § 1945.

PROCEEDINGS IN LOWER COURT AFTER REMITTITUR

Law of the case.

§ 1968. The decision of the supreme court becomes the law of the case in all subsequent proceedings in the district court.

Commercial Bank v. Azotine Mfg. Co. 69 Minn. 232, 72 N. W. 108.

Compliance with mandate.

§ 1969. The district court is bound to comply with the mandate of the supreme court however erroneous or irregular it may be. The district court cannot vary the mandate or examine it for any other purpose than execution; or give any other or further relief; or review it even for apparent error upon any matter decided on appeal; or intermeddle with it, further than to settle so much as has been remanded.[1] A substantial compliance, however, is sufficient.[2] The mandate should be construed with reference to the opinion of the supreme court.[3] The remedy for a failure of the district court to

Digitized by Google

comply with the mandate is either a new appeal or a writ of mandamus.[4]

[1] In re Sanford Fork & Tool Co. 160 U. S. 247; Caldwell v. Bruggerman, 8 Minn. 286 Gil. 252; McRoberts v. McArthur, 66 Minn. 74, 68 N. W. 770; Carlton v. Carey, 61 Minn. 318, 63 N. W. 611; Piper v. Sawyer, 78 Minn. 221, 80 N. W. 221; Merchants' Nat. Bank v. Stanton, 59 Minn. 532, 61 N. W. 680 (findings not responsive to question set down for trial).

[2] Patten Paper Co. v. Green Bay etc. Co. 93 Wis. 283.

[3] See § 1931. See also, In re Sanford Fork & Tool Co. 160 U. S. 247.

[4] In re Sanford Fork & Tool Co. 160 U. S. 247. See McRoberts v. McArthur, 66 Minn. 74, 68 N. W. 770; Carlton v. Carey, 61 Minn. 318, 63 N. W. 611.

Matters undetermined by appeal.

§ 1970. The district court is free to proceed as to any matter undetermined by the appeal and to make any order not inconsistent with the decision on appeal or the terms of the mandate.[1] A decision of the supreme court reversing an order of the district court on the ground that the form of relief granted was not warranted, does not preclude a renewal of the application, upon the same facts and record, for the appropriate relief.[2]

[1] In re Sanford Fork & Tool Co. 160 U. S. 247; Commercial Bank v. Azotine Mfg. Co. 69 Minn. 232, 72 N. W. 108.

[2] Gerdtzen v. Cockrell, 52 Minn. 501, 55 N. W. 58.

Amendment of pleadings.

§ 1971. The district court may, when not precluded by the mandate, allow pleadings to be amended so as to raise new issues after the cause has been disposed of in the supreme court on findings of fact and conclusions of law, and, as a necessary result of its power to permit such amendments, may grant a new trial. It should act with great caution, however, on an application for such an amendment.[1] When the supreme court remands the cause with directions to enter judgment the district court has no authority to allow an amendment but must enter judgment as directed.[2]

[1] City of Winona v. Minnesota Ry. Const. Co. 29 Minn. 68, 11 N. W. 228; Burke v. Baldwin, 54 Minn. 514, 56 N. W. 173; Reeves & Co. v. Cress, 80 Minn. 466, 83 N. W. 443.

[2] Keller v. Lewis, 56 Cal. 466; Patten Paper Co. v. Green Bay etc. Canal Co. 93 Wis. 283.

Digitized by Google

JURISDICTION OF SUPREME COURT AFTER REMAND

General rule.

§ 1972. After the supreme court has pronounced its judgment in a cause and remitted it to the court below its jurisdiction is completely divested, upon the filing of the remittitur in the lower court. And the supreme court has no authority to recall its remittitur after such filing unless there has been some irregularity or error in issuing it, as where it was issued contrary to the rules of the court, or where, by reason of a clerical mistake, it does not correctly express the judgment of the court.

Rud v. Board of County Com'rs, 66 Minn. 358, 68 N. W. 1062, 69 N. W. 886; Gerish v. Pratt, 8 Minn. 106 Gil. 81; Fonda v. St. Paul City Ry. Co. 72 Minn. 1, 80 N. W. 366.

Rehearing.

§ 1973. The supreme court will not entertain a motion for a rehearing after a remittitur has been sent down.

Caldwell v. Bruggerman, 8 Minn. 286 Gil. 252; Rud v. Board of County Com'rs, 66 Minn. 358, 68 N. W. 1062, 69 N. W. 886.

REHEARINGS

General statement.

§ 1974. The judgments of a court of final appeal have the strongest presumption in their favor and cannot be freely reconsidered without unreasonably protracting litigation, disregarding the claims of other litigants to the attention of the court and impairing popular confidence and respect.[1] But the demands of justice override every consideration of expediency and an appellate court will grant a reargument for the correction of palpable error. It is obviously impossible to lay down a general rule that shall be applicable to every case that may arise.[2] "The applicant must be able to show some manifest error of fact, into which counsel or the court have fallen in the argument or decision of the case; as, for example, that a provision of statute decisive of the case has, by mistake, been entirely overlooked by counsel and the court; or, perhaps, that a case has been decided upon a point not raised at all on the argument, and there is strong reason to believe that the court has erred in its decision; or, unless, in a case where great public interests are involved, and the case has either not been fully argued, or strong additional reasons may be urged, to show that the court has erred in its ruling. But where a question of law has once been fully discussed on the argument, and considered by the court, we cannot admit that a party is entitled to a reargument, on the ground that there is manifest error in the decision. We are not aware that any court has sanctioned such a practice, and it would be attended with inconveniences and evils far overbalancing the advantage accruing in the particular case."[3] It is a rule of the United States Supreme Court that "no reargument will be granted unless some member of the court who

Digitized by Google

concurred in the judgment doubts the correctness of the opinion and desires a further argument on the subject, and not then unless the proposition receives the support of the majority of the court; but under these conditions the court will order a reargument without waiting for the application of counsel."[4] This rule has been approved by our supreme court.[5] In New York the rule is laid down that "motions for reargument should be founded on papers showing clearly that some question, decisive of the case, and duly submitted by counsel, has been overlooked by the court; or, that the decision is in conflict with an express statute or with a controlling decision to which the attention of the court was not drawn, through the neglect or inadvertence of counsel."[6] This rule has met the approval of our supreme court.[7] A reargument is sometimes ordered by the court on its own motion.[8]

[1] Winchester v. Winchester, 121 Mass. 127.

[2] Derby v. Gallup, 5 Minn. 119 Gil. 85.

[3] Derby v. Gallup, 5 Minn. 119 Gil. 85. Followed with approval in Weller v. City of Winona, 5 Minn. 95 Gil. 70; Bradley v. Gamelle, 7 Minn. 331 Gil. 260; Fish v. Heinlin, 8 Minn. 540 Gil. 483; Woodbury v. Dorman, 15 Minn. 341 Gil. 274; Warner v. Lockerby, 31 Minn. 421, 18 N. W. 145; Densmore v. Shepard, 46 Minn. 54, 48 N. W. 528, 681.

[4] Washington Bridge Co. v. Stewart, 3 How. (U. S.) 413; Brown v. Aspden, 14 How. (U. S.) 25; United States v. Knight, 1 Black (U. S.) 488; Scott v. Austin, 36 Minn. 460, 32 N. W. 89, 864.

[5] Woodbury v. Dorman, 15 Minn. 341 Gil. 274. See also Winchester v. Winchester, 121 Mass. 127; Kent v. Waters, 18 Md. 53; Johns v. Johns, 20 Md. 59.

[6] Mount v. Mitchell, 32 N. Y. 702; Fosdick v. Town of Hemstead, 126 N. Y. 651; O'Brien v. Mayor, 142 N. Y. 671.

[7] Woodbury v. Dorman, 15 Minn. 341 Gil. 274.

[8] Scott v. Austin, 36 Minn. 460, 32 N. W. 89, 864.

Exclusive remedy.

§ 1975. A motion for a reargument, and not a second appeal, in the same action, is the proper mode of obtaining a rehearing in the supreme court of questions in the case already decided by it.

Lough v. Bragg, 19 Minn. 357 Gil. 309.

Cases where rehearing will be allowed.

§ 1976. A rehearing will generally be granted in a case where great public interests are involved and the question was not fully argued and strong additional reasons may be urged.[1] Where the court has fallen into some manifest error as to a fact appearing in the record and materially affecting the decision;[2] where a provision of statute decisive of the case has been overlooked;[3] where the decision is in conflict with a controlling case to which the attention of the court was not called;[4] where important constitutional questions are involved and the decision was rendered by a divided court;[5] where, upon the argument of a particular point, the court intimate or state

Digitized by Google

to counsel that they are so well satisfied with the correctness of his view that no further argument is desired but nevertheless decide the case adversely to counsel on that very point;[6] and where the court overlooked an important aspect of the case.[7]

[1] Derby v. Gallup, 5 Minn. 119 Gil. 85; State v. Cooley, 56 Minn. 540, 58 N. W. 150; Hanford v. St. Paul etc. Ry. Co. 43 Minn. 104, 42 N. W. 596, 44 N. W. 1144.

[2] Derby v. Gallup, 5 Minn. 119 Gil. 85; Weathersbee v. Farrar, 98 N. C. 255; Lough v. Bragg, 19 Minn. 357 Gil. 309; Rud v. Board of County Com'rs, 66 Minn. 358, 68 N. W. 1062, 69 N. W. 886; Minneapolis Trust Co. v. Eastman, 47 Minn. 301, 50 N. W. 82, 930; Smith v. Glover, 50 Minn. 58, 52 N. W. 210, 912.

[3] State v. District Court, 51 Minn. 539, 53 N. W. 800, 55 N. W. 122; Edson v. Child, 18 Minn. 351 Gil. 323; Kirby v. Western Union Telegraph Co. 4 S. D. 439.

[4] Mount v. Mitchell, 32 N. Y. 702; Butler-Ryan Co. v. Silvey, 70 Minn. 507, 73 N. W. 406, 510.

[5] Shreveport v. Holmes, 125 U. S. 694.

[6] Derby v. Gallup, 5 Minn. 119 Gil. 85.

[7] Armstrong v. St. Paul etc. Ry. Co. 48 Minn. 113, 49 N. W. 233, 50 N. W. 1029; Peet v. Sherwood, 47 Minn. 347, 50 N. W. 241, 929; County of Redwood v. Winona etc. Co. 40 Minn. 512, 41 N. W. 465, 42 N. W. 473; State v. Gut, 13 Minn. 341 Gil. 315.

Cases where a rehearing will not be allowed.

§ 1977. A rehearing will not be granted merely because there has been a change in the personnel of the court and the new members do not approve the judgment;[1] where the application presents no new and decisive facts but merely reiterates or amplifies the points made on the argument and is, in effect, nothing more than an appeal to the court to review its decision on points already discussed by counsel and considered and determined by the court;[2] where the court has been led into error because of omissions in the paper-book properly chargeable to the applicant;[3] where a statute applicable to the subject matter is enacted after the submission of a case on appeal, but which does not necessarily affect the validity of the judgment;[4] where counsel made admissions on the argument which he claims were misunderstood by the court, the trial court having found the facts as admitted;[5] where the affirmance was placed on two grounds and it is claimed that counsel did not argue one of them, no objection being made to the sufficiency of the other ground to sustain the judgment of the court;[6] where the applicant can secure a second trial as of right;[7] where it is claimed that the court has made a mistake as to a fact not appearing in the record;[8] where the court failed to refer in its opinion to a point urged by the applicant on the argument, that fact alone being no evidence that the point was not considered;[9] where the facts upon which the application is based do not appear, as they ought, in the return, but are presented by affidavits in connection with the petition.[10]

[1] Woodbury v. Dorman, 15 Minn. 341 Gil. 274; Ayer v. Stewart, 16 Minn. 89 Gil. 77.

Digitized by Google

[2] Derby v. Gallup, 5 Minn. 119 Gil. 85; Fish v. Heinlin, 8 Minn. 540 Gil. 483; Bradley v. Gamelle, 7 Minn. 331 Gil. 260; Densmore v. Shepard, 46 Minn. 54, 48 N. W. 528, 681; Weller v. City of St. Paul, 5 Minn. 95 Gil. 70; Warner v. Lockerby, 31 Minn. 421, 18 N. W. 145.

[3] Fowler v. Atkinson, 6 Minn. 578 Gil. 412.

[4] Dutcher v. Culver, 24 Minn. 584.

[5] Smith v. City of St. Paul, 69 Minn. 276, 72 N. W. 104, 210.

[6] Butler-Ryan Co. v. Silvey, 70 Minn. 507, 73 N. W. 406, 510.

[7] Great Northern Ry. Co. v. Stewart, 65 Minn. 514, 68 N. W. 1102.

[8] Minneapolis Trust Co. v. Eastman, 47 Minn. 301, 50 N. W. 82, 930; Weathersbee v. Farrar, 98 N. C. 255.

[9] Minneapolis Trust Co. v. Eastman, 47 Minn. 301, 50 N. W. 82, 930.

[10] Smith v. City of St. Paul, 69 Minn. 276, 72 N. W. 104, 210.

Form of application.

§ 1978. "Applications for rehearing shall be made ex parte, on petition setting forth the grounds on which they are made, and filed within ten days after notice of the decision."[1] The application should distinctly specify the grounds upon which it rests, and, so far as it involves matter of fact, be supported by affidavits, in order to show to the satisfaction of the court, upon the face of the petition, and of the whole record and files in the case, probable cause for a rehearing.[2] An extended argument is improper. It is customary in this state to cite authorities. The petition need not be printed.

[1] Rule 47, Supreme Court.

[2] Winchester v. Winchester, 121 Mass. 127. See Smith v. City of St. Paul, 69 Minn. 276, 72 N. W. 104, 210.

Time of making application.

§ 1979. It is provided by rule of court that the application for a reargument must be made and filed within ten days after notice of the decision.[1] Doubtless, in an extraordinary case, the court would entertain an application any time before the case is remanded. It is too late after the case has been remanded.[2] "We are of opinion that after an appellate court has pronounced its judgment or decree in a cause, and has remitted it to the court below for enforcement, and such remittitur has been filed in the lower court, the jurisdiction of the appellate court is completely divested, and that it has no authority to recall the remittitur, unless there has been some irregularity or error in issuing it; as where it was issued contrary to the rules of the court, or where, by reason of a clerical mistake, it does not correctly express the judgment of the court."[3]

[1] See § 1978.

[2] Caldwell v. Bruggerman, 8 Minn. 286 Gil. 252. See Humphrey v. Havens, 13 Minn. 150 Gil. 135.

[3] Rud v. Board of County Com'rs, 66 Minn. 358, 68 N. W. 1062, 69 N. W. 886.

Digitized by Google

CHAPTER XIX

CERTIORARI

I OUT OF SUPREME COURT

Constitutional provision.

§ 1980. The constitution of this state provides that the supreme court shall have "appellate jurisdiction in all cases, both in law and equity." [1] This is held to mean that, in all judicial proceedings, the judgment which finally determines the rights of the parties is subject to review by the supreme court. The legislature may prescribe the mode by which a cause is to be carried to the supreme court, either by appeal or otherwise, and either directly from the court first determining it, or after a rehearing before some other court; but it cannot deprive a party of the right of appeal to the supreme court. If no other mode is given by statute the supreme court may assert and exercise its appellate jurisdiction by means of the writ of certiorari.[2]

[1] Const. Minn. Art. 6 § 2.

[2] County of Brown v. Winona etc. Co. 38 Minn. 397, 37 N. W. 949.

Statutory provision.

§ 1981. The supreme court is authorized by statute to issue writs of certiorari to all courts of inferior jurisdiction, to corporations and to individuals "to the furtherance of justice and the execution of the laws; and shall be always open for the issuance and return of all such writs and processes, and for the hearing and determination of the same, and all matters therein involved, subject to such regulations and conditions [1] as the court may prescribe. Any judge of said court may order the issuance of any such writ or process, and prescribe as to the service and return of the same." Any one of the judges of the supreme court may issue a writ of certiorari in vacation.[2]

[1] G. S. 1894 § 4823. See State v. Dunn (Minn.) 90 N. W. 772.

[2] G. S. 1894 § 4827.

General nature of writ.

§ 1982. "Originally, and in English practice, a certiorari was an original writ issuing out of the court of chancery or king's bench, directed to the judges or officers of an inferior court, commanding them to certify or return the records or proceedings in a cause before them, for the purpose of a judicial review of their action. In the United States, the office of this writ has been extended, and its application is not now confined to the decisions of courts, properly so called, but it is also used to review the proceedings of special tribunals, commissions, magistrates, and officers of municipal corporations exercising judicial powers, affecting the rights or property of the citizen, when they act in a summary way, or in a new course dif-

Digitized by Google

ferent from that of the common law." [1] The writ of certiorari as used in this state is not the common law writ of certiorari but rather a writ in the nature of certiorari.[2] "In England, the courts, in certain cases, allow the writ at any time, not only as a proceeding in error, but also for the purpose of bringing a cause into the superior court for trial. Under this practice indictments were frequently removed by this writ from the inferior court into the court of king's bench; and when the writ was sustained, the court above would commence the trial de novo, having no regard to the place where the cause left off in the inferior court. But generally, in this country, and certainly in this state, a certiorari is employed strictly as in the nature of a writ of error. The legitimate office of this writ is to review and correct decisions and final determinations of inferior tribunals, not to divest them of the right of terminating the proceedings, nor to withdraw from them the question to be tried. The office of the writ is simply to review and correct decisions and determinations already made. It follows that, before trial and determination, it does not divest the inferior jurisdiction of the right to terminate the proceedings before it. Upon return of the writ the inquiry is whether or not there has been error, and, upon answer to this question, the court above determines whether to affirm or reverse, just as is done in cases of writs of error or of appeals." [3]

[1] In re Wilson, 32 Minn. 145, 19 N. W. 723.

[2] Minnesota Central Ry. Co. v. McNamara, 13 Minn. 508 Gil. 468; Moede v. County of Stearns, 43 Minn. 312, 45 N. W. 435.

[3] Grinager v. Town of Norway, 33 Minn. 127, 22 N. W. 174. See also, State v. District Court, 44 Minn. 244, 46 N. W. 349; Craighead v. Martin, 25 Minn. 41.

§ 1983. The office of this writ, which is in the nature of appeal, is to bring up for review the final determination of an inferior tribunal, which, if unreversed, would stand as a final adjudication of some legal right of the relator.

State v. Linton, 42 Minn. 32, 43 N. W. 571; Craighead v. Martin, 25 Minn. 41; State v. Dunn (Minn.) 90 N. W. 772.

A matter of discretion.

§ 1984. The writ of certiorari is not a writ of right but its allowance is a matter of sound legal discretion. It should be denied where it would result in grave public detriment and inconvenience.[1] Where the proceedings sought to be reviewed are of a strictly legal nature in a court of law, and there is no other mode of appeal provided by law, a writ of certiorari is practically a writ of right in this state.[2]

[1] Libby v. Town of West St. Paul, 14 Minn. 248 Gil. 181.

[2] County of Brown v. Winona etc. Co. 38 Minn. 397, 37 N. W. 949.

An appellate writ.

§ 1985. The jurisdiction to proceed by writ of certiorari is in its nature appellate or revising, and not original.

Goar v. Jacobson, 26 Minn. 71, 1 N. W. 799; State v. Linton, 42 Minn. 32, 43 N. W. 571; Dousman v. City of St. Paul, 22 Minn. 387; Grinager v. Town of Norway, 33 Minn. 127. See § 1892.

Digitized by Google

Will lie when no right of appeal.

§ 1986. Certiorari will always lie for the review of strictly judicial proceedings in a court of law, if no other mode of appeal is provided by statute.

County of Brown v. Winona etc. Co. 38 Minn. 397, 37 N. W. 949; Sherwood v. City of Duluth, 40 Minn. 22, 41 N. W. 234; State v. Leftwich, 41 Minn. 42, 42 N. W. 598; State v. Probate Court, 51 Minn. 241, 53 N. W. 463; State v. Willis, 61 Minn. 120, 63 N. W. 169; Tierney v. Dodge, 9 Minn. 166 Gil. 153; Faribault v. Hulett, 10 Minn. 30 Gil. 15; Minnesota Central Ry. Co. v. McNamara, 13 Minn. 508 Gil. 468; State v. Searle, 59 Minn. 489, 61 N. W. 553, State v. District Court, 83 Minn. 464, 86 N. W. 455.

§ 1987. When a court acts in a summary manner, or in a new course, different from the common law, certiorari will lie in the absence of any statutory mode of appeal.

Tierney v. Dodge, 9 Minn. 166 Gil. 153; Faribault v. Hulett, 10 Minn. 30 Gil. 15; Minnesota Central Ry. Co. v. McNamara, 13 Minn. 508 Gil. 468; City of St. Paul v. Marvin, 16 Minn. 102 Gil. 91; Massachusetts Mutual Life Ins. Co. v. Estate of Elliot, 24 Minn. 134; State v. District Court, 84 Minn. 377, 87 N. W. 942.

Does not lie where there is right of appeal.

§ 1988. Except in special and extraordinary cases certiorari will not lie where there is or has been an opportunity for an appeal.[1] Although our supreme court has recognized that cases may arise which would justify the issuance of the writ after the expiration of the time allowed by statute for appealing no such case is found in our reports.[2]

[1] St. Paul v. Steamboat Dr. Franklin, 1 Minn. 98 Gil. 76 (a special proceeding before the mayor of St. Paul); Wood v. Myrick, 9 Minn. 149 Gil. 139 (irregularities of commissioners in probate proceedings); State v. Milner, 16 Minn. 55 Gil. 43 (proceedings before a justice for violation of city ordinance against peddling); Dousman v. City of St. Paul, 22 Minn. 387 (proceedings by city officials of St. Paul making assessments for local improvements and perfecting a judgment therefor); State v. Weston, 23 Minn. 366 (intermediate order in a criminal action); State v. Noonan, 24 Minn. 124 (intermediate order in a criminal action); State v. Bruckhauser, 26 Minn. 301, 3 N. W. 695 (prosecution before justice for violation of village ordinance); State v. Board of Public Works, 27 Minn. 442, 8 N. W. 161 (action of common council or board of public works in making assessments for local improvements); State v. Probate Court, 28 Minn. 381, 10 N. W. 209 (order of probate court granting creditor further time in which to present claim); State v. Severance, 29 Minn. 269, 13 N. W. 48 (final order directing receiver to distribute estate of insolvent); State v. Buckham, 29 Minn. 462, 13 N. W. 902 (order discharging a person brought up on habeas corpus); State v. Hanft, 32 Minn. 403, 23 N. W. 308

Digitized by Google

(judgment against a garnishee); Fall v. Moore, 45 Minn. 517, 48 N. W. 404 (order affirming the clerk's refusal to allow and insert costs in a judgment); State v. Willis, 61 Minn. 120, 63 N. W. 169 (contempt proceedings when the penalty imposed for the benefit of an injured party); State v. Steele, 62 Minn. 28, 63 N. W. 1117 (order for maintenance of widow during settlement of estate); State v. Olson, 56 Minn. 210, 57 N. W. 477 (action of town supervisors in laying out a highway); State v. Probate Court, 72 Minn. 434, 75 N. W. 700 (order allowing amendment of claim after time for filing claims in probate proceedings expired); State v. District Court, 79 Minn. 27, 81 N. W. 536 (order denying application for discharge in bastardy proceedings); State v. Town of Twin Lakes, 84 Minn. 374, 87 N. W. 925 (action of a town board of review in refusing an application for the abatement of a personal property assessment for taxation, where the essence of the controversy is in which of two towns in the same county the property should legally be listed for taxation).

[2] Wood v. Myrick, 9 Minn. 149 Gil. 139; State v. Milner, 16 Minn. 55 Gil. 43; State v. District Court, 79 Minn. 27, 81 N. W. 536; State v. Probate Court, 72 Minn. 434, 75 N. W. 700.

Will not lie to an intermediate order.

§ 1989. In this state the writ of certiorari is employed strictly as in the nature of a writ of error. Its office is to review and correct the decisions and final determinations of inferior courts and tribunals and not to divest them of the right of trying and terminating the proceedings before them. A writ of certiorari does not lie directly to an intermediate order.[1] Such orders, however, may be reviewed on certiorari to the final judgment or determination in the proceeding.[2]

[1] State v. Weston, 23 Minn. 366; State v. Noonan, 24 Minn. 124; Grinager v. Town of Norway, 33 Minn. 127, 22 N. W. 174; State v. District Court, 44 Minn. 244, 46 N. W. 349; State v. District Court, 58 Minn. 534, 60 N. W. 546; State v. Linton, 42 Minn. 32, 43 N. W. 571; State v. Probate Court, 51 Minn. 241, 53 N. W. 463; State v. Probate Court, 72 Minn. 434, 75 N. W. 700; State v. Probate Court, 83 Minn. 58, 85 N. W. 917.

[2] See § 1901.

Held to lie.

§ 1990. Certiorari has been held to lie to review the following proceedings: for the erection of mill-dams and mills;[1] condemnation proceedings;[2] summary proceedings under a city ordinance;[3] order in probate proceedings denying application for further time in which to present claims;[4] proceedings to enforce the payment of taxes against real estate;[5] action of district court in confirming a special assessment by the board of public works of the city of Duluth;[6] the action of the district court in refusing to appoint person to examine and inspect election ballots under Laws 1893 ch. 4 § 188;[7] an order of the probate court directing or refusing to direct payment of a claim against an estate;[8] proceedings for the punish-

Digitized by Google

ment of criminal contempt;[9] summary criminal proceedings before a city justice;[10] action of common council in removing fire commissioners for cause, after notice and hearing;[11] laying out a street or highway across private property and assessing the owner's damages therefore; making special assessments against a man's property to pay for local improvements; assessing damages for the destruction of buildings to prevent the spread of fire; determining contested election cases;[12] action of state auditor in determining in what county personal property is taxable;[13] an order of the district court confirming the report of appraisers appointed to determine and award compensation for property damaged by the construction of a dam.[14]

[1] Faribault v. Hulett, 10 Minn. 30 Gil. 15.
[2] Minnesota Central Ry. Co. v. McNamara, 13 Minn. 508 Gil. 468.
[3] City of St. Paul v. Marvin, 16 Minn. 102 Gil. 91.
[4] Massachusetts Mutual Life Ins. Co. v. Estate of Elliot, 24 Minn. 134. Aliter when application is granted, State v. Probate Court, 28 Minn. 381, 10 N. W. 209.
[5] County of Brown v. Winona etc. Co. 38 Minn. 397, 37 N. W. 949.
[6] Sherwood v. City of Duluth, 40 Minn. 22, 41 N. W. 234.
[7] State v. Searle, 59 Minn. 489, 61 N. W. 553.
[8] State v. Probate Court, 51 Minn. 241, 53 N. W. 463.
[9] State v. Leftwich, 41 Minn. 42, 42 N. W. 598; State v. Willis, 61 Minn. 120, 63 N. W. 169.
[10] Tierney v. Dodge, 9 Minn. 166 Gil. 153.
[11] State v. Common Council, 53 Minn. 238, 55 N. W. 118.
[12] In re Wilson, 32 Minn. 145, 19 N. W. 723; State v. Clough, 64 Minn. 378, 67 N. W. 202.
[13] State v. Dunn (Minn.) 90 N. W. 772.
[14] State v. District Court, 83 Minn. 464, 86 N. W. 455.

Held not to lie.

§ 1991. It has been held that certiorari would not lie to review the following proceedings: proceedings of county commissioners in altering a highway on the relation of one not specially injured;[1] proceedings of town officers in issuing bonds;[2] where the judgment in condemnation proceedings was formally defective and the proper remedy was to apply to the court below for a correction;[3] action of county commissioners in forming a new school district;[4] discharge of accused in bastardy proceedings;[5] action of a town board of review in refusing an application for the abatement of a personal property assessment for taxation, where the essence of the controversy is in which of two towns in the same county the property should be legally listed for taxation.[6]

[1] Conklin v. Fillmore County, 13 Minn. 454 Gil. 423.
[2] Libby v. Town of West St. Paul, 14 Minn. 248 Gil. 181.
[3] St. Paul & Sioux City Ry. Co. v. Murphy, 19 Minn. 500 Gil. 433.
[4] Lemont v. County of Dodge, 39 Minn. 385, 40 N. W. 359.
[5] State v. Linton, 42 Minn. 32, 43 N. W. 571.
[6] State v. Town of Twin Lakes, 84 Minn. 374, 87 N. W. 925.

Digitized by Google

As ancillary to habeas corpus.

§ 1992. It is common practice in this state to employ the writ of certiorari as ancillary to the writ of habeas corpus for the purpose of bringing to the supreme court a full return of the proceedings below. When so employed the writ is not an appellate proceeding.

In re Snell, 31 Minn. 110, 16 N. W. 692; In re Fanning, 40 Minn. 4, 41 N. W. 1076; State v. Wagener, 74 Minn. 518, 77 N. W. 424; State v. Fitzgerald, 51 Minn. 534, 53 N. W. 799.

To review action of municipalities—boards—officers, etc.

§ 1993. "The authorities are almost uniform in holding that mere legislative or ministerial acts, as such, of municipal officers cannot be reviewed on certiorari; that only those which are judicial or quasi judicial can be thus reviewed. The courts are not always agreed as to what acts are judicial. Some have gone a great length in holding certain acts judicial, which, on principle, it would be very difficult to place under that head. But in every case which we have found where a court has assumed the right to review the acts of municipal officers on certiorari, either the act itself was judicial in its nature, or else its validity was involved in judicial proceedings which were the subject of review. The following are instances of acts of municipal officers which have been held judicial, and hence directly subject to review on certiorari: laying out a street or highway across private property, and assessing the owner's damages therefor; making special assessments against a man's property to pay for improving or paving a street; assessing damages for the destruction of buildings to prevent the spread of fire; determining contested election cases. All these bear more or less analogy to the judicial acts of courts, properly so called. To hold that any mere legislative act of a municipal corporation could be thus directly reviewed on certiorari would not only be a radical departure from all precedent, but extremely onerous upon the courts and vexatious to municipal officers." [1] The mere fact that the proper performance of an act requires the exercise of discretion does not make it a judicial act.[2] "Unless we are prepared to assume a general supervision over all municipal corporations, boards, commissions, and public officers in the state, this writ must be confined to its legitimate office, which is to review proceedings judicial in their nature, which affect the citizen in his rights of person or property." [3] "It may be said generally that the exercise of judicial functions is to determine what the law is, and what the legal rights of parties are, with respect to a matter in controversy; and whenever an officer is clothed with that authority, and undertakes to determine those questions, he acts judicially." [4]

[1] In re Wilson, 32 Minn. 145, 19 N. W. 723.

[2] Id.

[3] Lemont v. County of Dodge, 39 Minn. 385, 40 N. W. 359. See to same effect, Christlieb v. County of Hennepin, 41 Minn. 142, 42 N. W. 930; Moede v. County of Stearns, 43 Minn. 312, 45 N. W. 435; State v. Dunn (Minn.) 90 N. W. 772.

[4] State v. Dunn (Minn.) 90 N. W. 772.

Digitized by Google

§ 1994. "While we have to recognize the fact that the office of this writ has been extended beyond what it was at common law, and is not now confined to reviewing the decisions of courts, properly so called, but may also be used in certain cases to review the proceedings of special tribunals, boards, commissions, and officers of municipal corporations, yet reflection and further examination only confirm us in the opinion that, both on principle and considerations of public policy, we are right in confining the office of the writ, in the latter class of cases, to acts that are strictly judicial, or quasi judicial, in their nature. There is no country in which the distinction between the functions of the three departments of government is more definitely marked out on paper than in the United States, and yet there is none in which the courts have assumed so often to review, in advance of actual litigation involving the question, the acts of co-ordinate branches of the government. It has become the fashion to invoke the courts by direct action, or through some remedial writ, to review almost every conceivable act, legislative, executive, or ministerial, of other departments; and courts have been so often inclined to amplify their jurisdiction in that respect that they have not unfrequently converted themselves into a sort of appellate and supervisory legislative or executive body. Such a practice is calculated to interfere with the proper exercise of the functions of executive and legislative officers or bodies; to obliterate the distinction between the powers and duties of the different departments of government; and, above all, to bring the courts themselves into disrepute, and destroy popular respect for their decisions. It may be very convenient to have in advance a judicial determination upon the validity of a legislative or executive act. It would often be equally so in the case of acts of a legislature. But we think that the courts will best subserve the purposes for which they are organized by confining themselves strictly to their own proper sphere of action, and not assuming to pass upon the purely legislative or executive acts of other officers or bodies until the question properly arises in actual litigation between parties."

Mitchell, J., in Moede v. County of Stearns, 43 Minn. 312, 45 N. W. 435. See also, State v. Common Council, 53 Minn. 238, 55 N. W. 118.

§ 1995. The fact that a board or officer has, in the performance of their duties, to ascertain certain facts, and, in doing so, to determine what the law is, does not of itself render its acts judicial. That has to be done every day by public bodies and officers, in the discharge of purely legislative or executive acts. Neither does it render an act judicial in its nature because it, in a general sense, affects the relator's interests in common with those of other members of the public. To render the proceedings of special tribunals, commissioners, or municipal officers judicial in their nature, they must affect the rights or property of the citizen in a manner analogous to that in which they are affected by the proceedings of courts acting judicially. Where proceedings are judicial, if no right of appeal is given, certiorari will lie, but the fact that no right of ap-

Digitized by Google

peal is given has no bearing on the question whether the proceedings are judicial in their nature.

State v. Clough, 64 Minn. 378, 67 N. W. 202; Christlieb v. County of Hennepin, 41 Minn. 142, 42 N. W. 930; State v. Dunn (Minn.) 90 N. W. 772.

§ 1996. Certiorari will not lie to review acts of municipal officers which are mere usurpations of authority. Such acts are not judicial or quasi judicial; they are not even official.

State v. Mayor of St. Paul, 34 Minn. 250, 25 N. W. 449; State v. Village of Lamberton, 37 Minn. 362.

§ 1997. The proceedings of municipal bodies are not to be considered according to the strict rules of legal procedure. If such bodies keep within their jurisdiction their action is not to be reversed by the courts for any mere informalities or irregularities such as might constitute reversible error in the proceedings of a court. The action of such bodies should be considered with reference to their nature and the objects for which they are organized.

State v. Common Council, 53 Minn. 238, 55 N. W. 118.

Proceedings held judicial.

§ 1998. The following proceedings have been held judicial or quasi judicial and hence reviewable in the courts by certiorari: removal from office of fire commissioners by common council for cause and after notice and hearing;[1] laying out a street or highway across private property and assessing the owner's damages therefor; making special assessments against a man's property to pay for improving or paving a street; assessing damages for the destruction of buildings to prevent the spread of fire; determining contested election cases;[2] the proceedings of town supervisors voting a special tax levy to pay orders drawn by them on the treasurer to pay bounties to volunteers;[3] the action of the state auditor in determining in what county personal property is taxable.[4]

[1] State v. Common Council, 53 Minn. 238, 55 N. W. 118.

[2] In re Wilson, 32 Minn. 145, 19 N. W. 723; State v. Clough, 64 Minn. 378, 67 N. W. 202; Sherwood v. City of Duluth, 40 Minn. 234, 41 N. W. 234.

[3] Scribner v. Allen, 12 Minn. 148 Gil. 85 (a doubtful case and inconsistent with later cases).

[4] State v. Dunn (Minn.) 90 N. W. 772.

Proceedings held nonjudicial.

§ 1999. The following proceedings have been held administrative, legislative or political rather than judicial and hence not reviewable in the courts by certiorari: restricting the sale of liquor to certain parts of a city;[1] the action of county commissioners in forming a new school district;[2] the action of county commissioners in dividing a town and organizing a new one out of part of its territory;[3] the revocation of an auctioneer's license by the mayor of St. Paul;[4] the action of the county commissioners in designating a newspaper for official publications;[5] the granting of a license by a village coun-

Digitized by Google

cil to sell intoxicating liquor;[6] the recanvassing of votes by a city council.[6]

[1] In re Wilson, 32 Minn. 145, 19 N. W. 723.
[2] Lemont v. County of Dodge, 39 Minn. 385, 40 N. W. 359; Moede v. County of Stearns, 43 Minn. 312, 45 N. W. 435.
[3] Christlieb v. County of Hennepin, 41 Minn. 142, 42 N. W. 930.
[4] State v. Mayor of St. Paul, 34 Minn. 250, 25 N. W. 449.
[5] Sinclair v. Board of County Com'rs, 23 Minn. 404.
[6] State v. Village of Lamberton, 37 Minn. 362, 34 N. W. 336.

What is carried up by certiorari.

§ 2000. "It has been said that the writ of certiorari brings up nothing but the record, or the proceedings in the nature of a record, and that therefore the court to which the return is made can only review errors apparent upon such record or proceedings, and cannot examine the rulings of the inferior tribunal upon the admission or exclusion of evidence, or the giving or refusal of instructions to a jury. * * * If there should be any doubt whether at common law the writ of certiorari would bring up anything except the record, we are of the opinion that the statute gives us, as 'the supreme judicial tribunal' of the state, the power to issue it with an enlarged office, if not as a common-law certiorari, strictly speaking, yet as some other writ * * * necessary to the furtherance of justice and the execution of the laws in the nature of certiorari, and to all intents and purposes a certiorari, with increased scope. * * * It is only necessary to say in this case that the record, the proceedings in the nature of a record, the rulings of the inferior tribunal upon the admission or rejection of testimony, the instructions given and refused to the jury, with the exceptions taken, together with so much of the evidence as may be proper to show the bearing of such rulings and instructions, and the prejudice to the petitioner, may be brought before this court in the return to a certiorari for examination and revision."[1] If it is sought to question the sufficiency of the evidence to justify the findings of the inferior tribunal the return should purport on its face or in the certificate of the officer to contain all the evidence introduced at the trial.[2]

[1] Minnesota Central Ry. Co. v. McNamara, 13 Minn. 508 Gil. 468; City of St. Paul v. Marvin, 16 Minn. 102 Gil. 91; State v. Common Council, 53 Minn. 238, 55 N. W. 118; Gervais v. Powers, 1 Minn. 46 Gil. 30; State v. District Court, 83 Minn. 464, 86 N. W. 455.
[2] State v. St. John, 47 Minn. 315, 50 N. W. 200; Gibson v. Brennan, 46 Minn. 92, 48 N. W. 460. See Payson v. Everett, 12 Minn. 216 Gil. 137; State v. Probate Court, 83 Minn. 58, 85 N. W. 917.

Scope of review on certiorari.

§ 2001. A party has a right to have considered and determined all questions properly presented by the record.[1] In this state the scope of review on certiorari is the same as on appeal from a final judgment except that non-judicial tribunals are not held to strict

Digitized by Google

compliance with the rules of legal procedure. Rulings on evidence, intermediate orders and instructions may be considered.[1] The sufficiency of the evidence to sustain the findings may also be considered, but the supreme court will not reverse for insufficiency of the evidence if there is any evidence reasonably tending to support the decision of the inferior tribunal—if it furnishes any legal or substantial basis for the decision.[2] Of course a reversal would be ordered if the findings were manifestly and palpably against the preponderance of the evidence although there was some evidence reasonably tending to support them.[4]

[1] Bunday v. Dunbar, 5 Minn. 444 Gil. 362: See Dousman v. City of St. Paul, 22 Minn. 1387; Gibson v. Brennan, 46 Minn. 92, 48 N. W. 460.

[2] Minnesota Central Ry. Co. v. McNamara, 13 Minn. 508 Gil. 468; Bunday v. Dunbar, 5 Minn. 444 Gil. 362. See § 1900.

[3] State v. Common Council, 53 Minn. 238, 55 N. W. 118; De Rochebrune v. Southeimer, 12 Minn. 78 Gil. 42. See State v. District Court, 83 Minn. 464, 86 N. W. 455 (contains misstatement as to scope of permissible review).

[4] See State v. District Court, 71 Minn. 383, 73 N. W. 1092

Time of applying for writ.

§ 2002. There is no fixed time within which an application for a writ of certiorari must be made. Undoubtedly, it ought to be made promptly.[1] The statutory period of appeal is generally followed by way of analogy.[2] This limitation is not inflexible but if a party fails to act until after the expiration of such period he must show facts excusing his laches.[3]

[1] County of Brown v. Winona etc. Co. 38 Minn. 397, 37 N. W. 949.

[2] State v. Milwaukee Co. 58 Wis. 4; Keys v. Marine Co. 42 Cal. 256; People v. Perry, 16 Hun (N. Y.) 463.

[3] Kimple v. Superior Court, 66 Cal. 137; Wood v. Myrick, 9 Minn. 149 Gil. 139.

Necessity of a certificate to the return.

§ 2003. The return should include a formal certificate of the officer making the return to the effect that the return contains a full transcript of the records as required by the writ. In one case the supreme court said, "we cannot consider the fragmentary and disordered sheets containing what may have possibly been evidence on the trial, for they are not only not certified to be all the evidence, but they are not even certified to as having been evidence at all."[1] The return must contain all the evidence upon which the action of the lower court or tribunal was predicated.[2]

[1] State v. St. John, 47 Minn. 315, 50 N. W. 200. See, State v. Probate Court, 79 Minn. 257, 82 N. W. 580.

[2] Gibson v. Brennan, 46 Minn. 92, 48 N. W. 460.

Conclusiveness of return.

§ 2004. The record as returned by the inferior tribunal imports absolute verity and the appellate tribunal is confined to the facts

Digitized by Google

disclosed by the return.[1] No point made upon the evidence can be considered when the whole of the evidence bearing upon the point does not appear to be returned.[2]

[1] Gervais v. Powers, 1 Minn. 46 Gil. 30; Taylor v. Bissell, 1 Minn. 225 Gil. 186; State v. St. John, 47 Minn. 315, 50 N. W. 200. See also Dousman v. City of St. Paul, 22 Minn. 387.

[2] State v. Graffmuller, 26 Minn. 6, 46 N. W. 445.

§ 2005. If the return contains matters not responsive to the writ they will be disregarded.

De Rochebrune v. Southeimer, 12 Minn. 78 Gil. 42.

Parties.

§ 2006. Parties without any joint interest cannot unite in a petition for a writ.[1] Courts will not review the action of public officers by certiorari at the instance of private individuals who have no peculiar interest therein.[2]

[1] Libby v. Town of West St. Paul, 14 Minn. 248 Gil. 181.

[2] Conklin v. County of Fillmore, 13 Minn. 454 Gil. 423; State v. Village of Lamberton, 37 Minn. 362, 34 N. W. 336. See, State v. Fitch, 30 Minn. 532, 16 N. W. 411.

To whom directed.

§ 2007. Whether the better practice is to have the writ directed both to the court and the real parties in interest or to the court alone, accompanied by a citation to such parties to appear and show cause is unsettled in this state.[1] When a court has but one judge it is immaterial whether the writ is directed to the court or the judge but the better practice is in all cases to direct it to the court.[2]

[1] State v. Probate Court, 67 Minn. 51, 69 N. W. 609, 908.

[2] County of Brown v. Winona etc. Co. 38 Minn. 397, 37 N. W. 949.

Effect as a supersedeas.

§ 2008. The writ of certiorari operates by its own force as a supersedeas. No bond is necessary for that effect.

State v. Noonan, 24 Minn. 124.

Costs.

§ 2009. Our statute provides that "when an action or proceeding is instituted in the name of the state on the relation of any citizen such relator is entitled to and liable for costs and disbursements in the same cases and to the same extent as if such action or proceeding had been instituted in his own name."[1] As costs cannot be taxed against a court this statute must mean that they shall be taxed for or against the real party in interest.[2]

[1] G. S. 1894 § 5510.

[2] State v. Probate Court, 67 Minn. 51, 69 N. W. 609, 908.

Digitized by Google

II OUT OF THE DISTRICT COURT

The statutory authority.

§ 2010. The district courts of this state in term time, and the judges thereof in vacation, are authorized to award writs of certiorari throughout the state, returnable to the proper county whenever such writs are "necessary to the perfect exercise of the powers with which they are vested and the due administration of justice." [Laws 1897 ch. 7] See Schultz v. Talty, 71 Minn. 16, 73 N. W. 521.

To probate courts.

§ 2011. The district courts of the state have jurisdiction to issue writs of certiorari to the probate courts.

State v. Willrich, 72 Minn. 165, 75 N. W. 123; State v. Probate Court, 83 Minn. 58, 85 N. W. 917.

To justice courts.

§ 2012. Prior to 1881 the district courts had no authority to issue writs of certiorari to justices of the peace.[1] The practice, however, was very common until 1879 as shown by the numerous cases in our early reports.[2] The district court is made a court of appeal from justices of the peace, by statute,[3] pursuant to the constitution; and hence it has power to review, the judgments of justices of the peace by certiorari in cases where no appeal is given by statute.[4] The supreme court may issue the writ to a justice of the peace.[5]

[1] Goar v. Jacobson, 26 Minn. 71, 1 N. W. 799.

[2] Gervais v. Powers, 1 Minn. 46 Gil. 30; Baker v. United States, 1 Minn. 207 Gil. 181; Bunday v. Dunbar, 5 Minn. 444 Gil. 362; Walker v. McDonald, 5 Minn. 455 Gil. 368; Tierney v. Dodge, 9 Minn. 166 Gil. 153; Cunningham v. La Crosse & St. Paul Packet Co. 10 Minn. 299 Gil. 235; De Rochebrune v. Southeimer, 12 Minn. 78 Gil. 42; Payson v. Everett, 12 Minn. 216 Gil. 137; Snow v. Hardy, 3 Minn. 77 Gil. 35; State v. Fitch, 30 Minn. 532, 16 N. W. 411; Craighead v. Martin, 25 Minn. 41.

[3] G. S. 1894 § 4833.

[4] See State v. Willrich, 72 Minn. 165, 75 N. W. 123.

[5] State v. Haines, 58 Minn. 96, 59 N. W. 976.

Digitized by Google

CHAPTER XX

PROHIBITION

Constitutional provision.

§ 2013. The constitution of this state provides that the supreme court shall have "appellate jurisdiction in all cases, both in law and equity." [1] This would undoubtedly be held to authorize the issuance of the writ of prohibition irrespective of statute.[2]

[1] Const. Minn. Art. 6 § 2.

[2] See County of Brown v. Winona etc. Co. 38 Minn. 397, 37 N. W. 949.

Statutory provisions.

§ 2014. The supreme court has power to issue writs of prohibition to all courts of inferior jurisdiction, to corporations and to individuals whenever necessary to the furtherance of justice and the execution of the laws. Any judge of said court may order the issuance of any such writ and prescribe as to the service and return of the same.

[G. S. 1894 § 4823]

"Writs of prohibition shall only be issued out of the supreme court, and shall be applied for upon affidavit, by motion to the court, or a judge thereof in vacation; and if the cause shown appears to the court or judge to be sufficient, a writ shall be thereupon issued, which shall command the court and party, or officer, to whom it is directed, to desist and refrain from any further proceedings in the action or matter specified therein, until the next term of said supreme court, or the further order of the court thereon; and to show cause at the next term of said court, or some day to be named in the same term, at the option of the court, if issued in term time, why they should not be absolutely restrained from any further proceedings in such action or matter."

[G. S. 1894 § 5988]

§ 2015. "Such writ shall be served upon the court and party, or officer, to whom it is directed, in the same manner as a writ of mandamus; and a return shall be made thereto by such court or officer, which may be enforced by attachment."

[G. S. 1894 § 5989] See Dayton v. Paine, 13 Minn. 493 Gil. 454.

§ 2016. "If the party to whom such writ is directed shall, by an instrument in writing, to be signed by him and annexed to such return, adopt the same return, and rely upon the matters therein contained, as sufficient cause why such court should not be restrained, as mentioned in said writ, such party shall thenceforth be deemed the defendant in such proceeding, and the person prosecuting such writ may take issue, or demur to the matters so relied upon by such defendant."

[G. S. 1894 § 5990]

Digitized by Google

§ 2017. "If the party to whom such writ is directed shall not adopt such return, the party prosecuting such writ, shall bring on the argument of such return as upon a rule to show cause; and he may, by his own affidavit and other proofs, controvert the matters set forth in such return."

[G. S. 1894 § 5991]

§ 2018. "The court, after hearing the proofs and allegations of the parties, shall render judgment, either that a prohibition absolute, restraining the said court and party, or officer, from proceeding in such action or matter, do issue, or a writ of consultation authorizing the court and party, or officer, to proceed in the action or matter in question; and may make and enforce such order in relation to costs and charges, and the amount thereof, as may be deemed just."

[G. S. 1894 § 5992]

§ 2019. "If the party to whom such first writ of prohibition is directed adopts the return of the court thereto, and judgment is rendered for the party prosecuting such writ, a prohibition absolute shall be issued; but if judgment is given against such party, a writ of consultation shall be issued as above provided."

[G. S. 1894 § 5993]

General nature and office of writ.

§ 2020. A writ of prohibition, as employed in this state, is an extraordinary writ issuing out of the supreme court for the purpose of keeping inferior courts, or tribunals, corporations, officers and individuals invested by law with judicial or quasi judicial authority, from going beyond their jurisdiction.[1] The writ is directed to the court or other tribunal and to the prosecuting party commanding the former not to entertain and the latter not to prosecute the action or proceeding.[2] The office of the writ is not to correct errors or reverse illegal proceedings, but to prevent or restrain the usurpation of inferior tribunals or judicial officers, and to compel them to observe the limits of their jurisdiction.[3] It is not a writ of right, but issues in the discretion of the court and only in extreme cases, where the law affords no other adequate remedy by motion, trial, appeal, certiorari or otherwise.[4] It is to be used with great caution and forbearance, for the furtherance of justice, and for securing order and regularity in the subordinate tribunals of the state.[5] The exercise of unauthorized judicial or quasi judicial power is regarded as a contempt of the sovereign which should be promptly checked.[6] Three things are essential to justify the writ: first, that the court, officer, or person is about to exercise judicial or quasi judicial power; second, that the exercise of such power by such court, officer, or person is unauthorized by law; third, that it will result in injury for which there is no other adequate remedy.[7]

[1] Home Ins. Co. v. Flint, 13 Minn. 244 Gil. 228; Dayton v. Paine, 13 Minn. 493 Gil. 454; State v. Ward, 70 Minn. 58, 72 N. W. 825; State v. McMartin, 42 Minn. 30, 43 N. W. 572; State v.

Digitized by Google

Probate Court, 19 Minn. 117 Gil. 85; United States v. Shanks, 15 Minn. 369 Gil. 302.

[2] Home Ins. Co. v. Flint, 13 Minn. 244 Gil. 228; Dayton v. Paine, 13 Minn. 493 Gil. 454.

[3] Dayton v. Paine, 13 Minn. 493 Gil. 454.

[4] State v. Municipal Court, 26 Minn. 162, 2 N. W. 166; State v. District Court, 26 Minn. 233, 2 N. W. 698; State v. Ward, 70 Minn. 58, 72 N. W. 825; State v. Cory, 35 Minn. 178, 28 N. W. 217; State v. Young, 44 Minn. 76, 46 N. W. 204; State v. Probate Court, 19 Minn. 117 Gil. 85; State v. Wilcox, 24 Minn. 143; State v. District Court, 77 Minn. 302, 79 N. W. 960.

[5] Washburn v. Phillips, 2 Met. (Mass.) 296; Prignitz v. Fischer, 4 Minn. 366 Gil. 275; State v. Ward, 70 Minn. 58, 72 N. W. 825; Appo v. People, 20 N. Y. 531.

[6] State v. Young, 29 Minn. 474, 523, 9 N. W. 738; State v. McMartin, 42 Minn. 30, 43 N. W. 572.

[7] State v. Young, 29 Minn. 474, 523, 9 N. W. 738; State v. Ward, 70 Minn. 58, 72 N. W. 825; State v. District Court, 77 Minn. 302, 79 N. W. 960.

To whom writ may be directed.

§ 2021. The writ of prohibition is issued only to restrain the exercise of judicial powers. It will not issue to restrain the exercise by individuals or non-judicial bodies of political, legislative or administrative functions.[1] It is usually directed to courts to keep them within the limits of their jurisdiction, but it may also issue to an officer or municipal body to prevent the unlawful exercise of judicial or quasi judicial power;[2] and, in rare cases, it may issue to a person or body of persons, not being in law a court, nor strictly officers.[3]

[1] Home Ins. Co. v. Flint, 13 Minn. 244 Gil. 228; Dayton v. Paine, 13 Minn. 493 Gil. 454; State v. Peers, 33 Minn. 81, 21 N. W. 860; State v. Ueland, 30 Minn. 29, 14 N. W. 58; State v. Ostrom, 35 Minn. 480, 29 N. W. 585.

[2] State v. Young, 29 Minn. 474, 523, 9 N. W. 738; State v. Ward, 70 Minn. 58, 72 N. W. 825; State v. Ostrom, 35 Minn. 480, 29 N. W. 585.

[3] State v. Young, 29 Minn. 474, 523, 9 N. W. 738; State v. McMartin, 30 Minn. 30, 43 N. W. 572.

Rule in extraordinary proceedings as to other remedy.

§ 2022. "The rule laid down by some text writers and decided cases, that the writ of prohibition is not a proper remedy, when there is an adequate remedy by appeal or writ of error, is not one of universal application. It is undoubtedly correct as applied to a case where, in the course of an ordinary action, the court attempts to decide upon matters not within its jurisdiction, for all errors of that description are best corrected by the usual remedy of an appeal, writ of error or certiorari. To extend the rule further than that would almost entirely abolish the writ. There are very few

Digitized by Google

proceedings of a judicial character in which a party aggrieved by a usurpation may not, either by some mode of review and correction, or by an action of trespass or otherwise, have an adequate remedy for the wrong. But we do not find any decision that in extraordinary proceedings the existence of such a remedy shall be ground for a refusal of the writ."

Gilfillan, C. J. in State v. Wilcox, 24 Minn. 143. See also, State v. Municipal Court, 26 Minn. 162, 2 N. W. 166; State v. Ward, 70 Minn. 58, 72 N. W. 825.

Danger of usurpation must be real and imminent.

§ 2023. To authorize the issuance of the writ it should be made to appear unequivocally that the inferior court is about to proceed in some matter over which it possesses no jurisdiction. This may be made to appear by setting out any acts or declarations of the court or officer which indicate his intention to pursue such a course. The mere fact that the court has been asked to proceed beyond its jurisdiction is insufficient, for the presumption is that the court will act only within its jurisdiction.

Prignitz v. Fischer, 4 Minn. 366 Gil. 275; Dayton v. Paine, 13 Minn. 493 Gil. 454.

Jurisdiction of the person.

§ 2024. Prohibition will not lie to question the jurisdiction of the court over the person of the defendant. The proper remedy is by motion, demurrer or appeal.

State v. District Court, 26 Minn. 233, 2 N. W. 698.

Jurisdiction of the subject-matter.

§ 2025. The writ of prohibition will lie only where there is a want of jurisdiction of the subject matter in the court against which the writ is directed.[1] But jurisdiction of the subject matter means, in this connection, jurisdiction of the general class of cases to which the particular case belongs. It does not mean jurisdiction of the subject matter of the particular case. If the court has jurisdiction of the general class of cases to which the particular case belongs and could properly proceed upon any conceivable state of facts, prohibition will not lie.[2] In an action proceeding in the ordinary way, by summons, pleadings, trial, judgment, etc. where the cause of action is within the jurisdiction of the court, and in the course of the action any matter arises or is presented to the court which requires it to decide upon its jurisdiction, an error in such decision ought to be corrected upon review and not by prohibition. Due protection to the party in such cases does not require that the supreme court should interrupt and suspend the action of the court below until the question of jurisdiction thus raised and decided may be passed upon by that court. It is much better for the orderly administration of justice that such a case should first go through the usual course of trial and decision in the court below and then be carried to the supreme court in the ordinary way.[3] A court does not lose jurisdiction of the subject matter by making an erroneous

Digitized by Google

ruling or unauthorized order.[4] Prohibition does not lie for an excess of jurisdiction committed during the course of a trial.[5] In one case in this state it was said, obiter, that prohibition would lie "where such inferior tribunal assumes to entertain a cause over which it has jurisdiction but goes beyond its legitimate powers and transgresses the bounds prescribed by law."[6] This was a mere quotation and should not be taken unqualifiedly as the law in this state. It is certainly inconsistent with several of our cases.[7] The court may, however, lose its jurisdiction during the course of an action by reason of the subject matter passing beyond its control.[8]

[1] State v. District Court, 77 Minn. 405, 80 N. W. 355.
[2] See State v. Ward, 70 Minn. 58, 72 N. W. 825.
[3] State v. Municipal Court, 26 Minn. 162, 2 N. W. 166; State v. District Court, 26 Minn. 233, 2 N. W. 698; State v. Cory, 35 Minn. 178, 28 N. W. 178.
[4] State v. District Court, 77 Minn. 405, 80 N. W. 355.
[5] State v. Wilcox, 24 Minn. 143, 147.
[6] State v. Ward, 70 Minn. 58, 72 N. W. 825.
[7] State v. Municipal Court, 26 Minn. 162, 2 N. W. 166; State v. District Court, 26 Minn. 233, 2 N. W. 698; State v. District Court, 77 Minn. 405, 80 N. W. 355; State v. Cory, 35 Minn. 178, 28 N. W. 178.
[8] State v. Probate Court, 19 Minn. 117 Gil. 85; State v. Young, 44 Minn. 76, 46 N. W. 204.

Cases in which writ was allowed.

§ 2026. Case of Francis Lee, 1 Minn. 66 Gil. 44 (to prevent a judge of probate from proceeding by writs of attachment and other process to enforce obedience to a writ of habeas corpus issued by him without authority); State v. Probate Court, 19 Minn. 117 Gil. 85 (to restrain a probate court from reviewing the proceedings for a sale, after confirmation, the confirmation of the sale having exhausted the jurisdiction of the court); United States v. Shanks, 15 Minn. 369 Gil. 302 (to restrain a probate judge from administering the estate of a tribal Indian); State v. Young, 29 Minn. 474, 523, 9 N. W. 738 (to restrain certain district judges from proceeding under the act of March 2, 1881 for the adjustment of the state railroad bonds); State v. Simons, 32 Minn. 540, 21 N. W. 750 (to restrain a district judge from proceeding under Laws 1883 ch. 73 providing for the incorporation of villages upon petition to the judge of the district court, the statute being held unconstitutional); State v. Young, 44 Minn. 76, 46 N. W. 204 (to restrain court from exercising jurisdiction over property of insolvent after conveyance by assignee).

Cases in which writ was not allowed.

§ 2027. Home Ins. Co. v. Flint, 13 Minn. 244 Gil. 228 (to restrain a county attorney from proceeding under the act of March 9, 1867 requiring him to examine the financial condition of insurance companies); Dayton v. Paine, 13 Minn. 493 Gil. 454 (acts already done); Prignitz v. Fischer, 4 Minn. 366 Gil. 275 (to re-

Digitized by Google

strain a court commissioner from hearing and determining a motion to set aside a demurrer and for judgment, there being no evidence that he was about to entertain the motion); State v. Ueland, 30 Minn. 29, 14 N. W. 58 (to restrain a probate judge from proceeding under G. S. 1878 ch. 10 § 124 in respect to the incorporation of cities); State v. Peers, 33 Minn. 81, 21 N. W. 860 (to restrain the action of two justices of the peace from taking testimony in an election contest); State v. Municipal Court, 26 Minn. 162, 2 N. W. 166 (action of unlawful detainer—equitable defence claimed to oust jurisdiction of court—proper remedy an appeal); State v. District Court, 26 Minn. 233, 2 N. W. 698 (want of jurisdiction over the person—summons improperly served—special appearance with motion to set aside summons—motion denied—proper remedy an appeal); State v. Cory, 35 Minn. 178, 28 N. W. 217 (unlawful detainer—defence of fraud and usury held to oust jurisdiction of court—proper remedy an appeal); State v. Ostrom, 35 Minn. 480, 29 N. W. 585 (to restrain county commissioners from proceeding in the performance of the acts necessary to submitting the question of a change of a county seat to a vote of the people); State v. McMartin, 42 Minn. 30, 43 N. W. 572 (to test the title of a de facto judicial officer to the office); State v. Young, 44 Minn. 76, 46 N. W. 204 (proceedings for contempt after appeal with a supersedeas); State v. Ward, 70 Minn. 58, 72 N. W. 825 (trial of mayor by common council—removal from office for cause); State v. District Court, 77 Minn. 405, 80 N. W. 355 (conviction before justice for crime claimed not to be within jurisdiction of justice—appeal on law and facts to district court—motion to dismiss for want of jurisdiction in justice denied); State v. Sullivan, 67 Minn. 379, 69 N. W. 1094 (to restrain a person from acting as a judge of a court claimed to be organized under an unconstitutional statute).

Digitized by Google

CHAPTER XXI

SERVICE OF NOTICES AND PAPERS

Who entitled to notice—statute.

§ 2028. "A defendant appears in an action when he answers, demurs, or gives the plaintiff written notice of his appearance; after appearance, a defendant is entitled to notice of all subsequent proceedings; but when a defendant has not appeared, service of notices or papers, in the ordinary proceedings in an action, need not be made upon him."

[G. S. 1894 § 5212] See § 2056.

Must be in writing—on either attorney or client—statute.

§ 2029. "Notices shall be in writing; and notices and other papers may be served on the party or attorney in the manner prescribed in the next three sections [§§ 2031, 2033 infra], where not otherwise provided by statute."

[G. S. 1894 § 5213]

§ 2030. Mere verbal notice may be disregarded.[1] It is provided that service of papers must generally be made on the attorney of record rather than on the party.[2] The service of orders is regulated by rule of court.[3] An order to show cause generally includes a direction as to its service. This and the subsequent sections do not apply to notices to terminate leases.[4]

[1] Stein v. Roeller, 66 Minn. 283, 68 N. W. 1087.

[2] See § 2035.

[3] See § 2090.

[4] Alworth v. Gordon, 81 Minn. 445, 84 N. W. 454.

Mode of service—generally—statute.

§ 2031. "The service may be personal or by delivery to the party or attorney on whom the service is required to be made, or it may be as follows:

(1) If upon an attorney, it may be made during his absence from his office, by leaving the papers with his clerk therein, or with a person having charge thereof; or, when there is no person in the office, by leaving it, between the hours of six in the morning and nine in the evening, in a conspicuous place in the office; or if it is not open so as to admit of such service, then by leaving it at the attorney's residence, with some person of suitable age and discretion.

(2) If upon a party, it may be made by leaving the papers at his residence, between the hours of six in the morning and nine in the evening, with some person of suitable age and discretion."

[G. S. 1894 § 5214] Similar to New York statute.

§ 2032. Service upon an attorney at his office, he being absent, can be made by leaving the paper in a conspicuous place in the

Digitized by Google

office only when there is in the office no clerk of his, or person having charge thereof.[1] The only way in which effective service can be made on an attorney in his office is by delivering a copy to him personally. Handing a copy to his clerk, he being in the office, is insufficient, if he refuses to accept it from the clerk.[2] Service cannot be made on an attorney by throwing papers through the transom or pushing them under the door of his office.[3] A person who occupies offices with an attorney, as, for example, another attorney, the offices having a common entrance, has "charge thereof" within the meaning of the statute.[4] If at the time service is made upon the person in charge of the office the attorney does not appear to be there, the fact that he is in an adjacent room does not render the service irregular.[5] If an attorney's office is found locked, papers cannot be served by unlocking the door and posting them in a conspicuous place.[6] If the attorney who has charge of the business in his individual name is a member of a firm the papers may be served on his partner whether the former is in the office or not.[7] When an attorney's office is closed service on his wife at his residence is good.[8]

[1] Mies v. Thompson, 53 Minn. 273, 55 N. W. 44.
[2] Union Nat. Bank v. Benjamin, 61 Wis. 512.
[3] Haight v. Moore, 36 N. Y. Supr. 294.
[4] Crook v. Crook, 12 N. Y. St. 663; Id., 14 Daly, 298.
[5] Gross v. Clark, 1 N. Y. Civ. Pro. 17.
[6] Campbell v. Spencer, 1 How. Pr. (N. Y.) 97; Haight v. Moore, 36 N. Y. Supr. 294.
[7] Lansing v. McKillup, 7 Cowen (N. Y.) 416.
[8] Campbell v. Smith, 9 Wis. 305.

Mode of service—by mail—statute.

§ 2033. "Service by mail may be made, when the person making the service, and the person on whom it is to be made, reside in different places, between which there is a regular communication by mail. In case of service by mail, the paper shall be deposited in the post-office, addressed to the person on whom it is served, at his place of residence, and the postage paid; and in such case, the time of service shall be double that required in case of personal service."

[G. S. 1894 §§ 5215, 5216] Similar to New York statute.

§ 2034. The paper must be mailed at the place of residence of the attorney or party serving it. When the paper actually comes into the hands of the person to be served within the time required for personal service, it is immaterial where it is mailed; for then it is equivalent to personal service. But, if it be mailed at any other than the proper place, the person adopting that mode of service must take the risk of its reaching the person to whom sent within the proper time. Service by mail being in derogation of common law must be made in strict compliance with the statute.[1] This statute does not apply to service of papers on the clerk of court, so that a service on him by mail is not good unless the papers actually reach him within the proper time.[2] When a complaint is served by mail

Digitized by Google

after a seasonable demand of a copy by an appearing defendant the latter has double time in which to answer.[3] Probably a party does not secure double time in which to amend of course by serving his pleading by mail.[4] When a paper is properly mailed the service is deemed complete. The risk of failure of the mail is on the person addressed.[5] A paper is properly served under the statute if mailed on the last day of the time allowed for service although not received until after the expiration of such time.[6] The time to answer runs from the day the paper is mailed, not from the day of its receipt.[7] The time of the departure of mails may be ignored and papers may be mailed at any time before midnight of the last day of service. The nine o'clock limitation is not applicable to service by mail.[8] It has been held that a deposit in a mail box prior to the last collection is sufficient,[9] and it would undoubtedly be held sufficient to deposit papers in a mail box or mail chute any time before midnight of the last day of service. It is not necessary to include in the address the street or office number.[10] A direction on the envelope to return the same within a certain number of days to the sender if not delivered does not vitiate the service, in the absence of proof that it prevented the addressee from receiving it.[11] If the postage is not fully prepaid the addressee need not take the paper from the post-office,[12] but if he does and satisfies himself of its contents he cannot claim that he was not served because he returned it to the postmaster.[13]

[1] Van Aernam v. Winslow, 37 Minn. 514, 35 N. W. 381.
[2] Thorson v. St. Paul etc. Ins. Co. 32 Minn. 434, 21 N. W. 471.
[3] Gillette-Herzog Mfg. Co. v. Ashton, 55 Minn. 75, 56 N. W. 576.
[4] Dunnell, Minn. Pl. § 691.
[5] Van Aernam v. Winslow, 37 Minn. 514, 35 N. W. 381.
[6] Id.; Elliott v. Kennedy, 26 How. Pr. (N. Y.) 422.
[7] Van Horne v. Montgomery, 5 How. Pr. (N. Y.) 238.
[8] Elliott v. Kennedy, 26 How. Pr. (N. Y.) 422; Noble v. Trotter, 4 How. Pr. (N. Y.) 322.
[9] Vernon v. Gillen Printing Co. 16 Misc. (N. Y.) 507.
[10] Oothout v. Rhinelander, 10 How. Pr. (N. Y.) 460.
[11] Gaffney v. Bigelow, 2 Abb. N. C. (N. Y.) 311.
[12] Anonymous, 1 Hill (N. Y.) 217; Woods v. Hartshorn, 2 How. Pr. (N. Y.) 71.
[13] Clark v. McFarland, 10 Wend. (N. Y.) 634.

Must be on attorney generally—when not—statute.

§ 2035. "Where a plaintiff or defendant who has appeared resides out of the state, and has no attorney in the action, the service may be made by mail, if his residence is known; if not known, on the clerk for him. But where a party, whether resident or non-resident, has an attorney in the action, the service of papers shall be upon the attorney instead of the party. But if the attorney shall have removed from the state, such service may be made upon him personally, either within or without the state, or by mail to him at his place of residence, if known, and if not known, then by mail up-

Digitized by Google

on the party, if his residence is known, whether within or without the state. And if the residence of neither the party or attorney are known, the service may be made on the clerk for the attorney."

[G. S. 1894 § 5217]

§ 2036. Where, after the commencement of an action, the defendants and their attorney removed from the state, it was held proper to serve a notice of trial by mail on the attorney out of the state.[1] Until the entry of judgment the attorney of record is the proper person upon whom to serve notices of all kinds. As a general rule the authority of an attorney ceases upon the entry of judgment and notices must thereafter be served upon the party,[2] but there are several exceptions to this general rule.[3] Where a county is a party the county attorney is the person upon whom notices and papers should be served.[4] Upon an appeal to the district court from an order of the probate court admitting a will to probate the notice of appeal may be served on the attorney of the proponent.[5]

[1] Olmstead v. Firth, 64 Minn. 243, 66 N. W. 988.

[2] Berthold v. Fox, 21 Minn. 51; Phelps v. Heaton, 79 Minn. 476, 82 N. W. 990.

[3] See § 1421.

[4] Board of County Com'rs v. Sutton, 23 Minn. 299.

[5] In re Brown, 32 Minn. 443, 21 N. W. 474.

Limitation on preceding sections.

§ 2037. "The provisions of the four preceding sections (§§ 2031, 2033, 2035 supra) do not apply to the service of a summons or other process, or of any paper to bring a party into contempt."

[G. S. 1894 § 5218] See State v. District Court, 42 Minn. 40, 43 N. W. 686; Savings Bank v. Authier, 52 Minn. 98, 53 N. W. 812; Masterson v. Le Claire, 4 Minn. 163 Gil. 108; Bausman v. Tilley, 46 Minn. 66, 48 N. W. 459; Becker v. Hager, 8 How. Pr. (N. Y.) 68; Ewing v. Johnson, 34 How. Pr. (N. Y.) 202.

Defective notices—amendment—extension of time—statute.

§ 2038. "A notice or other paper is valid and effectual, though the title of the action in which it is made is omitted, or it is defective either in respect to the court or parties, if it intelligently refers to such action or proceeding; and in furtherance of justice, upon proper terms, any other defect or error in any notice or other paper or proceeding may be amended by the court, and any mischance, omission or defect relieved, within one year thereafter; and the court may enlarge or extend the time, for good cause shown, within which by statute any act is to be done, proceeding had or taken, notice or paper filed or served; or may, on such terms as are just, permit the same to be done or supplied after the time therefor has expired, except that the time for bringing a writ of error or appeal shall in no case be enlarged, or a party be permitted to bring such writ of error or appeal after the time therefor has expired."

[G. S. 1894 § 5219]

Digitized by Google

§ 2039. Neither the district nor the supreme court can give a party a right to appeal after the time for appeal prescribed by the statutes has passed.[1] This section has reference to matters of practice and procedure in pending actions and does not confer power to extend or modify the statute of limitations.[2] Under this section the supreme court may relieve an appellant and reinstate an appeal which has been dismissed.[3]

[1] Burns v. Phinney, 53 Minn. 431, 55 N. W. 540.

[2] Humphrey v. Carpenter, 39 Minn. 115, 39 N. W. 67.

[3] Baldwin v. Rogers, 28 Minn. 68, 9 N. W. 79.

Waiver of irregularities by retention of papers.

§ 2040. If a pleading, notice or other paper is served too late or contains a defect of form it must be returned within twenty four hours with a statement of the reason for its return; otherwise the irregularity will be deemed waived.

Smith v. Mulliken, 2 Minn. 319 Gil. 273; Aetna Ins. Co. v. Swift, 12 Minn. 437 Gil. 326; Hayward v. Gray, 13 Minn. 165 Gil. 154; Marty v. Ahl, 5 Minn. 27 Gil. 14.

Digitized by Google

CHAPTER XXII

ORDERS TO SHOW CAUSE

I AS A SHORT NOTICE

Rule of court.

§ 2041. "Orders to show cause will only be granted when a restraining order is necessary, or some exigency is shown which would cause injury or render the relief sought ineffectual if the moving party were required to give the statutory notice of motion. If, on the hearing, it appear that there was no such ground for the order, it may be discharged or the hearing continued in the discretion of the court. Such order must be accompanied by a notice setting forth the grounds on which the relief asked is sought as in other notices of motion."

[Rule 11, District Court]

Statute.

§ 2042. "When a notice of a motion is necessary, it must be served eight days before the time appointed for the hearing; but the judge may, by an order to show cause, prescribe a shorter time."

[G. S. 1894 § 5226]

A short notice.

§ 2043. An order to show cause, as authorized by the above statute, is in fact only the authority for a short notice of motion.[1] It has no greater effect on the determination of the motion than an ordinary notice of motion. There is an indistinct idea that by an order to show cause the court has, as it were, passed on the merits, unless the opposing party can reverse its opinion. But this is incorrect. It is not to be understood that when a court grants such an order it expresses in any degree an opinion on the merits; it looks not at the merits, but at the question whether there is a necessity for a shorter notice than eight days.[2]

[1] Marty v. Ahl, 5 Minn. 27 Gil. 14.

[2] Thompson v. Erie Ry. Co. 9 Abb. Pr. N. S. (N. Y.) 233; McAuliffe v. Coughlin, 105 Cal. 268.

Practice on the hearing.

§ 2044. The practice on the hearing is exactly the same as if a regular notice of eight days had been given. The order to show cause does not in fact throw the burden of proof upon the party ordered to show cause although its language suggests that idea.

See § 2067.

Granted ex parte—discretionary.

§ 2045. The order is granted ex parte,[1] but not as of course.[2] The matter lies in the discretion of the court or judge [3]—a discre-

Digitized by Google

tion which should be exercised only in exceptional cases.[4] The application should be based on an affidavit setting forth grounds for the order.[5]

[1] Marty v. Ahl, 5 Minn. 27 Gil. 14; Gere v. Weed, 3 Minn. 352 Gil. 249; Pulver v. Grooves, 3 Minn. 359 Gil. 252.

[2] Androvette v. Bowe, 15 How. Pr. (N. Y.) 75; Springsteen v. Powers, 4 Robt. (N. Y.) 624.

[3] Goodrich v. Hopkins, 10 Minn. 162 Gil. 130.

[4] Androvette v. Bowe, 15 How. Pr. (N. Y.) 75.

[5] Cooper v. Galbraith, 24 N. J. L. 219; Proctor v. Soulier, 82 Hun (N. Y.) 353.

Where and when returnable.

§ 2046. An order relating to a matter cognizable by the court but not by the judge at chambers should properly be made returnable before the court, but this is not indispensable.[1] The authority of a judge at chambers to make an order returnable before the court is unquestioned. Probably an order to show cause returnable eight days or more cannot be granted.[2] Any discrepancy between the time of the hearing designated in the order and in the copy served is waived by an appearance at the hearing without objection.[3]

[1] Yale v. Edgerton, 11 Minn. 271 Gil. 184.

[2] Vale v. Brooklyn etc. Ry. Co. 12 Civ. Pro. (N. Y.) 102. But see Marty v. Ahl, 5 Minn. 27 Gil. 14.

[3] Marty v. Ahl, 5 Minn. 27 Gil. 14.

Default—rule of court.

§ 2047. "Whenever notice of a motion shall be given or an order to show cause served, and no one shall appear to oppose the motion or application, the moving party shall be entitled, on filing proof or admission of service, to the relief or order sought, unless the court shall otherwise direct. If the moving party shall not appear or shall decline to proceed, the opposite party, upon filing like proof of service, shall be entitled to an order of dismissal."

[Rule 9, District Court] See In re Kittson, 45 Minn. 197, 48 N. W. 419.

Renewal of application.

§ 2048. "When an application made to any judge for an order to show cause is refused the application shall not be renewed before another judge without leave."

[Rule 17, District Court]

II AS A PROCESS

Instances.

§ 2049. An order to show cause is frequently employed in our practice as original process for the institution of special proceedings, as, for example, for constructive contempt of court;[1] mandamus;[2] quo warranto;[3] prohibition;[4] against a sheriff for failure to turn over money;[5] for the removal of an assignee;[6] for non-payment of taxes.[7]

Digitized by Google

[1] State v. Ives, 60 Minn. 478, 62 N. W. 831; State v. Willis, 61 Minn. 120, 63 N. W. 169.
[2] Dunnell, Minn. Pl. 1579.
[3] Id. § 1706.
[4] Hull v. Chapel, 71 Minn. 408, 74 N. W. 156; William Dearing & Co. v. Burke, 74 Minn. 80, 76 N. W. 1020; In re Grundysen, 53 Minn. 346, 55 N. W. 557; Breuer v. Elder, 33 Minn. 147, 22 N. W. 147.
[6] In re Nicolin, 55 Minn. 130, 56 N. W. 587.
[7] State v. Northern Trust Co. 73 Minn. 70, 75 N. W. 754.

§ 2050. **Parties may fully submit and litigate matters in dispute upon an order to show cause without the medium of an ordinary action.**

Truesdale v. Farmers etc. Co. 67 Minn. 454, 70 N. W. 568; Thomas v. Hale, 82 Minn. 423, 85 N. W. 156.

Digitized by Google

CHAPTER XXIII

COMPUTATION OF TIME

The statute.

§ 2051. "The time within which an act is to be done shall be computed by excluding the first day and including the last. If the last day is Sunday, it shall be excluded."

[G. S. 1894 § 5222]

§ 2052. This section was intended to apply only when it is necessary to have a rule for ascertaining the first day or the last day on which a thing may be done. Such a rule is necessary only when a thing is to be done within a specified period, as within a week, month, or year, or designated number of days, weeks, months, or years. When the first or last day is expressed, no rule is needed to ascertain what that day is and this section is inapplicable.[1] If the last day upon which an act must be done is Sunday it may be done on Monday.[2] In computing the time of serving notice of trial in the district court the day of service is excluded and the first day of the term included.[3] But in giving the ten days notice of argument required by Rule 8 of the supreme court, the day of service and the first day of the term must both be excluded.[4] This section was designed to establish a uniform rule applicable to statutory construction as well as matters of practice.[5] Thus it has been held applicable in computing the time of a notice of special election,[6] of filing an affidavit and account for a mechanic's lien,[7] to the life of a judgment,[8] to the construction of Laws 1889 ch. 22 giving a right to a contract from the state for mineral lands within a certain period,[9] publishing notice of sale under a power in a mortgage,[10] the service of summons in a justice court,[11] accepting or rejecting an offer of judgment,[12] the filing of an answer in tax proceedings;[13] to the period of redemption from a foreclosure sale.[14]

[1] N. W. Guaranty Loan Co. v. Channell, 53 Minn. 269, 55 N. W. 121. See Marvin v. Marvin, 75 N. Y. 240.

[2] Johnson v. Merritt, 50 Minn. 303, 52 N. W. 863; Kipp v. Fitch, 73 Minn. 65, 75 N. W. 752; Bovey De Laittre Lumber Co. v. Tucker, 48 Minn. 223, 50 N. W. 1038.

[3] State v. Weld, 39 Minn. 426, 40 N. W. 561.

[4] Greve v. St. Paul etc. Ry. Co. 25 Minn. 327.

[5] Spencer v. Haug, 45 Minn. 231, 50 N. W. 305.

[6] Coe v. Caledonia etc. Ry. Co. 27 Minn. 197, 6 N. W. 621; Brady v. Moulton, 61 Minn. 185, 63 N. W. 489.

[7] Frankkoviz v. Smith, 34 Minn. 403, 26 N. W. 225.

[8] Spencer v. Haug, 45 Minn. 231, 50 N. W. 305; Davidson v. Gaston, 16 Minn. 230 Gil. 202.

[9] Johnson v. Merritt, 50 Minn. 303, 52 N. W. 863.

[10] Worley v. Naylor, 6 Minn. 192 Gil. 123.

[11] Smith v. Force, 31 Minn. 119, 16 N. W. 704.

[12] Mansfield v. Fleck, 23 Minn. 61.

[13] Kipp v. Fitch, 73 Minn. 65, 75 N. W. 752.

[14] Bovey De Laittre Lumber Co. v. Tucker, 48 Minn. 223, 50 N. W. 1038.

Digitized by Google

CHAPTER XXIV

MOTIONS AND ORDERS

MOTIONS

Definition.

§ 2053. A motion is an application for an order.[1] An order is a direction of a court or judge made or entered in writing, and not included in a judgment.[2]

[1] G. S. 1894 § 5225.

[2] G. S. 1894 § 5224. See §§ 2083–2085.

Scope of remedy by motion.

§ 2054. It is impossible to define with precision the scope of the remedy by motion in our practice. It is far more extensive and various than at common law.[1] A motion is not a proper remedy for the determination of the substantive rights of parties. Such rights can only be determined upon a regular trial in which the parties have an opportunity to submit oral testimony and to insist upon a strict application of the rules of evidence.[2]

[1] See, for example, Hall v. Southwick, 27 Minn. 234, 6 N. W. 799; Steele v. Taylor, 1 Minn. 275 Gil. 210; Davidson v. Lamprey, 16 Minn. 445 Gil. 402; State v. Macdonald, 30 Minn. 98, 14 N. W. 459; Willoughby v. St. Paul German Ins. Co. 80 Minn. 432, 83 N. W. 377; Temple v. Scott, 3 Minn. 419 Gil. 306.

[2] See McMurran v. Bourne, 81 Minn. 515, 84 N. W. 338; Reilly v. Bader, 50 Minn. 199, 52 N. W. 522; Barker v. Foster, 29 Minn. 166, 12 N. W. 460; Woodford v. Reynolds, 36 Minn. 155, 30 N. W. 757.

Generally oral.

§ 2055. Two methods of moving prevail in American practice. In some jurisdictions the practice is to file with the clerk a written statement that the party moves the court for certain specified relief, and to give the adverse party, in advance of the hearing, a copy of this statement. In other jurisdictions it is the practice to serve on the adverse party written notice that the motion will be made at a time and place named, for certain specified relief, and then at the time and place designated to move orally for such relief. In this latter method the written notice of motion corresponds substantially with the written motion of the former.[1] In this state the latter method prevails; that is, all motions are oral, except in a few instances where a written motion is required by statute or rule of court.

[1] 14 Ency. Pl. & Pr. 115.

Necessity of notice.

§ 2056. We have no general statute or rule of court providing in what cases notice of motion is necessary except that "after appear-

Digitized by Google

ance a defendant is entitled to notice of all subsequent proceedings; but when a defendant has not appeared, service of notices or papers, in the ordinary proceedings in an action, need not be made upon him."[1] Of course no notice is necessary in the case of motions made in the course of the trial. Where, upon the call of the calendar at the first day of the term, the court sets a day for hearing a motion, no notice is necessary although the clerk has previously set the case down for trial on a day certain.[2] An order made on a motion without notice, where notice is required, is not void but merely irregular.[3] An error in making an order without notice is cured by subsequently making the same order upon notice.[4] Where an order is improperly made without notice but a party is given an opportunity to question the propriety of the order at a subsequent hearing he is not prejudiced.[5]

[1] G. S. 1894 § 5212. See § 2028.
[2] Grimes v. Fall, 81 Minn. 225, 83 N. W. 835.
[3] Danner v. Capehart, 41 Minn. 294, 42 N. W. 1062.
[4] Markell v. Ray, 75 Minn. 138, 77 N. W. 788.
[5] American Surety Co. v. Nelson, 77 Minn. 402, 80 N. W. 300.

Notice of motion—length of—statute.

§ 2057. "When a notice of a motion is necessary, it must be served eight days before the time appointed for the hearing; but the judge may, by an order to show cause, prescribe a shorter time."[1] In computing the period of notice the day of service is to be excluded and the day set for the hearing of the motion included.[2]

[1] G. S. 1894 § 5226.
[2] See § 2051.

Notice of motion—form and contents.

§ 2058. A notice of motion must be in writing.[1] It should be entitled in the action;[2] addressed to all the parties concerned or more properly their attorneys;[3] specify the time[4] and place[5] of the motion and whether it will be addressed to the court or judge;[6] refer to the papers upon which the motion will be made;[7] state generally the grounds of the motion, except in the case of irregularity which must be set forth with particularity;[8] specify the relief sought,[9] including a demand for further and general relief[10] and costs;[11] and signed by the attorney of the moving party with his office and post-office address.[12] It is rare that objection can successfully be made to a notice of motion. If a party has not been actually misled to his prejudice defects in a notice will be disregarded.[13] Appearing at the hearing without objection waives all objections to the notice.[14] If a notice is defective the proper practice is to return it within twenty four hours with objections stated.[15]

[1] G. S. 1894 § 5213. See § 2029.
[2] Not essential. See § 2038.
[3] Anderson v. Vandenburgh, 1 How. Pr. (N. Y.) 212. See § 2035.
[4] Marty v. Ahl, 5 Minn. 27 Gil. 14; Blake v. Sherman, 12 Minn. 420 Gil. 305. See § 2061.
[5] See § 2062.

Digitized by Google

[6] Yale v. Edgerton, 11 Minn. 271 Gil. 184.
[7] See § 2059.
[8] Id.
[9] Id.
[10] Landis v. Olds, 9 Minn. 90 Gil. 79; Gerdtzen v. Cockrell, 52 Minn. 501, 55 N. W. 58. See § 2074.
[11] See § 2074.
[12] Rule 4, District Court.
[13] Marty v. Ahl, 5 Minn. 27 Gil. 14; Yale v. Edgerton, 11 Minn. 271 Gil. 184; Blake v. Sherman, 12 Minn. 420 Gil. 305.
[14] Marty v. Ahl, 5 Minn. 27 Gil. 14.
[15] Id. See § 2040.

Notice of motion—rule of court.

§ 2059. "Notices of motion shall be accompanied with copies of the affidavits and other papers on which the motions are made, provided that papers in the action of which copies shall have theretofore been served and papers other than such affidavits which have theretofore been filed, may be referred to in such notice and read upon the hearing without attaching copies thereof. When the notice is for irregularity, the notice shall set forth particularly the irregularity complained of; in other cases it shall not be necessary to make a specification of points, but it shall be sufficient if the notice state generally the grounds of the motion."

[Rule 8, District Court]

§ 2060. As regards the specification of points this rule is the same as Rule 37 in New York. It is there held that the term "irregularity" as here used applies only to technical and formal irregularities of practice and not to irregularities of substance.[1] Thus it has been held unnecessary to specify irregularities particularly on the following motions: to set aside judgment entered against a minor;[2] or by confession upon an insufficient statement;[3] to open a sale on the ground of surprise;[4] to vacate an order for want of due service;[5] to vacate an execution in violation of a stay of proceedings;[6] to vacate a judgment by default after service of an answer;[7] to vacate an attachment on the ground that its issuance was unauthorized by the facts;[8] to vacate an order for insufficiency of the affidavit on which it was founded.[9] It is necessary that the irregularity should be specified in the notice and a statement in the moving affidavits alone is insufficient.[10] The moving party must specify in his notice all the irregularities upon which he wishes to rely, for only such as are specified will be considered.[11]

[1] Mojarrieta v. Saenz, 80 N. Y. 547.
[2] Peck v. Coler, 20 Hun (N. Y.) 534.
[3] Winnebrenner v. Edgerton, 30 Barb. (N. Y.) 185.
[4] Kellogg v. Howell, 62 Barb. (N. Y.) 280.
[5] Emerson v. Auburn etc. Ry. Co. 13 Hun (N. Y.) 150.
[6] Jackson v. Smith, 16 Abb. Pr. (N. Y.) 201.
[7] Decker v. Kitchen, 21 Hun (N. Y.) 332.
[8] Andrews v. Schofield, 27 N. Y. App. Div. 90.

Digitized by Google

[9] Dauchy v. Miller, 16 Abb. Pr. N. S. (N. Y.) 10.
[10] German American Bank v. Dorthy, 39 N. Y. App. Div. 166.
[11] Bowman v. Sheldon, 5 Sandf. (N. Y.) 657; New York v. Lyons, 24 How. Pr. (N. Y.) 280.

Time—at chambers.

§ 2061. Motions may be noticed for hearing and made at any time, as well in vacation as in term.[1] All motions relating to a cause on trial ought to be made in open court. Such motions are not infrequently entertained by the court at chambers as a matter of convenience, but the practice is not one to be commended. Many motions should be addressed to the court at chambers rather than to the judge at chambers, but the distinction is not jurisdictional.[2]

[1] Johnson v. Velve (Minn. 1902) 90 N. W. 126 (hearing on a demurrer). See § 18.
[2] See § 2086.

Where made—statute.

§ 2062. "Motions must be made in the district in which the action is pending, or in an adjoining district: provided, that no motion shall be made in an adjoining district which shall require the hearing of such a motion at a greater distance from the county seat, where the action is pending, in which such motion is made, than the residence of the judge of the district wherein such action is pending, from such county seat, unless the place where such motion is made, in such adjoining district, is nearer by direct railway communication to said county seat than said residence of the judge of the district is by such railway communication. Orders made out of court, and without notice, may be made by any judge of a district court, at any place in the state; but no order to stay proceedings for a longer time than twenty days shall be made, except upon notice to the adverse party. Motions for judgment upon demurrer, or upon the pleadings, may be made and determined in vacation; and when any motion is made in a district court other than that in which the action is pending, the order, determination, or judgment thereon is to be entered in the same manner, and have the same force and effect, as when made in and by the judge of the district, and in the county in which the action is pending: provided, that demurrers in civil actions may be brought on for argument by either party at any time the court may fix for that purpose, at chambers or at any regular or special term of court, in any county in the judicial district in which the action is pending."

[G. S. 1894 § 5227]

§ 2063. If the judge of the district court in the district where an injunction of the court has been disobeyed is disqualified from acting, proceedings for such contempt may be had in an adjoining district.[1] Where an action was brought in Le Sueur county and the venue was changed to Hennepin county, it was held irregular for the plaintiff to notice a demurrer of the defendant for argument in Sibley county after the change of venue. But it was an irregularity not

Digitized by Google

going to the jurisdiction of the court.[2] Objection that the court did not fix the time for argument on a demurrer as provided in the foregoing statute cannot be raised for the first time on appeal.[3] Probably no order fixing the time is necessary. It is believed that a demurrer may be noticed for argument under this statute at any time informally agreed upon between the judge and the moving party.[4] The limitation on the right of the court to grant a stay of more than twenty days contained in the above statute refers only to an ex parte application made to the court at chambers in cases where the stay is not made and entered as a part of the final decision therein.[5] An issue of law arising upon a demurrer may be noticed for hearing before the court in the county wherein the action is pending at any time, whether it be at a term of the court or not.[6]

[1] State v. District Court, 52 Minn. 283, 53 N. W. 1157.
[2] Flowers v. Bartlett, 66 Minn. 213, 68 N. W. 976.
[3] Fallgatter v. Lammers, 71 Minn. 238, 73 N. W. 860.
[4] Johnson v. Velve (Minn. 1902) 90 N. W. 126.
[5] State v. Searle, 81 Minn. 467, 84 N. W. 324.
[6] Johnson v. Velve (Minn. 1902) 90 N. W. 126.

§ 2064. If the local judge is disqualified by interest a motion may be made before any district judge of the state, if all the parties consent.[1] Under a former statute consent of parties was not necessary.[2]

[1] G. S. 1894 § 4839. See § 14.
[2] See Board of County Com'rs, 22 Minn. 97.

§ 2065. If a motion is made in an adjoining county it is not necessary that the moving papers or the record on appeal show that it is proper to make it there, for the presumption is in favor of the jurisdiction.

Johnston v. Higgins, 15 Minn. 486 Gil. 400; Drake v. Sigafoos, 39 Minn. 367, 40 N. W. 257. See Ingram v. Conway, 36 Minn. 129, 30 N. W. 447.

Refusal to entertain motion or exercise discretion.

§ 2066. A party is entitled to have a motion heard and determined on the merits, if it is made in proper form.[1] While the supreme court cannot compel the district court to exercise its discretion in a particular may, yet it may compel it to exercise its discretion upon a proper motion.[2] No appeal lies from a refusal of the district court to entertain a motion,[3] unless the refusal is in effect a denial of the motion on the merits.[4]

[1] Colvill v. Langdon, 22 Minn. 565.
[2] State v. Otis, 58 Minn. 275, 59 N. W. 1015.
[3] Mayall v. Burke, 10 Minn. 285 Gil. 224.
[4] Ashton v. Thompson, 28 Minn. 330, 9 N. W. 876; McCord v. Knowlton, 76 Minn. 391, 79 N. W. 397.

Practice at the hearing—rule of court—evidence.

§ 2067. "Upon motion or order to show cause, the moving party shall have the opening and the closing of the argument. Before the

Digitized by Google

argument shall commence, the moving party shall introduce his evidence to support the application; the adverse party shall then introduce his evidence in opposition; and the moving party may then introduce evidence in rebuttal or avoidance of the new matter offered by the adverse party. On hearing such motion or order to show cause, no oral testimony shall be received."

[Rule 10, District Court]

§ 2068. This rule against the admission of oral evidence at the hearing is not inflexible. "A party is not entitled, as matter of right, to have a motion involving an issue of fact heard and tried on the oral testimony of witnesses. Ordinarily no oral testimony should be received on the hearing of a motion, but the trial court, in the exercise of a sound discretion, may permit the trial of an issue of fact, involved in a motion, on oral testimony, as if the issue had been raised by the pleadings, or it may on its own motion direct a reference to ascertain and report the facts. This discretion of the court should be exercised only in exceptional cases; for if parties were permitted, as a matter of course, to have every issue of fact in every action tried on oral testimony, and to require the formalities of a final trial of an action on its merits to be observed, it would result in vexatious and burdensome delays, and in many cases in a miscarriage of justice. On the other hand, the power of the court, in its discretion, in exceptional cases, to receive oral testimony on the hearing of a motion, and to require a party who has made an affidavit in the proceeding to appear for cross-examination, is not only wholesome, but in some cases absolutely essential to prevent the circumvention of justice."[1] The rule against the reception of oral evidence on a motion has no application to a proceeding for the appointment of a receiver under the insolvency laws of this state.[2] Affidavits are the usual mode of proof on motions.[3] A stipulation that a motion shall be heard on certain papers is binding.[4]

[1] Strom v. Montana Central Ry. Co. 81 Minn. 346, 84 N. W. 46. See also, State v. Egan, 62 Minn. 280, 64 N. W. 813; Anderson v. Horn, 23 Abb. N. C. (N. Y.) 475.

[2] Prouty v. Hallowell, 53 Minn. 488, 55 N. W. 623.

[3] Sherrerd v. Frazer, 6 Minn. 572 Gil. 406.

[4] Shaw v. Henderson, 7 Minn. 480 Gil. 386.

§ 2069. A duly verified pleading may be used as an affidavit on a motion if its allegations are positive.[1] As a general rule affidavits to be used on motions must be positive and not on information and belief.[2] Affidavits on information and belief should name the informant or the source of information so that the court may determine the value of the statements and whether the absence of an affidavit of a person with positive personal knowledge is excusable under the circumstances.[3] Such affidavits are to be taken as true if uncontroverted.[4] Counter affidavits are generally admissible, but an affidavit of merits cannot be controverted.[5] While our rule of court allows the moving party to introduce evidence in rebuttal or avoidance of new matter offered by the adverse party, he is not generally

Digitized by Google

permitted to introduce affidavits which are merely corroborative.[6] Affidavits attacking or sustaining the reputation for veracity of an affiant on motion are not permissible, according to the better view.[7] After a motion has been made and submitted the moving party has no right, without leave of court or notice to the adverse party to submit to the court additional affidavits in support of his motion.[8] When a motion is made the opposing party has the right to know what affidavits, and other papers and evidence, will be used in support of it, that he may prepare to meet them by counter proof; and he also has the right to be heard in argument upon the evidence submitted. To allow supplemental affidavits to be introduced without notice would deprive him of both these privileges. The proper way to adduce additional evidence after the submission of a motion to the court, is to apply for leave, which being granted, the additional papers should be served upon the opposite party, with notice that they will be presented to the court at a time and place mentioned; or otherwise, by regular notice and service of papers, as on an original motion. The adverse party will then be allowed the same opportunity to oppose them, that he enjoyed upon the first hearing in regard to the proof then introduced.[9] Whether affidavits presented out of time shall be received is discretionary with the court.[10]

[1] Stees v. Kranz, 32 Minn. 313, 20 N. W. 241; Fowler v. Burns, 7 Bosw. (N. Y.) 637.

[2] McRoberts v. Washburne, 10 Minn. 23 Gil. 8.

[3] Melville v. Brown, 16 N. J. L. 363. Knudson v. Matuska etc. Co. 1 How. Pr. N. S. (N. Y.) 154; Whitlock v. Roth, 10 Barb. (N. Y.) 78.

[4] McRoberts v. Washburne, 10 Minn. 23 Gil. 8; Excise Commissioners v. Purdy, 13 Abb. Pr. (N. Y.) 434.

[5] See § 1416.

[6] Jacobs v. Miller, 10 Hun (N. Y.) 230; Childs v. Fox, 18 Abb. Pr. (N. Y.) 112.

[7] Merritt v. Baker, 11 How. Pr. (N. Y.) 456.

[8] Dunwell v. Warden, 6 Minn. 287 Gil. 194.

[9] Id.

[10] Farmers' Nat. Bank v. Backus, 64 Minn. 43, 66 N. W. 5.

§ 2070. Where the affidavits offered in opposition to a motion show that the moving party is entitled to the relief sought, though upon a ground not stated in the moving papers, he may take advantage of the ground thus shown.

Richards v. White, 7 Minn. 345 Gil. 271.

§ 2071. On motions in the district court, what affidavits may be read, and in what order, and whether a continuance shall be granted to give a party opportunity to procure further proof, are matters of practice in the discretion of that court and the supreme court will not reverse its action unless it is evident that the appellant was not allowed a reasonable opportunity to be heard.

Carson v. Getchell, 23 Minn. 571.

Digitized by Google

§ 2072. Affidavits made out of the state before a notary public may be used on the hearing of motions without further authentication than the seal of the notary.

G. S. 1894 § 5687. See Hickey v. Collom, 47 Minn. 565, 50 N. W. 918; Wood v. St. Paul City Ry. Co. 42 Minn. 411, 44 N. W. 308.

Application for order without notice—rule of court.

§ 2073. "Any party applying to any judge or court commissioner for any order to be granted without notice, except an order to show cause, shall state in his affidavit whether he has made any previous application for such order, and if such previous application has been made upon the same state of facts, every subsequent application shall be refused. When an application made to any judge for the approval of any bond or undertaking, or for an order to show cause, or any ex parte order is refused, the application shall not be renewed before another judge without leave."

[Rule 17, District Court] As to renewal of motions see § 2078.

Relief which may be awarded.

§ 2074. If there is an appearance and a contest on the merits it is believed that in this state the court may grant any relief warranted by the facts presented, regardless of the prayer. It has been held that where the notice of motion asks for specific relief, and also for "such further or other relief in the premises, as to the court shall seem meet and proper" the court may, there being an appearance and contest by the adverse party, grant any relief compatible with the facts presented, taking care, however, that the adverse party be not taken by surprise as to such further relief.[1] In case of default the relief awarded is strictly limited in nature and degree to that specifically prayed, a general prayer for relief not even authorizing costs.[2]

[1] Landis v. Olds, 9 Minn. 90 Gil. 79; Gerdtzen v. Cockrell, 52 Minn. 501, 55 N. W. 58.

[2] Rogers v. Toole, 11 Paige (N. Y.) 212; Northrop v. Van Dusen, 5 How. Pr. (N. Y.) 134.

Non-appearance on motion—rule of court.

§ 2075. "Whenever notice of a motion shall be given or an order to show cause served, and no one shall appear to oppose the motion or application the moving party shall be entitled, on filing proof or admission of service, to the relief or order sought, unless the court shall otherwise direct. If the moving party shall not appear or shall decline to proceed, the opposite party, upon filing like proof of service, shall be entitled to an order of dismissal."

[Rule 9, District Court] See Farrington v. Wright, 1 Minn. 24 Gil. 191; Steele v. Taylor, 1 Minn. 275 Gil. 210.

§ 2076. The supreme court will not review an order of the district court under this rule. The proper practice is for the aggrieved party to move the district court to open the default.

Digitized by Google

Dols v. Baumhoefer, 28 Minn. 387, 10 N. W. 470; Thompson v. Haselton, 34 Minn. 12, 24 N. W. 199.

Strangers to record cannot move.

§ 2077. In this state there is no such practice as permitting a stranger to an action to take any part, or make any application or motion in it, except on application for leave to become a party, and have his rights in the matter involved adjudicated. Nor can he become a party, not for the purpose of joining in the litigation, but of arresting it. There is no way in which a stranger to an action may stop the progress of it, but through an adverse action.

Mann v. Flower, 26 Minn. 479, 5 N. W. 365; Hunter v. Cleveland Co-operative Stove Co. 31 Minn. 505, 18 N. W. 645; Hunt v. O'Leary, 78 Minn. 281, 80 N. W. 1120; Id. 84 Minn. 200, 87 N. W. 611; Steele v. Taylor, 1 Minn. 275 Gil. 210.

RENEWAL OF MOTION

Upon same facts.

§ 2078. When a motion is once denied, whether on the merits or on technical grounds, the defeated party cannot renew it upon the same state of facts without leave of court,[1] unless the order denying it is by its terms "without prejudice."[2] A motion to vacate an order denying a motion is tantamount to a renewal of the original motion and cannot be made without leave.[3] A motion for entirely different relief, though based upon the same facts, is probably not within the rule requiring leave.[4] A different party to the action may move for the same relief without leave.[5] Granting a party leave to renew a motion on the same state of facts is a matter lying almost wholly in the discretion of the trial court.[6] An order to show cause why an application should not be granted is sufficient leave to renew the application.[7] An order denying a motion to dismiss the second motion is equivalent to leave.[8]

[1] Irvine v. Myers, 6 Minn. 558 Gil. 394; Griffin v. Jorgenson, 22 Minn. 92; Weller v. Hammer, 43 Minn. 195, 45 N. W. 427; Belmont v. Erie Ry. Co. 52 Barb. (N. Y.) 637; Stacy v. Stephen, 78 Minn. 480, 81 N. W. 391. See §§ 1425, 2073.

[2] In re Minneapolis Ry. Terminal Co. 38 Minn. 157, 36 N. W. 105.

[3] Mitchell v. Allen, 12 Wend. (N. Y.) 290; Pierce v. Kneeland, 9 Wis. 32; Little v. Leighton, 46 Minn. 201, 48 N. W. 778.

[4] Frost v. Flint, 2 How. Pr. (N. Y.) 125.

[5] N. J. Zinc Co. v. Blood, 8 Abb. Pr. (N. Y.) 147.

[6] Irvine v. Myers, 6 Minn. 558 Gil. 394; Little v. Leighton, 46 Minn. 201, 48 N. W. 778.

[7] Goodrich v. Hopkins, 10 Minn. 162 Gil. 130.

[8] O'Hara v. H. L. Collins Co. 84 Minn. 435, 87 N. W. 1023.

Upon different facts.

§ 2079. A motion may be renewed on a materially different state of facts without leave as of right. But the new matter which will alone justify the renewal of a motion without leave must be some-

Digitized by Google

thing which has happened, or for the first time come to the knowledge of the party moving, since the decision of the former motion.

Belmont v. Erie Ry. Co. 52 Barb. (N. Y.) 637 (leading case on subject); Riggs v. Pursell, 74 N. Y. 370. See O'Hara v. H. L. Collins Co. 84 Minn. 435, 87 N. W. 1023.

Either party may apply for modification of order.

§ 2080. It is well settled that whatever can be done upon motion to the court may, by the court, upon further motion by either party, be altered, modified or wholly undone. Whether it be the party whose motion was denied, or the party moved against who asks the favor, if proper cause exists, the practice is the same. In either case the order previously entered is opened or vacated, and the matter heard anew, precisely as if it had never been argued before, and as if the principal or original motion, on all the papers then presented, had then, for the first time, been made.

Weiser v. City of St. Paul (Minn. 1902) 90 N. W. 8; Belmont v. Erie Ry. Co. 52 Barb. (N. Y.) 637.

Practice.

§ 2081. The practice on a renewed motion is substantially the same as on an original motion, and is almost wholly in the discretion of the trial court. The adverse party is entitled to notice and copies of the new papers. If the facts are the same the court may entertain the renewed motion on the original papers, but generally an entire new set of papers should be prepared. Under an order to show cause why leave should not be granted to renew a motion once denied the court may, after granting leave, entertain the motion instanter, if no objection to want of notice is made. It is common to give notice of an application for such leave and in the same notice to give notice of renewing such motion conditionally in case such leave be granted.

Fowler v. Huber, 7 Robt. (N. Y.) 52; Andrews v. Cross, 17 Abb. N. C. (N. Y.) 92; White v. Munroe, 33 Barb. (N. Y.) 650; Jensen v. Barbour, 12 Mont. 566; Belmont v. Erie Ry. Co. 52 Barb. (N. Y.) 637.

Appeal.

§ 2082. A renewal of a motion is a waiver of the right to appeal from the order made on the original motion.[1] The pendency of an appeal from an order is no bar to an application to vacate the order and renew the motion upon which it was made.[2] The affirmance of an order on appeal does not add to its effect and preclude the renewal of the motion, in the discretion of the court below, upon a different state of facts.[3]

[1] Harris v. Brown, 93 N. Y. 390.

[2] Belmont v. Erie Ry. Co. 52 Barb. (N. Y.) 653.

[3] Riggs v. Pursell, 74 N. Y. 370.

Digitized by Google

ORDERS

Definition of order.

§ 2083. "Every direction of a court or judge, made or entered in writing, and not included in a judgment, is denominated an order." [G. S. 1894 § 5224]

§ 2084. We have no interlocutory judgments in our practice.[1] A determination or direction of the court which would have been called an interlocutory judgment under the old practice is now an order. The above definition of an order was taken from the New York code. In their report the Code Commissioners said, "To avoid the confusion incident to the use of the word judgment, in two senses, one as interlocutory, and the other as final, we have thought it better to use it only in the latter sense and to designate all other written directions of a court or judge, as orders."[2] And the above is properly to be taken as an abrogation of interlocutory judgments rather than as a definition of an order. As a definition it is certainly very imperfect.

[1] Belmont v. Ponvert, 3 Robt. (N. Y.) 693; Sellers v. Union Lumbering Co. 36 Wis. 398. See Thompson v. Bickford, 19 Minn. 17 Gil. 1.

[2] Report, Code Commissioners, 182.

§ 2085. There is a distinction between an order and a mere direction for an order. An order may be operative, except for purposes of appeal, before it is filed or entered.[1] It would seem that an order cannot be appealed from until it is entered and of course it cannot be entered until it is filed.[2] If the party in whose favor an order is made fails to file it the adverse party may compel him to do so upon application to the court.[3]

[1] Aetna Ins. Co. v. Swift, 12 Minn. 437 Gil. 326.

[2] See § 2089.

[3] Aetna Ins. Co. v. Swift, 12 Minn. 437 Gil. 326.

Distinction between chamber and court orders.

§ 2086. At common law and in the practice of most of the states there is an important distinction between chamber orders and orders of the court. While the distinction exists in our practice it is of trifling practical importance because all orders may be made as well in vacation as in term and as well at chambers as in open court and because the court may sit at chambers as well as the judge.[1] The district judge constitutes the district court and he may entertain all motions at chambers or elsewhere in his district,[2] and probably anywhere within the state.[3] The distinction between chamber orders and court orders is therefore immaterial. An order made at chambers will be sustained regardless of its form or the opinion entertained by the judge as to its character.[4] It is a common practice in some districts of this state for the court in signing court orders to employ the phrase, "By the court." The employment of this phrase is objectionable because it is utterly useless. It matters not how the court characterizes an order. The court cannot change the nature

Digitized by Google

of an order. The classification of orders must always be made upon their subject matter, and not upon the name by which a judge, attorney or other officers may have designated them.[5] While the application for a court order should properly be addressed to the "court at chambers" instead of to the "judge at chambers" it has been held that a mistake in this regard is immaterial.[6]

[1] G. S. 1894 § 5388; Yale v. Edgerton, 11 Minn. 271 Gil. 184; Rollins v. Nolting, 53 Minn. 232, 54 N. W. 1118; Fallgatter v. Lammers, 71 Minn. 238, 73 N. W. 860; Johnson v. Velve (Minn. 1902) 90 N. W. 126.

[2] Yale v. Edgerton, 11 Minn. 271 Gil. 184; Marty v. Ahl, 5 Minn. 27 Gil. 14.

[3] See State v. District Court, 52 Minn. 283, 53 N. W. 1157; Flowers v. Bartlett, 66 Minn. 213, 68 N. W. 976.

[4] Yale v. Edgerton, 11 Minn. 271 Gil. 184; Marty v. Ahl, 5 Minn. 27 Gil. 14; Rogers v. Greenwood, 14 Minn. 333 Gil. 256; Johnston v. Higgins, 15 Minn. 486 Gil. 400; State v. Macdonald, 26 Minn. 445, 4 N. W. 1107; Ives v. Phelps, 16 Minn. 451 Gil. 407.

[5] Marty v. Ahl, 5 Minn. 27 Gil. 14.

[6] Yale v. Edgerton, 11 Minn. 271 Gil. 184; Rogers v. Greenwood, 14 Minn. 333 Gil. 256; Johnston v. Higgins, 15 Minn. 486 Gil. 400.

§ 2087. In one of our cases it was said that "the power and jurisdiction of a judge at chambers are precisely those of a judge in vacation. The term 'chambers' means the private room or office of a judge, where, for the convenience of parties, he hears such matters and transacts such business as a judge in vacation is authorized to hear, and which do not require a hearing by the judge sitting as a court. The chambers of a judge are not an element of jurisdiction, but of convenience. For the purposes of jurisdiction, the chambers of a judge are wherever he is found within his district, and any business he is authorized to do as a judge in vacation is chamber business. The powers of a judge in vacation are often confounded with those of a court in vacation, under our statute which declares the district courts of the state to be always open for all business except the trial of issues of fact. A judge in vacation has no power to hear and determine any matter which the court only can hear. When, under the statute, he hears such matters in vacation, he sits as a court, and not as a judge in vacation or at chambers." [1] This statement is somewhat misleading because it does not explicitly recognize the fact that a court may sit at chambers as well as a judge. The power of the judge at chambers is confined to such matters as granting orders to show cause, extending time to plead, letting to bail, granting injunctions and otherwise putting the process of the court in motion, and generally such preliminary or intermediate matters as are allowed, of course, by a judge on a prima facie showing, and which might be allowed by a single judge of a court composed of several judges.[2]

[1] Hoskins v. Baxter, 64 Minn. 226, 66 N. W. 969.

Digitized by Google

[2] Pulver v. Grooves, 3 Minn. 359 Gil. 252; Gere v. Weed, 3 Minn. 352 Gil. 249; State v. Hill, 10 Minn. 63 Gil. 45; Yale v. Edgerton, 11 Minn. 271 Gil. 184; Rogers v. Greenwood, 14 Minn. 333 Gil. 256; Marty v. Ahl, 5 Minn. 27 Gil. 14; Johnston v. Higgins, 15 Minn. 486 Gil. 400; Hoffman v. Mann, 11 Minn. 364 Gil. 262; McNamara v. Minnesota Central Ry. Co. 12 Minn. 388 Gil. 269; State v. District Court, 52 Minn. 283, 53 N. W. 1157; State v. Duluth Street Ry. Co. 47 Minn. 369, 50 N. W. 332; Hoskins v. Baxter, 64 Minn. 226, 66 N. W. 969; State v. Macdonald, 26 Minn. 445, 4 N. W. 1107; Ives v. Phelps, 16 Minn. 451 Gil. 407.

Filing—rule of court.

§ 2088. "All orders, together with the affidavits and other papers upon which the same are based, which orders are not required to be served, shall, within one day after the making thereof, be filed in the office of the clerk, by the party applying for such orders. Orders required to be served shall be so filed within five days after the service thereof."

[Rule 15, District Court]

Entry.

§ 2089. There is no statute or rule of court requiring the clerk to enter an order in full in any record book. There is no order book in our practice corresponding to the judgment book. When an order is filed the clerk makes a note of it in his register. When a direction for an order is filed the order directed must be entered in full in the register.[1] Our statutes upon this subject are very incomplete. While there is no statute specifically requiring the clerk to enter an order except upon a direction, it is his clear duty to do so under the general statute directing him to enter in his register "a minute of each paper filed in the cause and all proceedings therein."[2] An appeal cannot be taken until the order is entered.[3]

[1] Aetna Ins. Co. 12 Minn. 437 Gil. 326.

[2] G. S. 1894 § 861.

[3] See Macauley v. Ryan, 55 Minn. 507, 57 N. W. 151.

Mode of serving orders and notices—rule of court.

§ 2090. "In cases where service of any order or notice is required to be made, if the party directed to make the service and the person upon whom service is to be made, reside in the same city, village or town, the service shall be personal. In all other cases such service shall be by mail, or in such other manner as the court may direct."

[Rule 21, District Court]

Proof of service—rule of court.

§ 2091. "Proof of personal service shall be made by the affidavit of the person making the service. The affidavit shall fully set forth the time, place, and manner of service, and that the person upon whom the service was made was to the affiant well known to be the person, co-partnership, or corporation, agent or attorney, upon whom such service was directed to be made.

Digitized by Google

If such service be made by mail, the proof thereof shall be (substantially) in the following form, to-wit:

State of Minnesota } ss.
County of }

I, , of (street and No., if any) in the of , in said county, of lawful age, being first duly sworn, on my said oath say, that at said on the day of 19 , I did then and there deposit in the post-office within and for said a true copy (or in case more than one service was made, true copies) of the hereto attached, which copy was (or, which copies were) properly enveloped, sealed, postage paid thereon and directed to the following named persons, co-partnerships or corporations, respectively in said order named, at the places respectively as follows, to-wit:

One to at No. Street, in the of in the State of

One to at No. Street, in the of in the State of

Proof of service shall in all cases be filed in the office of the clerk within five days after the making thereof.

Provided that the written admission of service by the attorney of record in any action or proceeding shall be sufficient proof of service."

[Rule 22, District Court]

§ 2092. It is not necessary that the affidavit of service of a summons by a private person should state that the person upon whom the service was made was to affiant known to be the person upon whom service was required to be made. The above rule has no application to proof of the service of a summons, but only to the service of such orders or notices as the court directs to be made on particular persons.[1] The last clause of the rule probably applies only when the order directs service to be made on the attorney or does not explicitly direct it to be made on the party.

[1] Cunningham v. Water-Power Sandstone Co. 74 Minn. 282, 77 N. W. 137.

Pro forma or consent orders.

§ 2093. Orders are sometimes entered upon consent of parties and good practice requires that the consent should be in writing and incorporated in the order.[1] "Regarding the effect of a pro forma order upon the rights of the party against whom it is made, if it appears affirmatively, or by any fair presumption, that he consented to a disposition of the motion upon which it was made, without any examination or consideration of the merits or questions involved, no good reason exists why he ought not to be concluded by it. The order in such a case should be treated as a finality and affirmed, because the party has voluntarily consented to a decision which is not reviewable. If he never agreed to the making and entry of an order of that kind, and that fact appears of record, the pro forma order

Digitized by Google

would probably be reversed on appeal, as unauthorized, with a direction to the court below to proceed and dispose of the matter on the merits. If the fact of non-consent does not appear, the party prejudiced would undoubtedly be entitled, upon application and motion in the court below, to have the order vacated, and for a decision upon the merits—a remedy clearly within the supervisory and appellate jurisdiction of this court to enforce, in case it should be refused." [2]

[1] Smith v. Grant, 11 Civil Pro. (N. Y.) 354.

[2] Johnson v. Howard, 25 Minn. 558. See also, Colvill v. Langdon, 22 Minn. 565; State v. District Court, 52 Minn. 283, 53 N. W. 1157.

Imposing terms or conditions.

§ 2094. When an order is granted as a matter of favor or discretion the court may impose reasonable terms or conditions.[1] But when a party is entitled to an order as a matter of strict right the court has no such authority.[2]

[1] Flaherty v. Minneapolis etc. Ry. Co. 39 Minn. 328, 40 N. W. 160; Deering v. McCarthy, 36 Minn. 302, 30 N. W. 302.

[2] Chapin v. Foster, 101 N. Y. 4.

Order as an estoppel.

§ 2095. An order affecting a substantial right, and appealable, made in determining a motion after a full hearing has been had on a controverted question of fact, and deciding a point actually litigated, is an adjudication binding upon the parties in a subsequent action and conclusive upon the point passed upon.[1] The rule is otherwise when the order is not appealable.[2] The estoppel applies in any event only to the facts actually litigated and not to such as might have been litigated.[3] The doctrine of estoppel, as applied to orders on motions, does not in anyway affect the right of renewing motions.[4]

[1] Truesdale v. Farmers' Loan & Trust Co. 67 Minn. 454, 70 N. W. 568; Fitterling v. Welch, 76 Minn. 441, 79 N. W. 500; Thomas v. Hale, 82 Minn. 423, 85 N. W. 423. See also, Volmer v. Stageman, 25 Minn. 235; Baker v. Wyman, 47 Minn. 177, 49 N. W. 649.

[2] Kanne v. Minneapolis etc. Ry. Co. 33 Minn. 419, 23 N. W. 854.

[3] Heidel v. Benedict, 61 Minn. 170, 63 N. W. 490.

[4] Riggs v. Pursell, 74 N. Y. 370.

Digitized by Google

CHAPTER XXV

STAY OF PROCEEDINGS

General statement.

§ 2096. Within reasonable limits it is discretionary with the trial court to stay proceedings.[1] Being a matter of discretion the court may attach conditions.[2] Execution on a money judgment may be stayed for six months as of right upon giving a bond.[3] It is provided by statute that "no order to stay proceedings for a longer time than twenty days shall be made, except upon notice to the adverse party."[4] It has been held that this provision refers only to an ex parte application made to the court at chambers in cases where the stay is not made and entered as a part of the final decision.[5] A stay for the purpose of preparing a "case" and making a motion for a new trial is customarily granted as a matter of course.[6] An order denying an application for a stay is not appealable.[7] Where an order to show cause why a stay should not be granted provides a temporary stay "until the further order of the court," this temporary stay, pending the hearing on the order to show cause, expires by its own limitation with the order of the court denying the permanent stay.[8] A stay may be granted to compel the payment of the costs of another action for the same cause;[9] to perfect a judgment to be used as a setoff;[10] to await administration in probate court where the defendant in the district court has paid a debt due the decedent to the heir;[11] to await the appointment of a general guardian before allowing an action by a lunatic to proceed;[12] to await the termination of garnishment proceedings;[13] to await the determination of a motion for an injunction;[14] to await the determination of an action involving the liability of a surety.[15] The setting aside of an order granting a stay is a matter of discretion.[16] A stay until a motion for an injunction may be heard and determined is not revived nor continued by an appeal, with a stay bond, from the order denying the injunction.[17]

[1] Danner v. Capehart, 41 Minn. 294, 42 N. W. 1062.
[2] Graves v. Backus, 69 Minn. 532, 72 N. W. 811; Dennis v. Nelson, 55 Minn. 144, 56 N. W. 589.
[3] G. S. 1894 §§ 5480–5485.
[4] G. S. 1894 § 5227. See §§ 2062, 2441a.
[5] State v. Searle, 81 Minn. 467, 84 N. W. 324. See Danner v. Capehart, 41 Minn. 294, 42 N. W. 1062.
[6] See § 1765. [7] Graves v. Backus, 69 Minn. 532, 72 N. W. 811.
[8] Id. [9] Gerrish v. Pratt, 6 Minn. 53 Gil. 14.
[10] Lindholm v. Itasca Lumber Co. 64 Minn. 46, 65 N. W. 931.
[11] Vail v. Anderson, 61 Minn. 552, 64 N. W. 47.
[12] Plympton v. Hall, 55 Minn. 22, 56 N. W. 351.
[13] Blair v. Hilgedick, 45 Minn. 23, 47 N. W. 310; Duxbury v. Shanahan, 84 Minn. 353, 87 N. W. 944.
[14] Sullivan v. Weibeler, 37 Minn. 10, 32 N. W. 787.
[15] Richardson v. Merritt, 74 Minn. 354, 77 N. W. 407, 234, 968.
[16] Danner v. Capehart, 41 Minn. 294, 42 N. W. 1062.
[17] Sullivan v. Weibeler, 37 Minn. 10, 32 N. W. 787.

Digitized by Google

CHAPTER XXVI
ARBITRATION

STATUTORY ARBITRATION

What may be submitted—statute.

§ 2097. "All controversies which can be the subject of a civil action may be submitted to the decision of one or more arbitrators in the manner provided in this chapter. No such submission shall be made respecting the claim of any person to any estate, in fee or for life, to real estate; but any claim to an interest for a term of years, or for one year or less, in real estate, and controversies respecting the partition of lands between joint tenants, or tenants in common, or concerning the boundaries of lands, or concerning the admeasurement of dower may be submitted to arbitration."

[G. S. 1894 §§ 6210, 6211]

§ 2098. Controversies concerning equitable rights may be submitted,[1] as for example, whether a nuisance should be abated.[2] It has been held that the term "estate" as used in the statute means legal estate and that claims to an equitable estate may be submitted.[3] The inhibition applies to cases where the question of title is only one of several questions but so intermingled with the others that it must necessarily be passed upon.[4] A controversy as to the performance of an agreement to convey real estate may be submitted.[5] Whether a conveyance of land in fee absolute on its face shall have effect only as a mortgage cannot be submitted.[6] A submission of a question of title is absolutely void and incapable of ratification.[7] A dispute as to title between two adjoining owners is not necessarily a dispute as to "boundaries" within the meaning of the statute.[8] Questions regarding land which do not involve the title may be submitted.[9]

[1] Tomlinson v. Hammond, 8 Iowa 40.
[2] Richards v. Holt, 61 Iowa 529.
[3] Olcott v. Wood, 14 N. Y. 32.
[4] Gallagher v. Kern, 31 Mich. 138.
[5] Blair v. Wallace, 21 Cal. 318.
[6] Russell v. Clark, 60 Wis. 284.
[7] Wiles v. Peck, 26 N. Y. 42. See Spencer v. Winselman, 42 Cal. 479; Butler v. Mace, 47 Me. 423; Thygerson v. Whitbeck, 5 Utah, 406.
[8] Lang v. Salliotte, 79 Mich. 505.
[9] Quinn v. Besse, 64 Me. 366; Fitch v. Constantine Hydraulic Co. 44 Mich. 74; Wood v. Treleven, 74 Wis. 577.

Partner no implied power to submit.

§ 2099. A member of a partnership has not implied authority to bind his copartners by a submission to arbitration of controversies relating to the partnership business.

Walker v. Bean, 34 Minn. 427, 26 N. W. 232.

Digitized by Google

Does not operate as discontinuance.

§ 2100. In this state, contrary to the prevailing rule elsewhere, a submission to arbitration does not operate as a discontinuance.

Hunsden v. Churchill, 20 Minn. 408 Gil. 360.

Form of agreement for submission—statute.

§ 2101. "The parties shall appear in person, or by their lawful agents or attorneys, before any justice of the peace, and shall there sign and acknowledge an agreement in substance as follows:

Know all men, that of and of have agreed to submit the demand a statement whereof is hereto annexed, (and all other demands between them as the case may be) to the determination of and , the award of whom or the greater part of whom, being made and reported within from this day, to the district court for the county of , the judgment thereon shall be final; and if either of the parties shall neglect to appear before the arbitrators, after due notice given him of the time and place appointed for hearing the parties, the arbitrators may proceed in his absence. Dated this of 19 .

.....

.....

And the justice shall subjoin to the said agreement his certificate, in substance as follows:

State of Minnesota } ss.
County of }

Then the above named and personally appeared, (or the above named personally, and the said by the said , his attorney, appeared, as the case may be) and acknowledged the above instrument, by them signed, to be their free act.

Before me ,
Justice of the Peace."

[G. S. 1894 § 6212]

§ 2102. The jurisdiction of the arbitrators under the statute over the matter referred to them depends on a compliance with the statute. It is a special jurisdiction which can be created only in the manner prescribed by the statute and every material requirement of the statute must be complied with. The acknowledgment must be made before a justice of the peace and one before any other officer is a nullity. The objection is not waived by a voluntary appearance.[1] It is indispensable that the agreement for submission name the arbitrators[2] and their names must be inserted before the acknowledgment.[3] The description of the subject matter submitted need not be as specific as would be required in a pleading.[4] The agreement may stipulate against an appeal,[5] and it is advisable to make provision as to costs.[6] An agreement to submit should be liberally construed so as to encourage the settlement of disputes by arbitration.[7]

[1] Barney v. Flower, 27 Minn. 403, 7 N. W. 823.

[2] Holdridge v. Stowell, 39 Minn. 360, 40 N. W. 259.

[3] N. W. Guaranty Loan Co. v. Channell, 53 Minn. 269, 55 N. W. 121.

Digitized by Google

[4] Heglund v. Allen, 30 Minn. 38, 14 N. W. 57.
[5] Daniels v. Willis, 7 Minn. 374 Gil. 295.
[6] Washburne v. Lufkin, 4 Minn. 466 Gil. 362.
[7] See §§ 2118, 2129.

Scope of submission—statute.

§ 2103. "If any specific demand is submitted to the exclusion of others, the demand submitted shall be set forth in the statement annexed to the agreement; otherwise it is not necessary to annex any statement of a demand, and the words in the agreement relating to such statement may be omitted, and the submission may then be of all demands between the parties, or of all demands which either of them has against the other, or the submission may be varied, in this respect, in any other manner, according to the agreement of the parties."

[G. S. 1894 § 6213]

Revoking submission—notice to parties—statute.

§ 2104. "Neither party has power to revoke a submission, made as herein provided, without the consent of the other; and if either of them neglects to appear before the arbitrators, after due notice, the arbitrators may, nevertheless, proceed to hear and determine the cause upon the evidence produced by the other party."

[G. S. 1894 § 6214]

§ 2105. At common law a commission may be revoked at any time before the award is made.[1] An arbitration is void unless both parties have notice of the time and place of meeting and an opportunity to be heard.[2]

[1] Minneapolis etc. Ry. Co. v. Cooper, 59 Minn. 290, 61 N. W. 143; Holdridge v. Stowell, 39 Minn. 360, 40 N. W. 259.
[2] Curtis v. Sacramento, 64 Cal. 102; Janney, Semple & Co. v. Goehringer, 52 Minn. 428, 54 N. W. 481.

Fixing time and place of hearing—statute.

§ 2106. "The arbitrators thus selected shall appoint a time and place for the hearing, and shall adjourn the same from time to time as may be necessary; and on the application of either party, and for good cause, they may postpone such hearing to a time not extending beyond the day fixed in such submission for rendering their award."

[G. S. 1894 § 6215]

Arbitrators must be sworn—statute.

§ 2107. "Before proceeding to hear any testimony, the arbitrators shall be sworn, by an officer authorized to administer oaths, faithfully and fairly to hear and examine the matters in controversy, and to make a just award according to law and evidence."

[G. S. 1894 § 6216]

§ 2108. The requirement of an oath may be waived.

See Hill v. Taylor, 15 Wis. 190; Day v. Hammond, 57 N. Y. 479.

Digitized by Google

Testimony to be given on oath—common law awards not abolished—statute.

§ 2109. "The arbitrators shall hear and receive the testimony of either party, under oath; and shall have power to administer all necessary oaths to parties or witnesses appearing before them. Nothing in this chapter contained shall preclude the submission and arbitrament of controversies, according to the common law."

[G. S. 1894 § 6228]

§ 2110. At common law the testimony need not be on oath unless required by the submission. Where parties to a controversy execute an agreement to submit it to arbitration and it is clear that it was intended to be a statutory arbitration, but it is not valid as such, by reason of failing to comply with some essential requirements of the statute, it cannot have effect as a common law submission.

Holdridge v. Stowell, 39 Minn. 360, 40 N. W. 259.

Time for making award—statute.

§ 2111. "The time within which the award shall be made and reported may be varied according to the agreement of the parties; and no award made after the time so agreed upon shall have any legal effect or operation, unless made upon a recommitment of the award by the court to which it is reported."

[G. S. 1894 § 6217]

§ 2112. The time may be extended without the formalities prescribed in § 2101.

Heglund v. Allen, 30 Minn. 38, 14 N. W. 57. See Hill v. Taylor, 15 Wis. 190.

Form of award—statute.

§ 2113. "To entitle any award to be enforced, according to the provisions of this chapter, it shall be in writing, subscribed by the arbitrators making the same, and attested by a subscribing witness."

[G. S. 1894 § 6218]

§ 2114. An award not attested is not an absolute nullity.[1] It should be attested before the time for making the award has expired.[2] An award is sufficient if a majority of the arbitrators subscribe to it and it is not necessary that it should appear why the others did not.[3] It is not necessary that the award should be expressed in technical language. Only the general conclusion should be given. It is not necessary that conclusions of law and fact should be stated separately. The reasons for the decision should not be given nor the evidence upon which it is based. No preliminary recitals are necessary to show jurisdiction or regularity in the proceedings.

[1] Lovell v. Wheaton, 11 Minn. 92 Gil. 57. But see Darling v. Darling, 16 Wis. 644; New Albany etc. Ry. Co. v. McPherters, 12 Ind. 472.

[2] New Albany etc. Ry. Co. v. McPherters, 12 Ind. 472.

[3] Durge v. Horicon etc. Co. 22 Wis. 691.

Digitized by Google

The return—statute.

§ 2115. "The award shall be delivered by one of the arbitrators to the clerk of the court designated in the agreement, or shall be inclosed and sealed by them, and transmitted to the clerk, and shall remain sealed until opened by the court. The award may be returned at any term or session of the court that is held within the time limited in the submission; and the parties shall attend at every such term or session, without any express notice for that purpose, in like manner as if an action for the same cause was pending between them in the same court; but the court may require actual notice to be given to either party, when it shall appear necessary or proper, before it proceeds to act upon the award."

[G. S. 1894 §§ 6219, 6223]

§ 2116. An award need not be filed in term.[1] As soon as arbitrators file their return they become functus officio and cannot thereafter amend or alter the award except by order of court.[2] The district court acquires jurisdiction and control of the proceeding by the filing of the award.[3]

[1] Lovell v. Wheaton, 11 Minn. 92 Gil. 57.

[2] Flannery v. Sahagian, 134 N. Y. 85; Dudley v. Thomas, 23 Cal. 367.

[3] Holdridge v. Stowell, 39 Minn. 360, 40 N. W. 259.

Motion to vacate—grounds—statute.

§ 2117. "Any party complaining of such award may move the court designated in such submission to vacate the same, upon either of the following grounds:

(1) That such award was procured by corruption, fraud, or other undue means.

(2) That there was evident partiality or corruption in the arbitrators, or either of them.

(3) That the arbitrators were guilty of misconduct, in refusing to postpone the hearing upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy, or any other misbehavior by which the rights of any party have been prejudiced.

(4) That the arbitrators exceeded their powers, or that they so imperfectly executed them that a mutual, final and definite award on the subject matter submitted was not made.

(5) That the award is contrary to law and evidence."

[G. S. 1894 § 6221]

§ 2118. The motion must be made before the award is confirmed by the court. In practice it is frequently made at the same time as the motion to confirm. A confirmation may be set aside to enable a party to move to vacate.[1] The grounds stated in the statute are exclusive.[2] An award is conclusive and final as to the questions decided unless it is modified, corrected or vacated in the manner and upon the specific grounds provided by the statute.[3] The terms "misconduct" and "misbehavior" imply a wrongful intention and not a mere error of judgment.[4] Courts favor awards and every presumption is indulged in favor of their fairness. The burden of proof is

Digitized by Google

upon the party seeking to set them aside and they will not be set aside for fraud, partiality or misconduct except upon clear and strong proof.[5] The exclusion of material evidence is ordinarily fatal to an award [6] and the party attacking the award on this ground is only required to prove the exclusion by a fair preponderance of evidence.[7] Our statute, unlike that of most of the states, provides that an award may be set aside because "contrary to law and evidence." It is generally held that an award is not subject to review as to the merits either upon the law or the evidence [8] and that arbitrators may, unless restricted by the submission, disregard strict rules of law or evidence and decide according to their sense of equity.[9] It is difficult to believe that our statute was designed to overrule these well established principles. It may be that the statute, so far as errors of law are concerned, would be construed to mean a failure to apply a rule of law which it is apparent, from the face of the award, that they intended to apply.[10] The phrase "contrary to evidence," as used in the statute, may possibly be construed to refer to cases where some mistake of fact appears on the face of the award.[11] For a court to review the sufficiency of the evidence to justify an award would be an extraordinary proceeding. If such was the intention of the legislature it is strange that no provision was made to have the evidence taken down. The power of arbitrators is confined strictly to matters submitted to them and if they exceed that limit, the award will, in general, be void and oral evidence is admissible to show that they exceeded their powers.[12] The arbitrators are bound to consider and determine all the questions submitted to them and if they fail to do so the award may be set aside. The presumption is that they did their duty and considered every matter submitted.[13] The submission of all matters in dispute growing out of a particular transaction or contract will estop the parties from thereafter claiming that the award is not conclusive and does not embrace a decision upon some particular matters.[14] Where an award does not appear upon its face to be definite and final and does not contain the data, or means of working out a definite and final determination of the whole controversy submitted, it should be set aside.[15] An award may be set aside in part.[16] An arbitrator cannot be permitted to impeach his own award, but he may impeach an award in which he took no part and give evidence of misconduct on the part of other arbitrators.[17] An award will not be set aside on the ground that the arbitrators have not acted on all matters submitted to them, or that they have exceeded their powers unless the party complaining has been prejudiced.[18] An award may be set aside on the ground that it was procured by false testimony and fraudulent practices.[19]

[1] Brace v. Stacy, 56 Wis. 148; Gaines v. Clark, 23 Minn. 64. See Johnston v. Paul, 23 Minn. 46 (discovery of facts subsequent to confirmation).

[2] Cooper v. Andrews, 44 Mich. 94; Spencer v. Curtis, 57 Ind. 221.

[3] Matter of Wilkins, 169 N. Y. 499.

[4] Smith v. Cutler, 10 Wend. (N. Y.) 590; Peachy v. Ritchie, 4 Cal. 207.

Digitized by Google

[6] Mosness v. German etc. Ins. Co. 50 Minn. 341, 52 N. W. 932; Christianson v. Norwich etc. Society, 84 Minn. 526, 88 N. W. 16; Levine v. Lancashire Ins. Co. 66 Minn. 138, 68 N. W. 855.
[7] Canfield v. Watertown Ins. Co. 55 Wis. 419; Mosness v. German etc. Ins. Co. 50 Minn. 341, 52 N. W. 932.
[8] Mosness v. German etc. Ins. Co. 50 Minn. 341, 52 N. W. 932.
[9] Matter of Wilkins, 169 N. Y. 499. See Goddard v. King, 40 Minn. 164, 41 N. W. 659.
[10] Fudickar v. Guardian etc. Ins. Co. 62 N. Y. 392.
[11] Id. See Goddard v. King, 40 Minn. 164, 41 N. W. 659.
[12] See Remington Paper Co. v. London Assurance Corp. 12 N. Y. App. 218.
[13] Dodds v. Hake, 114 N. Y. 260.
[14] Wood v. Treleven, 74 Wis. 577.
[15] New York Lumber etc. Co. v. Schneider, 119 N. Y. 475. See Gaines v. Clark, 23 Minn. 64.
[16] Herbst v. Hagenaers, 137 N. Y. 290. See Hoit v. Berger-Crittenden Co. 81 Minn. 356, 84 N. W. 48.
[17] Keep v. Keep, 17 Hun (N. Y.) 152; Bouck v. Bouck, 57 Minn. 490, 59 N. W. 547.
[18] Levine v. Lancashire Ins. Co. 66 Minn. 138, 68 N. W. 855; Mayor v. Butler, 1 Barb. (N. Y.) 325.
[19] Daniels v. Willis, 7 Minn. 374 Gil. 295. See Dewey v. Leonard, 14 Minn. 153 Gil. 120.
[20] Johnston v. Paul, 23 Minn. 46.

Motion to amend or correct—grounds—statute.

§ 2119. "Any party to such submission may also move the court designated therein, to modify or correct such award in the following cases:

(1) Where there is an evident miscalculation of figures, or an evident mistake in the description of any person, thing or property, referred to in such award.

(2) Where the arbitrators have awarded upon some matter not submitted to them, nor affecting the merits of the decision upon the matter submitted.

(3) Where the award is imperfect in some matter of form, not affecting the merits of the controversy, and where, if it had been a verdict, such defect could have been amended or disregarded by the court."

[G. S. 1894 § 6222]

§ 2120. If a party moves for a correction of the award he is estopped from claiming that it is invalid.

Bean v. Macomber, 35 Mich. 455.

Confirmation of award—statute.

§ 2121. "The award may be accepted or rejected by the court for any legal and sufficient reason, or it may be recommitted to the arbitrators for a rehearing by them."

[G. S. 1894 § 6220]

Digitized by Google

§ 2122. A party is entitled to notice of the motion to confirm, but he waives objection to the want of it by appearing at the hearing without objection.[1] An award is mere in fieri until confirmed.[2] After an award is confirmed it cannot be set aside or corrected by motion. All objections to the award must be made on the motion to confirm or sooner.[3] This section gives to the court authority to send the matter back to the arbitrators and to require them to go over the whole matter again, including the making of a new award if necessary. The court may also recommit with directions to the arbitrators to make their findings more specific.[4] The section, authorizing the court to recommit for a rehearing is enabling, not restrictive, and does not forbid a recommitment where a rehearing is unnecessary.[5] The motion to confirm may be brought on in vacation.[6] The filing of the award with the clerk gives the court jurisdiction and it is competent for the parties to waive all objections to the award on account of formal errors and irregularities and to authorize the clerk to enter judgment thereon at once, without confirmation by the court.[7] A matter will not be recommitted for mere error of judgment in the arbitrators.[8]

[1] Brace v. Stacy, 56 Wis. 148.
[2] Shroyer v. Bask, 57 Ind. 349.
[3] Gaines v. Clark, 23 Minn. 64; Brace v. Stacy, 56 Wis. 148.
[4] Johnston v. Paul, 22 Minn. 17.
[5] Lovell v. Wheaton, 11 Minn. 92 Gil. 57.
[6] Id.; Heglund v. Allen, 30 Minn. 38, 14 N. W. 57.
[7] Lovell v. Wheaton, 11 Minn. 92 Gil. 57.
[8] Harris v. Seal, 23 Me. 435.

Judgment on award—costs—statute.

§ 2123. "Upon such award being confirmed or modified, the court shall render judgment in favor of the party to whom any sum of money or damages have been awarded, that he recover the same; and if the award has directed any act to be done by either party, judgment shall be entered that such act be done according to such order; the costs of proceedings shall be taxed as in actions; and if no provision for the fees and expenses of the arbitrators has been made in the award, the court shall make a suitable allowance."
[G. S. 1894 § 6224]

§ 2124. The judgment must conform to the award.
Bouck v. Bouck, 57 Minn. 490, 59 N. W. 547.

Costs—statute.

§ 2125. "If there is no provision in the submission concerning the costs of the proceedings, the arbitrators may make such award respecting the costs as they shall judge reasonable, including therein a compensation for their own services; but the court may reduce the sum charged for the compensation of the arbitrators, if it appears to them unreasonable."
[G. S. 1894 § 6227]

Digitized by Google

Contents of judgment—statute.

§ 2126. "A record of such judgment shall be made, commencing with a memorandum reciting the submission, then stating the hearing before the arbitrators, their award, the proceedings of the court thereupon in modifying or confirming such award, and the judgment of the court for the recovery of the debt or damages awarded, and that the parties perform the acts ordered by the award, and for the recovery of the costs allowed."

[G. S. 1894, § 6226]

Docketing and effect of judgment—statute.

§ 2127. "Such record shall be filed and docketed as records of judgments in other cases, shall have the same force and effect in all respects, be subject to all the provisions of law in relation to judgments in actions, and may in like manner be removed by appeal and reversed, and execution be issued thereupon."

[G. S. 1894 § 6226]

§ 2128. A judgment duly rendered upon an award has the same final and conclusive effect, in all respects, as judgments in civil actions, and it can only be impeached, reviewed, or set aside in the same manner that such judgments may be and for like cause.[1] It was held, prior to Laws 1877 ch. 131, that an action could not be maintained to set aside such a judgment on the ground that the award upon which it was rendered was procured by means of false testimony, in a case where the court rendering it had full power to grant adequate relief in the same action.[2] On appeal the supreme court will not consider objections not raised below except such as go to the validity of the submission.[3] The parties may stipulate that there shall be no appeal.[4]

[1] Johnston v. Paul, 23 Minn. 46.

[2] Id. See Dewey v. Leonard, 14 Minn. 153 Gil. 120.

[3] Heglund v. Allen, 30 Minn. 38, 14 N. W. 57; Gaines v. Clark, 23 Minn. 64. See Matter of Wilkins, 169 N. Y. 499; Cooper v. Andrews, 44 Mich. 94.

[4] Daniels v. Willis, 7 Minn. 374 Gil. 295.

COMMON LAW ARBITRATION

General statement.

§ 2129. Either party may revoke the submission any time before the award is made. Arbitrators and witnesses need not be sworn unless the agreement requires it. The arbitrators must hear the parties in the presence of each other. When the award is made the authority of the arbitrators is terminated, and the only way to enforce the award is in an ordinary action subsequently brought.[1] It is competent for the parties, by mutual consent, to waive or repudiate an award. The waiver may be by oral agreement.[2] An award must be final and certain, and so determine the matters submitted that an action between the same parties in regard to it will

Digitized by Google

not afterwards lie. Every reasonable intendment will be made in favor of its finality and validity.[3] An award is invalid if made without notice or opportunity to one of the parties to be heard.[4] If arbitrators decide the matter submitted to them honestly and fairly according to their judgments, the award will not be set aside because they decided the facts erroneously, or were mistaken in the law they applied to them or decided on an erroneous theory.[5] An action will lie to set aside an award for fraud,[6] and in such an action one of the arbitrators who refused to join in the award may testify as to acts of partiality and misconduct on the part of the others.[7] In the case of appraisement under an insurance policy where one of the parties refuses to abide by the award on the ground of misconduct of the referees, and notifies the other party of that fact, stating the grounds of objection, and demanding a re-appraisement, the party so notified has the option to stand by the award or submit to a re-appraisement.[8] A provision in an insurance policy for submission of the amount of loss to arbitration is valid but it may be waived by the insurer.[9] An agreement to arbitrate a definite legal obligation cannot oust the courts of jurisdiction.[10] An arbitration bond should be liberally construed so as to encourage the settlement of disputes by arbitration.[11] A person acting in the capacity of an appraiser under a lease is to all intents and purposes an arbitrator at common law.[12]

[1] Holdridge v. Stowell, 39 Minn. 360, 40 N. W. 259; Minneapolis etc. Ry. Co. v. Cooper, 59 Minn. 290, 61 N. W. 143.
[2] Georges v. Niess, 70 Minn. 248, 73 N. W. 644.
[3] Hoit v. Berger-Crittenden Co. 81 Minn. 356, 84 N. W. 48.
[4] Janney, Semple & Co. v. Goehringer, 52 Minn. 428, 54 N. W. 481.
[5] Goddard v. King, 40 Minn. 164, 41 N. W. 659.
[6] Dewey v. Leonard, 14 Minn. 153 Gil. 120.
[7] Levine v. Lancashire Ins. Co. 66 Minn. 138, 68 N. W. 855.
[8] Christianson v. Norwich Union Fire Ins. Soc. 84 Minn. 526, 88 N. W. 16.
[9] Hamburg v. St. Paul etc. Ins. Co. 68 Minn. 335, 71 N. W. 388.
[10] Whitney v. Nat. Masonic etc. Assoc. 52 Minn. 378, 54 N. W. 184.
[11] Washburne v. Lufkin, 4 Minn. 466 Gil. 362; Daniels v. Willis, 7 Minn. 383 Gil. 304.
[12] Earle v. Johnson, 81 Minn. 472, 84 N. W. 332.

Digitized by Google

CHAPTER XXVII

FORECLOSURE OF MORTGAGES BY ADVERTISEMENT

GENERAL RULES

What mortgages may be foreclosed by advertisement—within what time—statute.

§ 2130. "Every mortgage of real estate, heretofore or hereafter executed, containing therein a power of sale, upon default being made in any condition of such mortgage, may be foreclosed by advertisement within fifteen years after the maturing of such mortgage or the debt secured thereby, in the cases and in the manner hereinafter specified."

[G. S. 1894 § 6028]

§ 2131. This act is not unconstitutional as embracing more than one subject or as embracing a subject not expressed in its title.[1] The foreclosure must be completed within the fifteen years; it is not enough to commence it within that time.[2] Whether a partial payment of the debt operates to extend the period within which the mortgage may be foreclosed is an open question.[3] The right to foreclose is not affected by the insanity, disability[4] or death[5] of the mortgagor, or the fact that the debt secured by the mortgage was not presented to the probate court for allowance.[6] A foreclosure under a mortgage which has been extinguished is void.[7] That an action is pending to have a mortgage adjudged satisfied does not bar the right to foreclose under a power in the mortgage.[8] Foreclosure by advertisement is regulated by statute and not by agreement of the parties.[9] The right to foreclose, pursuant to the statute in force at the time of the execution of a mortgage, under a power of sale contained in it, cannot be taken away by subsequent legislation.[10] A mortgagee is not forbidden to foreclose because he happens to be the administrator of the mortgagor.[11]

[1] Lynott v. Dickerman, 65 Minn. 471, 67 N. W. 1143.
[2] Archambou v. Green, 21 Minn. 520; Duncan v. Cobb, 32 Minn. 460, 21 N. W. 714.
[3] Kenaston v. Lorig, 81 Minn. 454, 84 N. W. 323.
[4] Lundberg v. Davidson, 72 Minn. 49, 74 N. W. 1018.
[5] Jones v. Tainter, 15 Minn. 512 Gil. 423; Fleming v. McCutcheon, 85 Minn. 152, 88 N. W. 433.
[6] Id.
[7] Misener v. Gould, 11 Minn. 166 Gil. 105; Benson v. Markoe, 41 Minn. 112, 42 N. W. 787.
[8] Montgomery v. McEwen, 9 Minn. 103 Gil. 93.
[9] Butterfield v. Farnham, 19 Minn. 85 Gil. 58. See Webb v. Lewis, 45 Minn. 285, 47 N. W. 803.

Digitized by Google

[10] O'Brien v. Krenz, 36 Minn. 136, 30 N. W. 458.
[11] Fleming v. McCutcheon, 85 Minn. 152, 88 N. W. 433.

What law governs—impairment of contract.

§ 2132. So far as mode of procedure is concerned the law in force at the time controls although it was enacted subsequent to the execution of the mortgage. But all the substantial provisions of the law regulating foreclosures in force when the mortgage is executed—that is, all provisions not mere matters of form, but materially affecting the right to foreclose under the power or the rights of the parties upon foreclosure—become part of the contract between the parties and cannot be impaired by future legislation.

Atkinson v. Duffy, 16 Minn. 45 Gil. 30; Stone v. Bassett, 4 Minn. 298 Gil. 215; Freeborn v. Pettibone, 5 Minn. 277 Gil. 219; Goenen v. Schroeder, 8 Minn. 387 Gil. 344; Carroll v. Rossiter, 10 Minn. 174 Gil. 141; Willis v. Jelinek, 27 Minn. 18, 6 N. W. 373; Heyward v. Judd, 4 Minn. 483 Gil. 375; Hillebert v. Porter, 28 Minn. 496, 11 N. W. 84; O'Brien v. Krenz, 36 Minn. 136, 30 N. W. 458; Archambou v. Green, 21 Minn. 520.

Strict compliance with statutes.

§ 2133. While the power to foreclose is derived from the convention of the parties the proceedings in the exercise of that power, so far as regulated by statute, are wholly statutory, and in order to constitute a valid foreclosure every statutory requirement must be substantially complied with.

Cutting v. Patterson, 82 Minn. 375, 85 N. W. 172; Peaslee v. Ridgway, 82 Minn. 288, 84 N. W. 1024; Clifford v. Tomlinson, 62 Minn. 195, 64 N. W. 381; Mason v. Goodnow, 41 Minn. 9, 42 N. W. 482; Richards v. Finnegan, 45 Minn. 208, 47 N. W. 788; Backus v. Burke, 48 Minn. 260, 51 N. W. 284; Hamel v. Corbin, 69 Minn. 223, 72 N. W. 106; Martin v. Baldwin, 30 Minn. 537, 16 N. W. 449; Heath v. Hall, 7 Minn. 315 Gil. 243; Holmes v. Crummett, 30 Minn. 23, 13 N. W. 924.

Insanity or disability of mortgagor.

§ 2134. The insanity or other disability of the mortgagor does not affect the right of the mortgagee or his assignee to foreclose under a power.

Lundberg v. Davidson, 72 Minn. 49, 74 N. W. 1018; Id., 68 Minn. 328, 71 N. W. 395, 72 N. W. 71.

General nature of foreclosure by advertisement.

§ 2135. A foreclosure by advertisement is a proceeding in pais.[1] It is also a proceeding in rem. While the power to foreclose is derived from the convention of the parties yet the proceedings in the exercise of the power, so far as regulated by statute, are purely statutory.[2] For the purpose of accomplishing a foreclosure, the proceeding by advertisement takes the place of an action; and the publication, and the personal notice required to be given to the occu-

Digitized by Google

pant of the mortgaged premises, take the place of the service of process by which an action to foreclose is commenced.[2] Two of the chief advantages of a sale under a power are that it avoids the necessity of bringing in as parties all persons in interest, and also avoids the danger of a failure to secure a perfect title, by reason of a defect of parties defendant.[4]

[1] In re Grundysen, 53 Minn. 346, 55 N. W. 557; Lundberg v. Davidson, 72 Minn. 49, 74 N. W. 1018.
[2] Swain v. Lynd, 74 Minn. 72, 76 N. W. 958.
[3] Fowler v. Woodward, 26 Minn. 347, 4 N. W. 231.
[4] Lundberg v. Davidson, 72 Minn. 49, 74 N. W. 1018.

Conditions requisite—statute.

§ 2136. "To entitle any party to give a notice, as hereinafter prescribed, and to make such foreclosure, it is requisite:

(1) That some default in a condition of such mortgage has occurred, by which the power to sell has become operative.

(2) That no action or proceeding has been instituted at law to recover the debt then remaining secured by such mortgage, or any part thereof; or if the action or proceeding has been instituted, that the same has been discontinued, or that an execution upon the judgment rendered therein has been returned unsatisfied in whole or in part.

(3) That the mortgage containing such power of sale has been duly recorded, and if it has been assigned, that all the assignments thereof have been recorded."

[G. S. 1894 § 6029]

Default.

§ 2137. The right of foreclosure by advertisement rests upon the power of sale contained in the mortgage, the proper record thereof, and of its assignments, if any, and the further fact that such power has become operative by reason of some default.[1] Without a default in the conditions of the mortgage there can be no valid foreclosure.[2] Where a mortgage provides that on default in the payment of interest the mortgagee may declare the whole sum due, the election may be exercised by advertising a sale, without other notice of the election.[3]

[1] Jones v. Ewing, 22 Minn. 157.
[2] See Felton v. Bissel, 25 Minn. 15; Mjones v. Yellow Medicine County Bank, 45 Minn. 335, 47 N. W. 1072; Herbert v. Turgeon, 84 Minn. 34, 86 N. W. 757; Chase v. Whitten, 51 Minn. 485, 53 N. W. 767; O'Brien v. Oswald, 44 Minn. 59, 47 N. W. 316.
[3] Fowler v. Woodward, 26 Minn. 347, 4 N. W. 231.

No action or proceeding.

§ 2138. Where judgment has been recovered for the mortgage debt the mortgage may be foreclosed by advertisement, if the execution is returned unsatisfied in whole or part.[1] Where part of the interest on a mortgage is paid by a promissory note the recovery of

Digitized by Google

judgment on the note is no objection to a foreclosure under the power for the remainder of the mortgage debt.[2] An action or proceeding instituted at law to recover the mortgage debt has the effect of suspending, for the time, the exercise of the right of foreclosure by action; but its non-existence can hardly be said to give or create the right.[3]

[1] Ross v. Worthington, 11 Minn. 438 Gil. 323.
[2] Goenen v. Schroeder, 18 Minn. 66 Gil. 51.
[3] Jones v. Ewing, 22 Minn. 157.

Mortgage and assignments must be recorded.

§ 2139. To authorize a foreclosure by advertisement it is indispensable that the mortgage and all assignments thereof should be recorded.[1] But assignments by operation of law need not be recorded. An executor or administrator may foreclose a mortgage without recording his appointment.[2] And where an assignment of a mortgage is made by an agent it is not necessary that his authority be recorded.[3] If an assignment has not been properly acknowledged so as to entitle it to record a foreclosure by the assignee is void.[4] A mortgage with but one witness, which has been legalized by a curative act, but the registration of which has not been legalized, cannot be foreclosed by advertisement. Otherwise when the registration has been legalized.[5] A mortgage on lands in two counties but recorded in only one may be foreclosed as to the lands in the county where it is recorded.[6] A false and impossible particular added to the description of the premises by mistake of the register will not prevent a foreclosure.[7] But a false and misleading description will render a foreclosure invalid.[8] Where an assignment was indorsed on a mortgage, describing it as "the within described mortgage," and was afterwards recorded on a subsequent page of the same book as the mortgage, it was held a sufficient record to authorize a foreclosure.[9] A mortgage with only one witness will not authorize a foreclosure, though recorded.[10] After the execution, delivery and record of a quitclaim deed, the legal effect of which is to release and discharge a mortgage of record, the mortgagee cannot foreclose the mortgage by advertisement. To entitle one to foreclose a mortgage by advertisement, he must have a legal mortgage containing a power of sale and duly recorded. The statute authorizing this method of foreclosure designs that there shall be of record a legal mortgage and that the record shall be so complete as to show the right of the mortgagee or his assigns to invoke its aid. There is no such thing as a foreclosure by advertisement of an equitable mortgage.[11] Equitable assignments need not be recorded.[12]

[1] See cases under § 2140.
[2] Baldwin v. Allison, 4 Minn. 25 Gil. 11; Holcombe v. Richards, 38 Minn. 38, 35 N. W. 714.
[3] Morrison v. Mendenhall, 18 Minn. 232 Gil. 212.
[4] Lowry v. Mayo, 41 Minn. 388, 43 N. W. 78.
[5] Ross v. Worthington, 11 Minn. 438 Gil. 323.

Digitized by Google

[6] Balme v. Wambaugh, 16 Minn. 116 Gil. 106. See Van Meter v. Knight, 32 Minn. 205, 20 N. W. 142.
[7] Torwarth v. Armstrong, 20 Minn. 464 Gil. 419.
[8] Thorp v. Merrill, 21 Minn. 336.
[9] Carli v. Taylor, 15 Minn. 171 Gil. 131.
[10] Johnson v. Sandhoff, 30 Minn. 197, 14 N. W. 889.
[11] Benson v. Markoe, 41 Minn. 112, 42 N. W. 787.
[12] Wilson v. Hayes, 40 Minn. 531, 42 N. W. 467.

Who may foreclose.

§ 2140. Only the record owner of the mortgage and power can give the notice and foreclose by advertisement.[1] The power of sale contained in a mortgage, being coupled with an interest, passes to the assignee of the mortgage. It cannot be severed from the legal ownership of the mortgage. It is indivisible and no matter how many owners of the mortgage there may be, there is but one power. If there are two or more legal owners, whether as original mortgagees or as assignees, or both, the power is in them jointly and all must join in the foreclosure proceedings.[2] If the record owner loses his interest in the mortgage during the course of the publication of the notice he cannot complete the foreclosure.[3] Whether, the publication being regular, a change in the record ownership of the mortgage between the last publication and the day of sale will affect the regularity of the sale, is an open question.[4] If an assignment of the mortgage by the mortgagee has been executed and recorded, the only way by which he can be restored to a position authorizing him to exercise the power of sale in his own name is to procure a written re-assignment of the mortgage and place it on record.[5]

[1] Bolles v. Carli, 12 Minn. 113 Gil. 62; Dick v. Moon, 26 Minn. 309, 4 N. W. 39; Brown v. Delaney, 22 Minn. 349; Bottineau v. Aetna Life Ins. Co. 31 Minn. 125, 16 N. W. 849; Solberg v. Wright, 33 Minn. 224, 22 N. W. 381; Lowry v. Mayo, 41 Minn. 388, 43 N. W. 78; Backus v. Burke, 48 Minn. 260, 51 N. W. 284; Burke v. Backus, 51 Minn. 174, 53 N. W. 458; Dunning v. McDonald, 54 Minn. 1, 55 N. W. 864; Hathorn v. Butler, 73 Minn. 15, 75 N. W. 743; Merrick v. Putnam, 73 Minn. 240, 75 N. W. 240; Clark v. Mitchell, 81 Minn. 438, 84 N. W. 327; Northern Cattle Co. v. Munro, 83 Minn. 37, 85 N. W. 919; Carpenter v. Artisans' Savings Bank, 44 Minn. 521, 47 N. W. 150; Benson v. Markoe, 41 Minn. 112, 42 N. W. 787.
[2] Dunning v. McDonald, 54 Minn. 1, 55 N. W. 864; Brown v. Delaney, 22 Minn. 349; Solberg v. Wright, 33 Minn. 224, 22 N. W. 381; Dick v. Moon, 26 Minn. 309, 4 N. W. 39.
[3] Dunning v. McDonald, 54 Minn. 1, 55 N. W. 864; Merrick v. Putnam, 73 Minn. 240, 75 N. W. 1047.
[4] Dunning v. McDonald, 54 Minn. 1, 55 N. W. 864. See Baldwin v. Allison, 4 Minn. 25 Gil. 11.
[5] Burke v. Backus, 51 Minn. 174, 53 N. W. 458.

Digitized by Google

Foreclosure by foreign executors—statute.

§ 2141. "Any executor or administrator duly appointed in any other state or country may foreclose by advertisement any mortgage of land in this state, belonging to the estate represented by him, in the same manner, and under like restrictions, as a resident, appointed in this state, may do: provided, that before commencing any such foreclosure, an authenticated copy of his appointment as such executor or administrator is filed for record in the office of the register of deeds of the county in which such foreclosure is to be commenced."

[G. S. 1894 § 6053] See G. S. 1894 §§ 7588, 7589; Holcombe v. Richards, 38 Minn. 38, 35 N. W. 714; Cone v. Nimocks, 78 Minn. 249, 80 N. W. 1056.

Effect of sale on debt.

§ 2142. A foreclosure sale has the effect of extinguishing the mortgage debt to the amount for which the property is sold.

Evans v. Rhode Island Hospital Trust Co. 67 Minn. 160, 69 N. W. 715, 1069.

Equitable interests not recognized.

§ 2143. Foreclosure proceedings by advertisement are based wholly upon record ownership and mere equitable interests cannot be recognized or given effect therein.[1] The fact that others have equitable interests in the mortgage does not affect the right of the legal owner thereof to foreclose by advertisement, but a court of equity will control the exercise of the right and the disposition of the proceeds of sale so as to protect equitable interests.[2] An equitable owner cannot foreclose in his own name but of course he may foreclose in the name of the record owner; and if the record owner allows the equitable owner to foreclose, using his name, both are bound, and the foreclosure is valid.[3] Where the record owner holds the mortgage in trust for others they may compel him, through a court of equity, to foreclose and account for the proceeds.[4]

[1] Clark v. Mitchell, 81 Minn. 438, 84 N. W. 327 and cases cited.

[2] Bottineau v. Aetna Life Ins. Co. 31 Minn. 125, 16 N. W. 849; Brown v. Delaney, 22 Minn. 349; Solberg v. Wright, 33 Minn. 224, 22 N. W. 381; Carpenter v. Artisans' Savings Bank, 44 Minn. 521, 47 N. W. 150; Dick v. Moon, 26 Minn. 309, 4 N. W. 39; Wilson v. Eigenbrodt, 30 Minn. 4, 13 N. W. 907; Northern Cattle Co. v. Munro, 83 Minn. 37, 85 N. W. 919.

[3] Carpenter v. Artisans' Savings Bank, 44 Minn. 521, 47 N. W. 150; Bausman v. Faue, 45 Minn. 412, 48 N. W. 13.

[4] Bottineau v. Aetna Life Ins. Co. 31 Minn. 125, 16 N. W. 849; Bausman v. Faue, 45 Minn. 412, 48 N. W. 13.

Foreclosure for instalments.

§ 2144. Provision is made by statute for the foreclosure of mortgages for instalments of principal or interest but it is now rarely resorted to.[1] Where there is a mortgage, containing a power of sale, upon only one tract or parcel of land, to secure a debt payable

Digitized by Google

in instalments, the mortgagee may foreclose upon any instalment coming due, but such foreclosure exhausts the lien of the mortgage on the land sold. The same land can be sold but once under the same mortgage. There can be a second sale to satisfy a subsequent instalment only when there remains land not sold at the first sale.[2]

[1] See G. S. 1878 ch. 81 §§ 3, 4; Watkins v. Hackett, 20 Minn. 106 Gil. 92; Shorts v. Cheadle, 8 Minn. 67 Gil. 44; Daniels v. Smith, 4 Minn. 172 Gil. 117; Fowler v. Johnson, 26 Minn. 338, 3 N. W. 987; Standish v. Vosberg, 27 Minn. 175, 6 N. W. 489; Cleveland v. Booth, 43 Minn. 16, 44 N. W. 670; Dick v. Moon, 26 Minn. 309, 4 N. W. 39; Herber v. Christopherson, 30 Minn. 395, 15 N. W. 676; Taylor v. Burgess, 26 Minn. 547, 6 N. W. 350.

[2] Fowler v. Johnson, 26 Minn. 338, 3 N. W. 987, 6 N. W. 486; Standish v. Vosberg, 27 Minn. 175, 6 N. W. 489; Martin v. Sprague, 29 Minn. 53, 11 N. W. 143; Brown v. Crookston Agr. Assoc. 34 Minn. 545, 26 N. W. 907; Loomis v. Clambey, 69 Minn. 469, 72 N. W. 707; Darelius v. Davis, 74 Minn. 345, 77 N. W. 214.

Effect of sale in exhausting lien.

§ 2145. Where a mortgage is given upon a single tract of land to secure a debt due and payable as an entirety, and upon default in payment a foreclosure is had under a power, a sale for less than the amount due exhausts the lien of the mortgage.[1] It is the general rule that a single sale exhausts the lien of the mortgage, or, in other words, that there can be but one sale under a power.[2] The remedy upon the mortgage as a security is exhausted by the foreclosure. The mortgage becomes, as a security, functus officio, and its only future office is as a muniment of title in case the mortgagor fails to redeem. After the foreclosure the rights of the parties are to be measured, not by anything in the mortgage—except as a muniment of title—but by the statute.[3]

[1] Loomis v. Clamby, 69 Minn. 469, 72 N. W. 707.

[2] Paquin v. Braley, 10 Minn. 379 Gil. 304; Farmers Nat. Bank v. Backus, 67 Minn. 43, 69 N. W. 638; Hanson v. Dunton, 35 Minn. 189, 28 N. W. 221.

[3] Pioneer Savings etc. Co. v. Farnham, 50 Minn. 315, 52 N. W. 897.

NOTICE OF SALE

Notice of sale—statute.

§ 2146. "Notice that such mortgage will be foreclosed by sale of the mortgaged premises, or some part of them, shall be given by publishing the same for six successive weeks, at least once in each week, in a newspaper printed and published in the county where the premises intended to be sold, or some part thereof, are situated, if there is one, if not, then in a newspaper printed and published in an adjoining county, if there is such a newspaper, if there is not,

Digitized by Google

then in a newspaper printed and published in the county to which the county in which the premises are located is attached for judicial purposes, if there be such a newspaper, if there is not, then in a newspaper printed and published at the capital of the state. In all cases, a copy of such notice shall be served in like manner as summons in civil actions in the district court, at least four weeks before the time of sale, on the person in possession of the mortgaged premises, if the same are actually occupied. Proof of such service may be made, certified and recorded, in the same manner as proof of publication of a notice of sale under a mortgage."

[G. S. 1894 § 6032]

Publication.

§ 2147. When a mortgage covers several separate and distinct tracts lying in different counties, the notice of foreclosure sale need be published in only one of such counties.[1] A mortgagee who has commenced publication may discontinue it and publish and sell under a new notice provided no person interested is misled by the change.[2] The day set for sale in the notice may be a considerable time beyond the last day of publication,[3] or it may be on that day.[4] It is no objection that the notice is published for more than six successive weeks.[5] A notice cannot be altered in a material particular during the course of publication.[6] Publication must not begin before a default in the conditions of the mortgage for the power does not become operative until then. A newspaper is published when it issues from the hands of the publisher. A publication in only one-sixth of the whole number of copies of an edition is insufficient. A notice not published for the prescribed time is not cured by a postponement of the sale.[7] A religious newspaper publishing general as well as religious news is a newspaper within the meaning of the statute.[8] A failure to publish in a newspaper in the proper county renders the sale void.[9] The publisher of a newspaper is presumptively its printer.[10]

[1] Paulle v. Wallis, 58 Minn. 192, 59 N. W. 999.
[2] Banning v. Armstrong, 7 Minn. 46 Gil. 31.
[3] Goenen v. Schroeder, 18 Minn. 66 Gil. 51; Atkinson v. Duffy, 16 Minn. 45 Gil. 30.
[4] Worley v. Naylor, 6 Minn. 192 Gil. 123.
[5] Atkinson v. Duffy, 16 Minn. 45 Gil. 30.
[6] Dana v. Farrington, 4 Minn. 433 Gil. 335.
[7] Pratt v. Tinkcom, 21 Minn. 142.
[8] Hull v. King, 38 Minn. 349, 37 N. W. 792.
[9] Lowell v. North, 4 Minn. 32 Gil. 15.
[10] Menard v. Crowe, 20 Minn. 448 Gil. 402; Kipp v. Cook, 46 Minn. 535, 49 N. W. 257.

Requisites of notice—statute.

§ 2148. "Every notice shall specify:

(1) The names of the mortgagor and of the mortgagee, and the assignee, if any.

(2) The date of the mortgage, and when and where recorded.

Digitized by Google

(3) The amount claimed to be due thereon, and taxes, if any, paid by the mortgagee at the date of the notice.

(4) A description of the mortgaged premises, conforming substantially to that contained in the mortgage.

(5) The time and place of sale."

[G. S. 1894 § 6033]

Names of parties—assignments—signature.

§ 2149. A notice describing a mortgage as having been executed to "Isaac Crowe, agent of Abraham Becker" and signed "Isaac Crowe, agent of Araham Becker" is sufficient.[1] The notice must appear to be given by one of competent authority.[2] A notice in the name of a deceased person is void.[3] A mortgage was executed to a partnership consisting of Farnham & Lovejoy. The notice of sale, describing the mortgage as given to Farnham & Lovejoy, contained, in parenthesis, the full names of such partners immediately after the firm name and was subscribed "Farnham & Lovejoy, Mortgagees." Held sufficient.[4] A mistake in using "mortgagee" for "mortgagor" is fatal.[5] A notice signed "Silas H. Baldwin, administrator of the estate of Rachel A. Baldwin, the said mortgagee, deceased" is sufficient. It is not necessary to state the death or appointment as administrator.[6] Only such assignments as are the subject of contract and are made by act of the parties need be mentioned in the notice.[7] A notice signed by the attorney of the mortgagee is sufficient.[8] All the record owners of the mortgage must sign the notice.[9] The notice should disclose the true state of the record.[10]

[1] Menard v. Crowe, 20 Minn. 448 Gil. 402.

[2] Bausman v. Kelley, 38 Minn. 197, 36 N. W. 333; Backus v. Burke, 48 Minn. 260, 51 N. W. 284; Dunning v. McDonald, 54 Minn. 1, 55 N. W. 864; Hathorn v. Butler, 73 Minn. 15, 75 N. W. 743.

[3] Bausman v. Kelley, 38 Minn. 197, 36 N. W. 333; Welsh v. Cooley, 44 Minn. 446, 46 N. W. 908; Bausman v. Faue, 45 Minn. 412, 48 N W. 13; Bausman v. Eads, 46 Minn. 148, 48 N. W. 769.

[4] Menage v. Burke, 43 Minn. 211, 45 N. W 155.

[5] Clifford v. Tomlinson, 62 Minn. 195, 64 N. W. 381.

[6] Baldwin v. Allison, 4 Minn. 25 Gil. 11.

[7] Id. See Hathorn v. Butler, 73 Minn. 15, 75 N. W. 743.

[8] Martin v. Baldwin, 30 Minn. 537, 16 N. W. 449.

[9] Dunning v. McDonald, 54 Minn. 1, 55 N. W. 864.

[10] Backus v. Burke, 48 Minn. 260, 51 N. W. 284.

No action or proceeding.

§ 2150. It is not necessary to state in the notice that no action or proceeding has been instituted to recover the mortgage debt.

See Jones v. Ewing, 22 Minn. 157.

The date of the mortgage and notice.

§ 2151. It is indispensable that the notice state the date of the mortgage.[1] Failure to date the notice is not fatal. When the mort-

Digitized by Google

gagee writes the date upon the face of the notice, that fact will control, and the amount claimed must correspond with the time so stated; but when no evidence of the date appears upon the face of the notice, the time of its first publication is its date.[2]

[1] Clifford v. Tomlinson, 62 Minn. 195, 64 N. W. 381.

[2] Ramsey v. Merriam, 6 Minn. 168 Gil. 104. See Coles v. York, 28 Minn. 464, 10 N. W. 775.

When and where recorded.

§ 2152. A notice which does not give the date upon which the mortgage was recorded is fatally defective.[1] Equally fatal is a failure to give the page of the record upon which the mortgage is recorded.[2]

[1] Martin v. Baldwin, 30 Minn. 537, 16 N. W. 449.

[2] Peaslee v. Ridgway, 82 Minn. 288, 84 N. W. 1024.

The amount claimed to be due.

§ 2153. The object of requiring the amount claimed to be due to be stated in the notice is to inform interested parties how much is claimed against their property so that they may act accordingly.[1] It is the amount claimed to be due on the mortgage at the date of the notice of sale, and not the total amount secured by the mortgage, and not then due, which must be stated in the notice.[2] When a foreclosure is made for an instalment due it is not necessary to state that it is for an instalment.[3] Where the amount claimed in the notice is within the literal terms of the note secured, that it is greater than legally due, no fraud or injury appearing, does not affect the validity of the foreclosure.[4] Claiming more than is actually due does not affect the validity of the sale unless it appears that it was done with a fraudulent purpose or that it has resulted in actual injury to the mortgagor.[5] Where the mortgagee may elect to declare the whole amount due upon default in payment of an instalment it is not necessary in the notice to state that the mortgagee so elects.[6] If a mortgage covers several tracts and is made a specific and separate lien on each tract for a specified amount the notice must specify the amount claimed to be due on each separately.[7] If the mortgage is given to secure several notes which pass into different hands the party owning the mortgage and foreclosing should claim the amount due on all the notes.[8]

[1] Mason v. Goodnow, 41 Minn. 9, 42 N. W. 482; Hamel v. Corbin, 69 Minn. 223, 72 N. W. 106.

[2] Gorham v. Nat. Life Ins. Co. 62 Minn. 327, 64 N. W. 906; Trafton v. Cornell, 62 Minn. 442, 64 N. W. 1148.

[3] Trafton v. Cornell, 62 Minn. 442, 64 N. W. 1148.

[4] Menard v. Crowe, 20 Minn. 448 Gil. 402.

[5] Ramsey v. Merriam, 6 Minn. 168 Gil. 104; Butterfield v. Farnham, 19 Minn. 85 Gil. 58; Menard v. Crowe, 20 Minn. 448 Gil. 402; Bowers v. Hechton, 45 Minn. 238, 47 N. W. 792; Lane v. Holmes, 55 Minn. 379, 57 N. W. 132; Seiler v. Wilber, 29 Minn. 307, 13 N. W. 136; Spencer v. Annan, 4 Minn. 542 Gil. 426.

Digitized by Google

[6] Trafton v. Cornell, 62 Minn. 442, 64 N. W. 1148; Fowler v. Woodward, 26 Minn. 347, 4 N. W. 231.

[7] Mason v. Goodnow, 45 Minn. 9, 42 N. W. 482; Vawter v. Crafts, 41 Minn. 14, 42 N. W. 484; Bitzer v. Campbell, 47 Minn. 221, 49 N. W. 691; Hull v. King, 38 Minn. 349, 37 N. W. 792; Barge v. Klausman, 42 Minn. 281, 44 N. W. 69; Child v. Morgan, 51 Minn. 116, 52 N. W. 1127; Saxe v. Rice, 64 Minn. 190, 66 N. W. 268.

[8] Dick v. Moon, 26 Minn. 309, 4 N. W. 39. See State Finance Co. v. Com. Title etc. Co. 69 Minn. 219, 72 N. W. 68; White v. Miller, 52 Minn. 367, 54 N. W. 736.

Taxes paid.

§ 2154. The notice should state the amount claimed for taxes paid prior to the notice.[1] As to taxes paid subsequent to the date of the notice and prior to the sale it is sufficient if the notice states that the premises will be sold to pay the debt "and the taxes, if any, on said premises."[2] Where there is a blanket mortgage constituting a specific lien on several tracts the notice should specify taxes paid on each tract separately.[3] The notice need not specify the years for which the taxes were paid.[4]

[1] Hamel v. Corbin, 69 Minn. 223, 72 N. W. 106. See Laws 1902 ch. 2 § 67.

[2] Kirkpatrick v. Lewis, 46 Minn. 164, 47 N. W. 970, 48 N. W. 783; Gorham v. Nat. Life Ins. Co. 62 Minn. 327, 64 N. W. 906. See Wyatt v. Quinby, 65 Minn. 537, 68 N. W. 109.

[3] Bitzer v. Campbell, 47 Minn. 221, 49 N. W. 691.

[4] Jones v. Cooper, 8 Minn. 334 Gil. 294.

Description of premises.

§ 2155. A description of the premises conforming substantially to the description in the mortgage is sufficient.

Schoch v. Birdsall, 48 Minn. 441, 51 N. W. 382; Johnson v. Cocks, 37 Minn. 530, 35 N. W. 436; Baumann v. Granite Savings Bank & Trust Co. 66 Minn. 227, 68 N. W. 1074. See Rochat v. Emmett, 35 Minn. 420, 29 N. W. 147.

The time and place of sale.

§ 2156. The notice should specify the hour of sale,[1] and the place of sale.[2]

[1] Menard v. Crowe, 20 Minn. 448 Gil. 402; Richards v. Finnegan, 45 Minn. 208, 47 N. W. 788; Thorwarth v. Armstrong, 20 Minn. 464 Gil. 419.

[2] Golcher v. Brisbin, 20 Minn. 453 Gil. 407; Thorwarth v. Armstrong, 20 Minn. 464 Gil. 419; Bottineau v. Aetna Life Ins. Co., 31 Minn. 125, 16 N. W. 849; Johnson v. Cocks, 37 Minn. 530, 35 N. W. 436; Merrill v. Nelson, 18 Minn. 366 Gil. 335.

Service of notice upon occupant.

§ 2157. Service of notice upon the occupant is required not solely for his benefit but as a means of communicating notice through him

Digitized by Google

to all who may be interested in the land.[1] Any person deriving title or interest through the mortgagor may attack a sale for want of service on the occupant.[2] To require notice to be served upon a party his occupancy must be open and visible, but it is not necessary that he should be living on the land.[3] Service may be made by leaving a copy of the notice at the house of usual abode of the occupant with some person of suitable age and discretion then resident therein.[4] If the mortgagor is in the actual occupation of part of the land and a tenant of his of the rest, notice upon the mortgagor alone is sufficient, at least so far as he is concerned.[5] Where husband and wife are residing upon land owned by him, he is the proper person on whom to serve the notice.[6] The occupant cannot waive notice so as to affect others.[7] Failure to make the required service renders the foreclosure void.[8] Service may be made by the mortgagee.[9] It is immaterial that the occupant is insane.[10] A judgment creditor may object that notice is not served.[11] Where the land is vacant there should be an "attempted service"; that is, a person should go to and upon the land for the purpose of making service and make affidavit that the land was then vacant and unoccupied.[12] It is clear that the statute does not require that service upon the occupant be made upon the premises.

[1] Casey v. McIntyre, 45 Minn. 526, 48 N. W. 402; Swain v. Lynd, 74 Minn. 72, 76 N. W. 958.
[2] Id.
[3] Cutting v. Patterson, 82 Minn. 375, 85 N. W. 172.
[4] Groff v. Nat. Bank of Commerce, 50 Minn. 348, 52 N. W. 934; Temple v. Norris, 53 Minn. 286, 55 N. W. 133; Brigham v. Conn. Mut. Life Ins. Co., 74 Minn. 33, 76 N. W. 952; Id. 79 Minn. 350, 82 N. W. 668.
[5] Holmes v. Crummett, 30 Minn. 23, 13 N. W. 924.
[6] Coles v. Yorks, 28 Minn. 464, 10 N. W. 775.
[7] Casey v. McIntyre, 45 Minn. 526, 48 N. W. 402.
[8] Heath v. Hall, 7 Minn. 315 Gil. 243; Morey v. City of Duluth, 69 Minn. 5, 71 N. W. 694, and cases supra.
[9] Kirkpatrick v. Lewis, 46 Minn. 164, 47 N. W. 970, 48 N. W. 783.
[10] Lundberg v. Davidson, 72 Minn. 49, 74 N. W. 1018.
[11] Swain v. Lynd, 74 Minn. 72, 76 N. W. 758.
[12] Laws 1895, ch. 216.

Affidavit of service or attempted service—statute.

§ 2158. "That in all cases where service of notice of the foreclosure of a mortgage on real estate by advertisement has been heretofore or shall be hereafter made or attempted to be made upon the occupant of the mortgaged premises, and an affidavit of such service or attempted service or return of the officer making such service or attempted service shall have been heretofore or shall be hereafter filed for record in the office of the register of deeds of the county in which the land described in such mortgage or some part thereof is situate, such affidavit or return and the original record thereof and certified copies thereof shall be presumptive evidence of such

Digitized by Google

service or attempted service, and of the fact, when such affidavit or return so states, that the land described in the mortgage notice was vacant and unoccupied at the time of such attempted service."

[Laws 1895 ch. 216]

Notice to mortgagor.

§ 2159. Under existing law no special provision is made for serving notice on the mortgagor. It was formerly otherwise.

See Jones v. Tainter, 15 Minn. 512 Gil. 423; Atkinson v. Duffy, 16 Minn. 45 Gil. 30; Bennett v. Healey, 6 Minn. 240 Gil. 158.

Postponement of sale—statute.

§ 2160. "Such sale may be postponed from time to time, by inserting a notice of such postponement, as soon as practicable, in the newspaper in which the original advertisement was published, and continuing such publication until the time to which the sale is postponed, at the expense of the party requesting such postponement."

[G. S. 1894 § 6035]

§ 2161. A notice not published for the prescribed time is not cured by a postponement of the sale.[1] A notice of sale cannot be altered in the course of publication in a material particular; the remedy is either a discontinuance or a postponement under this section.[2] It is not necessary to wait until the day originally set for the sale to make the postponement.[3] The mortgagee cannot charge the expenses of a postponement made at his instance to the mortgagor.[4] The customary practice is to continue the publication of the old notice unaltered with a notice of postponement, signed by the party signing the original notice, appended.

[1] Pratt v. Tinkcom, 21 Minn. 142. See Sanborn v. Petter, 35 Minn. 449, 29 N. W. 64 (insufficient affidavit of publication).

[2] Dana v. Farrington, 4 Minn. 433 Gil. 336.

[3] Bennett v. Brundage, 8 Minn. 432 Gil. 385.

[4] Hobe v. Swift, 58 Minn. 84, 59 N. W. 831.

THE SALE AND PROCEEDINGS THEREON

How made and by whom—statute.

§ 2162. "The sale shall be at public vendue between the hours of nine o'clock in the forenoon and the setting of the sun, in the county in which the premises to be sold, or some part thereof, are situated, and shall be made by the sheriff of the said county, or his deputy, to the highest bidder. Provided, however, that before such sale shall be made, the mortgagee or assignee of record, or the attorney in fact of such mortgagee or assignee, whose authority is recorded in the county where the foreclosure proceedings are had, shall authorize the attorney making such foreclosure by an instrument in writing, which shall be executed under seal and acknowledged and recorded in the office of the register of deeds of the county where such foreclosure is made prior to the sale."

[G. S. 1894 § 6034 as amended by Laws 1897 ch. 262]

Digitized by Google

§ 2163. The sheriff of a county attached to another for "judicial purposes" is the proper officer to conduct a foreclosure in his county.[1] A power of attorney which substantially complies with the statute is sufficient.[2] The requirement of a seal is of course abolished by Laws 1899 ch. 86. Several curative acts have been passed.[3] An attorney employed to foreclose a mortgage has no implied authority to receive redemption money.[4]

[1] Berthold v. Holman, 12 Minn. 335 Gil. 221.
[2] Peaslee v. Ridgway, 82 Minn. 288, 84 N. W. 1024.
[3] See Laws 1899 ch. 22, 333.
[4] In re Grundysen, 53 Minn. 46, 55 N. W. 557.

In separate tracts—statute.

§ 2164. "If the mortgaged premises consist of separate and distinct farms or tracts, they shall be sold separately, and no more farms or tracts shall be sold than are necessary to satisfy the amount due on such mortgage at the date of notice of such sale, with interest, taxes paid, and costs of sale."

[G. S. 1894 § 6036] See § 1516.

§ 2165. Distinct tracts may be sold as a whole if they constitute one farm.[1] If the mortgaged premises consist of one tract the whole may be sold although less than the whole would satisfy the debt.[2] A subsequent sale by the mortgagor of a part of the mortgaged premises cannot defeat the right of the mortgagee to sell the premises as a whole.[3] Where an instrument constitutes, in effect, several separate and distinct mortgages upon several separate lots, to secure several separate and distinct sums of money, although for convenience all are consolidated in one writing, a sale of all the lots together as one tract, for a gross sum, is void.[4] Government subdivisions are not decisive in determining whether the mortgaged premises consist of one tract.[5] A sale of land as one tract and for a gross sum is not void simply because it includes a tract not covered by the mortgage.[6] A sale of separate tracts in one parcel is not void but merely voidable, on a showing of fraud or prejudice.[7] A division of the mortgaged premises by the mortgagor subsequent to the mortgage does not defeat the legal right of the mortgagee to sell the premises as a whole, but a court of equity may compel a sale in parcels.[8] The fact that tracts are described separately in the mortgage is not decisive as to whether they should be sold as a whole or separately.[9]

[1] Merrill v. Nelson, 18 Minn. 366 Gil. 335.
[2] Johnson v. Williams, 4 Minn. 260 Gil. 183.
[3] Paquin v. Braley, 10 Minn. 379 Gil. 304.
[4] Hull v. King, 38 Minn. 349, 37 N. W. 792. See cases under § 2153 (7).
[5] Worley v. Naylor, 6 Minn. 192 Gil. 123.
[6] Bottineau v. Aetna Life Ins. Co. 31 Minn. 125, 16 N. W. 849; Lowry v. Tilleny, 31 Minn. 500, 18 N. W. 452.
[7] Willard v. Finnegan, 42 Minn. 476, 44 N. W. 985; Ryder v. Hu-

Digitized by Google

lett, 44 Minn. 353, 46 N. W. 559; Clark v. Kraker, 51 Minn. 444, 53 N. W. 706.

[8] Clark v. Kraker, 51 Minn. 444, 53 N. W. 706 and cases cited. See Bay View Land Co. v. Myers, 62 Minn. 265, 64 N. W. 816.

[9] Lalor v. McCarthy, 24 Minn. 417.

Mortgagee may purchase—statute.

§ 2166. "The mortgagee, his assignees, or his or their legal representatives, may fairly and in good faith purchase the premises so advertised, or any part thereof, at such sale."

[G. S. 1894 § 6037]

§ 2167. To authorize a purchase by the mortgagee the sale must be conducted by the sheriff or his deputy.[1] An executor may purchase.[2] A fair sale is a sale conducted with fairness as respects the rights and interests of the parties affected by it. The holders of the mortgage are interested that the property shall bring enough to satisfy their claim. Those claiming under the mortgagor, other than the holders of the mortgage, are interested that there be a surplus over and above the mortgage debt large enough to satisfy their claims, while the mortgagor is interested that the surplus may be as large as possible. As respects the mortgagor, then, any manner of conducting the sale which prevents the property from bringing a price as high as it would bring if otherwise conducted is unfair.[3] A sale cannot be made to the estate of a deceased person.[4] The mere fact that the mortgagee is the administrator of the estate of the mortgagor does not prevent him from purchasing.[5]

[1] Ramsey v. Merriam, 6 Minn. 168 Gil. 104; Allen v. Chatfield, 8 Minn. 435 Gil. 386.

[2] Wilson v. Bell, 17 Minn. 61 Gil. 40; Baldwin v. Allison, 4 Minn. 25 Gil. 11.

[3] Lalor v. McCarthy, 24 Minn. 417.

[4] Kenaston v. Lorig, 81 Minn. 454, 84 N. W. 323.

[5] Fleming v. McCutcheon, 85 Minn. 152, 88 N. W. 433.

Purchaser may rely on record.

§ 2168. Foreclosure by advertisement is a proceeding based on the records and the purchaser has a right to rely on the title as disclosed by the records.

Brown v. Union Depot etc. Co. 65 Minn. 508, 68 N. W. 107; Palmer v. Bates, 22 Minn. 532; Merchant v. Woods, 27 Minn. 396, 7 N. W. 826; Bausman v. Eads, 146 Minn. 148, 48 N. W. 769. See Wilson v. Eigenbrodt, 30 Minn. 4, 13 N. W. 907.

Purchaser charged with notice of mortgagor's title.

§ 2169. The purchaser succeeds to the title of the mortgagor at the time the mortgage was executed, and in making the purchase he is charged with notice of such title as disclosed by the records.[1] He is charged with notice of the rights of any person in possession.[2]

[1] American Building etc. Assoc. v. Waleen, 52 Minn. 23, 53 N. W. 867.

[2] Carleton College v. McNaughton, 26 Minn. 194, 2 N. W. 688.

Digitized by Google

Certificate of sale—statute.

§ 2170. "Whenever any sale of real property is made under a power of sale contained in any mortgage, the officer shall make, and deliver to the purchaser, a certificate, under his hand and seal, containing:

(1) A description of the mortgage under which such sale is made.

(2) A description of the real property sold.

(3) The price paid for each parcel sold separately.

(4) The date of the sale and the name of the purchaser.

(5) The time allowed by law for redemption.

Said certificate shall be executed, proved or acknowledged, and recorded, as required by law for a conveyance of real estate, within twenty days after such sale."

[G. S. 1894 § 6038] See § 1522.

§ 2171. A foreclosure sale is not complete until the certificate is executed, acknowledged and recorded.[1] Without a certificate no title passes.[2] When a deputy sheriff conducts the sale he may make a certificate either in his own name or in the name of his principal.[3] The certificate must describe the mortgage.[4] It is not necessary that it should be stated in the body of the certificate that the sale was made by the sheriff as such.[5] It is essential that the certificate should accurately describe the property sold.[6] A statement in a certificate that "the above described premises are subject to redemption within the time and according to the statute in such case made and provided" is sufficient.[7] The provision that the certificate shall be executed and recorded within twenty days after sale may be merely directory as to time, yet, as the provision as to filing the affidavit of costs and disbursements is mandatory, a party cannot extend the time for filing such affidavit by failing to procure and record his certificate within twenty days after sale.[8] A certificate issued to the "estate of A. H. deceased" conveys no title.[9] Failure to record the certificate within twenty days does not render the sale void.[10] A sheriff who conducts a sale is authorized to execute a certificate within three months after his term of office has expired.[11] An instrument in the form of a deed but containing all the essentials of a certificate has been held sufficient.[12]

[1] Johnson v. Cocks, 37 Minn. 530, 35 N. W. 436; Larocque v. Chapel, 63 Minn. 517, 65 N. W. 941; Lindgren v. Lindgren, 73 Minn. 90, 75 N. W. 1034.

[2] Smith v. Buse, 35 Minn. 234, 28 N. W. 220; Lindgren v. Lindgren, 73 Minn. 90, 75 N. W. 1034.

[3] Burke v. Lacock, 41 Minn. 250, 42 N. W. 1016; Clark v. Mitchell, 81 Minn. 438, 84 N. W. 327.

[4] Golcher v. Brisbin, 20 Minn. 453 Gil. 407; Cable v. Minneapolis Stock Yards etc. Co. 47 Minn. 417, 50 N. W. 528.

[5] Merrill v. Nelson, 19 Minn. 366 Gil. 335.

[6] Smith v. Buse, 35 Minn. 234, 28 N. W. 220; Lowry v. Tilleny, 31 Minn. 500, 18 N. W. 452; Schoch v. Birdsall, 48 Minn. 441, 51 N. W. 382; Law v. Citizens' Bank, 85 Minn. 411, 89 N. W. 320.

Digitized by Google

[7] Wells v. Atkinson, 24 Minn. 161. See Cable v. Minneapolis Stock Yards etc. Co. 47 Minn. 417, 50 N. W. 528.

[8] Larocque v. Chapel, 63 Minn. 517, 65 N. W. 941. See Ryder v. Hulett, 44 Minn. 353, 46 N. W. 559; Crombie v. Little, 47 Minn. 581, 50 N. W. 823.

[9] Kenaston v. Lorig, 81 Minn. 454, 84 N. W. 323.

[10] Crombie v. Little, 47 Minn. 581, 50 N. W. 823.

[11] See G. S. 1894 § 6040; Crombie v. Little, 47 Minn. 581, 50 N. W. 823.

[12] Crombie v. Little, 47 Minn. 581, 50 N. W. 823.

Certificate as evidence—limitation of actions—statute.

§ 2172. "That the sheriff's certificate of any sale, heretofore or hereafter made, under a power to sell contained in a mortgage, shall be prima facie evidence that all the requirements of law in that behalf have been duly complied with, and prima facie evidence of title in fee thereunder in the purchaser at such sale, his heirs or assigns, after the time for redemption therefrom has expired; and no such sale shall be held invalid or set aside by reason of any defect in the notice thereof, or in the publication or posting of such notice, or in the service of such notice on the person or persons in possession of the mortgaged premises, or in the proceedings of the officer making such sale, unless the action in which the validity of such sale shall be called in question be commenced, or the defence alleging its invalidity be interposed, within five years after the date of such sale: provided, that persons under disability to sue by reason of being minors, insane persons, idiots, persons in captivity, or in any country with which the United States are at war, when such sale was made, may commence such action or interpose such defence at any time within five years after the removal of such disability: provided, further, that such actions shall be commenced with reasonable diligence in all cases."

[G. S. 1894 § 6054 as amended by Laws 1901 ch. 374] See G. S. 1894, §§ 6055, 6056.

§ 2173. This statute, so far as it is a statute of limitations, is inapplicable to cases where the mortgagor remains in possession and actual occupancy of the premises.[1] It is valid, as a statute of limitations, if the purchaser goes into possession.[2] Whether it is applicable when the premises are vacant at the time of sale and remain vacant is an open question. It is to be observed that the statute is only applicable to certain specified defects. It is not applicable where there is an entire want of authority to exercise the power of sale as where a stranger has assumed to foreclose.[3] Failure to record an assignment before giving notice is not a "defect" within the statute.[4] The following have been held defects within the statute: failure to state in the notice the amount due on each lot where the mortgage constitutes a separate mortgage on several lots;[5] that the certificate does not show that a sale was duly postponed;[6] that the notice was not published for the required time;[7] that the notice contained an inaccuracy as to the date when the mortgage was recorded.[8] To constitute prima facie evidence the certificate must conform in mat-

Digitized by Google

ters of substance to the requirements of the statute.[9] The certificate is prima facie evidence that the notice of sale was properly published.[10] The certificate is only presumptive evidence of regularity.[11] It is not evidence of the mortgage and power.[12] Whatever facts are necessary to make the certificate intelligible with respect to the matters which it is required to set forth are necessarily contained in it and evidence.[13] A party may by laches lose the right to bring an action to set aside a foreclosure sale in a less time than five years.[14] A certificate executed by a deputy sheriff in his own name has the same force as evidence as a certificate executed in the name of the sheriff.[15] A certificate has no force as evidence under this section until after the period of redemption has expired.[16]

[1] Sanborn v. Petter, 35 Minn. 449, 29 N. W. 64.
[2] Russell v. H. C. Akeley Lumber Co. 45 Minn. 376, 48 N. W. 3.
[3] Bausman v. Kelley, 38 Minn. 197, 36 N. W. 333.
[4] Burke v. Backus, 51 Minn. 174. 53 N. W. 458.
[5] Bitzer v. Campbell, 47 Minn. 221, 49 N. W. 691.
[6] Mosness v. Lacy, 73 Minn. 283, 76 N. W. 34.
[7] Russell v. H. C. Akeley Lumber Co. 45 Minn. 376, 48 N. W. 3; Morgan v. Carter, 54 Minn. 141, 55 N. W. 1117.
[8] Id.
[9] Nelson v. Central Land Co. 35 Minn. 408, 29 N. W. 121.
[10] Burke v. Lacock, 41 Minn. 250, 42 N. W. 1016.
[11] Id.; Casey v. McIntyre, 45 Minn. 526, 48 N. W. 402; Sanborn v. Petter, 35 Minn. 449, 29 N. W. 64; Richards v. Finnegan, 45 Minn. 208, 47 N. W. 788.
[12] Anderson v. Schultz, 37 Minn. 76, 33 N. W. 440.
[13] Goenen v. Schroeder, 18 Minn. 66 Gil. 51.
[14] Marcotte v. Hartman, 46 Minn. 202, 48 N. W. 767. See Saxe v. Rice, 64 Minn. 190, 66 N. W. 268.
[15] Burke v. Lacock, 41 Minn. 250, 42 N. W. 1016.
[16] Herbert v. Turgeon, 84 Minn. 34, 86 N. W. 757.

When certificate operates as a conveyance—statute—interest of purchaser at sale.

§ 2173a. "Such certificate, so proved, acknowledged, and recorded, shall, upon the expiration of the time for redemption, operate as a conveyance, to the purchaser or his assignees, of all the right, title and interest of the mortgagor in and to the premises named therein, at the date of such mortgage, without any other conveyance whatever."

[G. S. 1894 § 6039] See § 1524.

§ 2174. The title of the mortgagor does not pass by the foreclosure until his right of redemption expires.[1] During the period of redemption the purchaser has a lien on the premises to the amount of the purchase price. The lien of the mortgage is not extinguished until it merges in the legal estate when that passes by lapse of time. It passes to the purchaser so that if he goes into possession under the foreclosure, even though it be invalid, he is regarded as a mortgagee in possession.[2] The purchaser has something more than a

Digitized by Google

mere right to receive back his purchase money and interest. He has the right to acquire absolute title to the land unless it is redeemed within the time allowed by law by one who has a right under the statute to redeem; and he cannot be deprived of this right by one who is not a lawful redemptioner.[3] During the period of redemption the rights of the parties are determined by the statute and not by anything in the mortgage and though the mortgage pledges the rents the purchaser is not entitled to them during the period of redemption.[4] A certificate executed and delivered but not recorded will not convey title.[5] The interest acquired by the purchaser is subject to the lien of any attachment or judgment duly made or docketed, as in case of real property, and may be attached or sold on execution in the same manner.[6] The title of the purchaser relates back to, and takes effect by virtue of, the mortgage, which is, in fact, the efficient instrument by which the title is transferred from the mortgagor to the purchaser.[7] The purchaser acquires all rights, privileges and easements appurtenant and necessary to the enjoyment of the mortgaged premises although they were acquired subsequent to the mortgage.[8] If the mortgagee is in possession at the time of sale with the consent of the mortgagor he is entitled, as against a subsequent mortgagee, to remain in possession long enough to satisfy any unpaid balance of debt.[9] When, after a default in a mortgage, the mortgagee in apparent good faith makes a void foreclosure, and, after the year to redeem, the purchaser takes possession under color of the foreclosure proceedings, he is a mortgagee in possession, and entitled to all the rights of such a mortgagee, whether he took possession with or without the consent, either express or implied, of the mortgagor.[10] An ordinary conveyance made by a mortgagee purchaser at an abortive sale conveys his mortgage lien on the premises.[11] A purchaser is bound to know the condition of the title which he purchases; and if the mortgage contains no covenants of title, and the title proves defective, he has no claim on the mortgagor to make it good. What he buys in such a case is just what title the mortgagor had at the time of the execution of the mortgage —nothing more and nothing less—and the amount of his bid is presumed to be determined with reference to that fact. Where the mortgage contains covenants of title which run with the land different considerations apply. In that case the purchaser buys the covenants and the consideration which he pays represents the value of the land as warranted by the covenants.[12] If the mortgagor or his grantee remains in possession after the period of redemption has expired the presumption is that the possession is in accordance with, and in subordination to, the title of the purchaser, and is under him with his acquiescence, unless the contrary appear, or until an intention to claim the premises adversely is made manifest.[13] A senior mortgagee, acquiring possession by consent of the mortgagor after a foreclosure sale under a junior mortgage, but before the title and right of possession of the mortgagor have been extinguished by the expiration of the year for redemption, has the rights of a mortgagee in possession.[14] The interest of the purchaser during the

Digitized by Google

year of redemption is capable of being conveyed by deed.[15] Where the purchaser at a void or voidable sale goes into possession peaceably and in good faith he is entitled to the rights of a mortgagee in possession. He is entitled to the crops and is not accountable for the rents and profits.[16] The purchaser is charged with notice of the rights of persons in possession of the premises.[17] Where the purchaser at a defective foreclosure sale, or his assigns, goes into possession of the mortgaged premises, with assent of the mortgagor or his successors in interest, under the right supposed to have been acquired under the foreclosure sale, he will be deemed a mortgagee in possession; and if he remains in possession until the right of redemption by the mortgagor is barred, he becomes invested with the legal title.[18] During the period of redemption a purchaser not in possession has no claim to crops or timber, but he may restrain waste.[19] Crops sown by a lessee of the mortgagor during the year of redemption and harvested by the lessee after the expiration of the year, but before the purchaser takes possession, belong to the lessee.[20] The purchaser succeeds to the equitable interest of the mortgagee, and when no redemption is made this interest draws to it the subordinate legal title of the mortgagor, and his title then stands under the mortgagee precisely as if the mortgage had been an absolute conveyance at its date; or, in other words, the mortgage ripens into a perfect title through the process of foreclosure. The purchaser is, then, only concerned with the state of the title at the date of the mortgage and the existence of liens affecting the rights of the mortgagee.[21] As between the mortgagee after foreclosure and expiration of the period of redemption and a stranger, chattels on the land belong to the former.[22]

[1] Daniels v. Smith, 4 Minn. 172 Gil. 117; Donnelly v. Simonton, 7 Minn. 167 Gil. 110; Horton v. Maffitt, 14 Minn. 289 Gil. 216; Standish v. Vosberg, 27 Minn. 175, 6 N. W. 489; Buchanan v. Reid, 43 Minn. 172, 45 N. W. 11; Gates v. Ege, 57 Minn. 465, 59 N. W. 495; Loy v. Home Ins. Co., 24 Minn. 315.

[2] Buchanan v. Reid, 43 Minn. 172, 45 N. W. 11.

[3] Hughes v. Olson, 74 Minn. 237, 77 N. W. 44.

[4] Pioneer Savings & Loan Co. v. Farnham, 50 Minn. 315, 52 N. W. 897.

[5] Lindgren v. Lindgren, 73 Minn. 90, 75 N. W. 1034.

[6] G. S. 1894 § 6045.

[7] Burke v. Lacock, 41 Minn. 250, 42 N. W. 1016.

[8] Swedish-American Nat. Bank v. Conn. etc. Ins. Co., 83 Minn. 377, 86 N. W. 420.

[9] Longfellow v. Fisher, 69 Minn. 307, 72 N. W. 118. See Anderson v. Minnesota Loan & Trust Co., 68 Minn. 491, 71 N. W. 665, 819.

[10] Backus v. Burke, 63 Minn. 272, 65 N. W. 459.

[11] Id. and cases cited.

[12] American Building etc. Assoc. v. Waleen, 52 Minn. 23, 53 N. W. 867; Pioneer Savings etc. Co. v. Freeburg, 59 Minn. 230, 61 N. W. 25.

Digitized by Google

[13] Lowry v. Tilleny, 31 Minn. 500, 18 N. W. 452.
[14] Jones v. Rigby, 41 Minn. 530, 43 N. W. 390.
[15] Cooper v. Finke, 38 Minn. 2, 35 N. W. 469.
[16] Johnson v. Sandhoff, 30 Minn. 197, 14 N. W. 889; Holton v. Bowman, 32 Minn. 191, 19 N. W. 734.
[17] Carleton College v. McNaughton, 26 Minn. 194, 2 N. W. 688.
[18] Rogers v. Benton, 39 Minn. 39 38 N. W. 765; Jellison v. Halloran, 44 Minn. 199, 46 N. W. 332; Russell v. H. C. Akeley Lumber Co., 45 Minn. 376, 48 N. W. 3; Law v. Citizens' Bank, 85 Minn. 411, 89 N. W. 320. See Backus v. Burke, 63 Minn. 272, 65 N. W. 459.
[19] Berthold v. Holman, 12 Minn. 335 Gil. 221.
[20] Aultman & Taylor Co. v. O'Dowd, 73 Minn. 58, 75 N. W. 756.
[21] Hokanson v. Gunderson, 54 Minn. 499, 56 N. W. 172.
[22] O'Donnell v. Burroughs, 55 Minn. 91, 56 N. W. 579.

Disposal of surplus purchase money—statute.

§ 2175. "If, after sale of any real estate, made as herein prescribed, there remains in the hands of the officer making the sale any surplus money, after satisfying the mortgage on which such real estate was sold, and payment of the tax and cost of sale, the surplus shall be paid over by said officer, on demand, to the mortgagor, his legal representatives or assigns."

[G. S. 1894 § 6046]

§ 2176. "Assigns" comprehend all those who take, either immediately or remotely, from or under the assignor, whether by conveyance, devise, descent, or act of law. A second mortgagee is entitled, in preference to the mortgagor, to receive the surplus, or at least, sufficient to satisfy his mortgage.[1] Taxes paid subsequent to the foreclosure cannot be deducted from the proceeds of the sale as against the mortgagor.[2] The surplus belongs to the same persons and is subject to the same liens as the land at the time of the sale. If the mortgagor is then the sole owner of the land, subject only to the mortgage, he is entitled to such surplus, although judgments are thereafter and before it is paid to him, docketed against him, which are a lien on his equity of redemption in the land.[3] The sheriff may safely turn the proceeds of the sale over to the mortgagee, at least to the extent of satisfying the whole mortgage, if he has no notice of the equities of third parties.[4]

[1] Brown v. Crookston Agr. Assoc. 34 Minn. 545, 26 N. W. 907; Fuller v. Langum, 37 Minn. 74, 33 N. W. 122; Fagan v. People's Savings etc. Assoc. 55 Minn. 437, 57 N. W. 142; Ness v. Davidson, 49 Minn. 469, 52 N. W. 46; Ayer v. Stewart, 14 Minn. 97 Gil. 68.
[2] Wyatt v. Quinby, 65 Minn. 537, 68 N. W. 109.
[3] Perkins v. Stewart, 75 Minn. 21, 77 N. W. 434; Johnson v. Stewart, 75 Minn. 20, 77 N. W. 435. See further as to disposition of surplus: Fowler v. Johnson, 26 Minn. 338, 3 N. W. 987; Taylor v. Burgess, 26 Minn. 547, 6 N. W. 350.
[4] Northern Cattle Co. v. Munro, 83 Minn. 37, 85 N. W. 919.

Digitized by Google

Affidavits to perpetuate evidence of proceedings—statutes.

§ 2177. "Any party desiring to perpetuate the evidence of any sale made in pursuance of the provisions of this chapter, may procure—

(1) An affidavit of the publication of the notice of sale, and of any notice of postponement, to be made by the printer of the newspaper in which the same was inserted, or by some person in his employ knowing the facts; and,

(2) An affidavit of the facts of any sale pursuant to such notice, to be made by the person who acted as an auctioneer at the sale, stating the time and place at which the same took place, the sum bid, and the name of the purchaser, which affidavit may be taken and certified to by any officer authorized by law to administer oaths."

[G. S. 1894 § 6047]

§ 2178. "Such affidavit shall be recorded at length by the register of deeds of the county in which the premises are situated in a book kept for the record of deeds; and such original affidavits, the record thereof, and certified copies of such record, shall be presumptive evidence of the facts therein contained."

[G. S. 1894 § 6048]

§ 2179. "A note referring to the page and book where the evidence of any sale having been made under a mortgage is recorded, shall be made by the register recording such evidence, in the margin of the record of such mortgage, if such record is in his office."

[G. S. 1894 § 6049]

§ 2180. "A record of the affidavits herein provided, and of the certificates executed on the sale of the premises, shall be sufficient to pass the title thereto; and the said conveyance shall be an entire bar of all claims or equity of redemption of the mortgagor, his heirs and representatives, and of all persons claiming under him or them, by virtue of any title subsequent to such mortgage, except as herein provided."

[G. S. 1894 § 6050]

§ 2181. The affidavits are prima facie evidence of the facts therein stated; at least, of the facts authorized to be stated.[1] They are not essential to the validity of the sale.[2] If defective affidavits are recorded the party foreclosing may subsequently record proper ones.[3] The affidavit of the publisher of a newspaper is sufficient.[4] An affidavit of publication should state all the statutory requirements of publication.[5] The affidavits are not evidence of the mortgage and power.[6]

[1] Griswold v. Taylor, 8 Minn. 342 Gil. 301; Sanborn v. Petter, 35 Minn. 449, 29 N. W. 64.

[2] Golcher v. Brisbin, 20 Minn. 453 Gil. 407; Burke v. Lacock, 41 Minn. 250, 42 N. W. 1016.

[3] Golcher v. Brisbin, 20 Minn. 453 Gil. 407.

[4] Menard v. Crowe, 20 Minn. 448 Gil. 402; Kipp v. Cook, 46 Minn. 535, 49 N. W. 257.

Digitized by Google

[5] Sanborn v. Petter, 35 Minn. 449, 29 N. W. 64; Golcher v. Brisbin, 20 Minn. 453 Gil. 407.

[6] Anderson v. Schultz, 37 Minn. 76, 33 N. W. 440.

Affidavit of costs—statute.

§ 2182. "That within ten days after foreclosure of any mortgage under the provisions of this act, the party foreclosing, or his attorney, shall make and file for record with the register of deeds in the county where the property is located, an affidavit of costs and disbursements, setting forth in full a detailed bill of the costs and disbursements, including attorneys' fees, embraced in the foreclosure sale, and that the same has been absolutely and unconditionally paid or incurred."

[G. S. 1894 § 6051]

§ 2183. This statute has been held constitutional [1] and mandatory.[2] If no affidavit is filed an action will lie for the recovery of all costs and disbursements of the sale.[3] Failure to file the affidavit does not invalidate the sale.[4] The word "foreclosure" as used in this section is construed as referring to a sale completed and consummated by the execution and recording of the proper certificate.[5] A party cannot extend the time for filing the affidavit by failing to procure and record his certificate of sale within twenty days after the sale.[6] The ten days begin to run, not from the day the property is offered for sale and struck off to the purchaser, but from the time the foreclosure sale is completed by the execution and recording of the certificate of sale.[7] Whether the affidavit is evidence of the facts required to be stated is an open question. It is not evidence of facts not required to be stated.[8] Failure to file the affidavit was cured by Laws 1895 ch. 308 and that act was constitutional.[9] It is no objection to an action to recover the surplus upon failure to file the affidavit that there is another mortgage on the premises unpaid and that the mortgagee therein is entitled to the surplus.[10]

[1] Perkins v. Stewart, 75 Minn. 21, 77 N. W. 434.

[2] Johnson v. N. W. Loan etc. Assoc. 60 Minn. 393, 62 N. W. 381; Brown v. Scandia Building etc. Assoc. 61 Minn. 527, 63 N. W. 1040; Larocque v. Chapel, 63 Minn. 517, 65 N. W. 941; Brown v. Baker, 65 Minn. 133, 67 N. W. 793; Itasca Invest. Co. v. Dean, 84 Minn. 388, 87 N. W. 1020.

[4] Johnson v. Cocks, 37 Minn. 530, 35 N. W. 436; Johnson v. N. W. Loan etc. Assoc. 60 Minn. 393, 62 N. W. 381; Larocque v. Chapel, 63 Minn. 517, 65 N. W. 941.

[5] Larocque v. Chapel, 63 Minn. 517, 65 N. W. 941.

[6] Id.

[7] Id.; Farnsworth Loan etc. Co. v. Com. Title etc. Co. 84 Minn. 62, 86 N. W. 877.

[8] Wyatt v. Quinby, 65 Minn. 537, 68 N. W. 109.

[9] Farnsworth Loan etc. Co. v. Com. Title etc. Co. 84 Minn. 62, 86 N. W. 877.

[10] Truesdale v. Sidle, 65 Minn. 315, 67 N. W. 1004; Itasca Invest. Co. v. Dean, 84 Minn. 388, 87 N. W. 1020.

Digitized by Google

REDEMPTION FROM SALE

By mortgagor or parties under him—statute.

§ 2184. "The mortgagor, his heirs, executors, administrators, or assigns, whose real property is sold in conformity to the provisions of this act, may, within twelve months after such sale, redeem such property as hereinafter provided, by paying the sum of money for which the same was sold, together with interest on the same from the time of such sale. Provided, that no redemption shall be made for real property sold in conformity to the provisions of this act, when the mortgage foreclosed contains a distinct rate of interest more than seven per cent. per annum, unless the party entitled to redeem shall pay, within the time provided, the sum for which said property was sold, together with interest thereon, from the date of sale to the time of redemption, at the rate specified in the mortgage, not to exceed ten per cent. per annum. Provided, that when no rate of interest is specified in the mortgage, the rate of interest after sale shall be seven per cent. per annum on the amount for which the property was sold. And provided, further, that when a rate of interest less than seven per cent. per annum is specified in the mortgage, the rate of interest after sale shall be the rate per annum specified in the mortgage on the amount for which the property was sold."

[G. S. 1894 § 6041 as amended by Laws 1899 ch. 37] See § 1533.

§ 2185. A junior mortgagee is not an "assign" within the meaning of this section,[1] nor is a purchaser at the foreclosure of a junior mortgage.[2] The right to redeem expires absolutely at the expiration of the twelve months and cannot be revived.[3] The time to redeem stated in the certificate of sale does not control in case of conflict with the statute.[4] If the last day of the twelve months falls on Sunday redemption may be made on Monday.[5] A wife joining in the mortgage of her husband is entitled to redeem.[6] An owner of an undivided half of a tract sold as a whole can only redeem the whole.[7] The assigns of the mortgagor are those to whom the property, or the interest of the mortgagor therein, is transferred.[8] Where the owner of premises assumes to redeem them as a creditor under a judgment against a former owner, in law the redemption will be one by an owner, and not by a creditor, and its legal effect will be to annul the sale from which the redemption is made.[9] Prior to Laws 1899 ch. 37 it was held that to redeem the mortgagor must pay the sum for which the property was sold with interest at seven per cent. although the mortgage provides for interest at a lesser rate.[10] The court cannot extend the period of redemption.[11] Redemption by one of two joint owners will inure to the benefit of both.[12] A purchaser at an abortive sale who has gone into possession by consent of the mortgagor, or his successor in interest, in the belief that the sale was valid, and has remained in possession until the redemption period has expired, may redeem under this section.[13] A tenant for years, a person beneficially interested, a tenant by curtesy, and one who has dower rights or one who has the statutory interest which has super-

Digitized by Google

seded both curtesy and dower in this state, may redeem under this section.[14]

[1] Cuilerier v. Brunelle, 37 Minn. 71, 33 N. W. 123; Darelius v. Davis, 74 Minn. 345, 77 N. W. 214.
[2] Buchanan v. Reid, 43 Minn. 172, 45 N. W. 11.
[3] Gates v. Ege, 57 Minn. 465, 59 N. W. 495.
[4] Carroll v. Rossiter, 10 Minn. 174 Gil. 141.
[5] Bovey De Laittre Lumber Co. v. Tucker, 48 Minn. 223, 50 N. W. 1038.
[6] Williams v. Stewart, 25 Minn. 516.
[7] Buettel v. Harmount, 46 Minn. 481, 49 N. W. 250. See Gesner v. Burdell, 18 Minn. 497 Gil. 444.
[8] Gesner v. Burdell, 18 Minn. 497 Gil. 444. See Law v. Citizens' Bank, 85 Minn. 411, 89 N. W. 320.
[9] Clark v. Butts, 78 Minn. 373, 81 N. W. 11.
[10] Evans v. Rhode Island Hospital Trust Co. 67 Minn. 160, 69 N. W. 715, 1069.
[11] State v. Kerr, 51 Minn. 417, 53 N. W. 719.
[12] Holterhoff v. Mead, 36 Minn. 42, 29 N. W. 675. See Oliver v. Hedderly, 32 Minn. 455, 21 N. W. 478.
[13] Law v. Citizens' Bank, 85 Minn. 411, 89 N. W. 320.
[14] Id.

By creditors—statute.

§ 2186. "If no such redemption is made, the senior creditor having a lien, legal or equitable, on the real estate, or some part thereof, subsequent to the mortgage, may redeem within five days after the expiration of the said twelve months; and each subsequent creditor, having such lien, within five days after the time allowed all prior lien-holders, as aforesaid, may redeem by paying the amount aforesaid, and all liens prior to his own held by the party from whom the redemption is made: provided, that no creditor shall be entitled to redeem, unless, within the year allowed for redemption, he files notice of his intention to redeem in the office of the register of deeds where the mortgage is recorded."

[G. S. 1894 § 6044] See §§ 1533, 1535.

§ 2187. The following persons are entitled to redeem under this section: a junior mortgagee;[1] the purchaser at the foreclosure sale of a junior mortgage;[2] a creditor of the mortgagor's grantee;[3] an attaching creditor;[4] the assignee of a junior mortgagee;[5] the assignee of a judgment against the mortgagor;[6] judgment creditors;[7] a creditor acquiring a lien pending the time for redemption.[8] To entitle a creditor to redeem he must have something more than the general right common to all creditors to have the general property of the debtor applied to the payment of his debts; he must have a right, either in law or equity, to have the specific property appropriated to the satisfaction of his claim in exclusion of other claims subsequent in date to his.[9] It is not necessary that the creditor should have a personal claim against the debtor; it is sufficient if he has a special claim on the specific land sold. The statute has in view

Digitized by Google

the party's relation and interest in respect to the land, and not in respect to any particular person. The right of redemption is given to a creditor, because the land is security for his debt, and without such right the security and perhaps the debt, might be lost.[10] A general creditor of a deceased person, although his claim has been allowed against the estate, has no such lien upon the real estate of the deceased as to entitle him to redeem.[11] A creditor having a lien on a part of the land sold may redeem the whole.[12] If a notice of intention to redeem is recorded, it is immaterial that it is not filed.[13] Where a party who has filed his notice of intention to redeem assigns his lien his assignee may redeem under such notice.[14] The purchaser at a foreclosure sale may question the right of a judgment creditor to redeem by attacking the judgment as absolutely void.[15] Defects in a notice of intention to redeem are waived if the purchaser accepts the redemption money.[16] A party having an equitable mortgage, in the form of an absolute deed, may redeem under this section without having first obtained a judicial determination that the deed is a mortgage.[17] A notice of intention to redeem filed before the creditor actually acquires his lien is ineffectual although he subsequently and during the year acquires the lien described in the notice.[18] The redemption by a creditor does not annul the sale but appropriates the benefit of it to the redemptioner.[19] Where a junior creditor redeems from a senior creditor who has himself previously redeemed upon a lien valid on its face and has received a certificate of redemption and the purchaser has accepted the redemption money, the redemption of the junior creditor is valid although it turns out that the senior creditor did not have a valid lien.[20] A redemption by a creditor after a tender of the amount of his claim is valid as against the mortgagor.[21] A lien creditor, redeeming, is a purchaser for a valuable consideration, so as to be protected from a resulting trust of which he had no notice.[22] The statute is to be liberally construed.[23] The right of redemption given to a creditor, when once vested, becomes a property right which cannot be divested without due process of law.[24] There can be no nullification of a creditor's right to redeem by any agreement made between other parties.[25]

[1] Nopson v. Horton, 20 Minn. 268 Gil. 239; Cuilerier v. Brunelle, 37 Minn. 71, 33 N. W. 123; Tinkom v. Lewis, 21 Minn. 132; Hoover v. Johnson, 47 Minn. 434, 50 N. W. 475.

[2] Buchanan v. Reid, 43 Minn. 172, 45 N. W. 11.

[3] Hospes v. Sanborn, 28 Minn. 48, 8 N. W. 905.

[4] Atwater v. Manchester Savings Bank, 45 Minn. 341, 48 N. W. 187.

[5] Bovey De Laittre Lumber Co. v. Tucker, 48 Minn. 223, 50 N. W. 1038; Darelius v. Davis, 74 Minn. 345, 77 N. W. 214.

[6] Swanson v. Realization & Debenture Corp. 70 Minn. 380, 73 N. W. 165.

[7] Pamperin v. Scanlan, 28 Minn. 345, 9 N. W. 868; Millard v. Finnegan, 42 Minn. 476, 44 N. W. 985; Bartleson v. Thompson, 30 Minn. 161, 14 N. W. 795; Martin v. Sprague, 29 Minn. 53, 11 N. W. 143; Willis v. Jelinek, 27 Minn. 18, 6 N. W. 373; Lowry v. Akers, 50 Minn. 508, 52 N. W. 922; Todd v. John-

Digitized by Google

son, 56 Minn. 60, 57 N. W. 320; Parker v. St. Martin, 53 Minn. 1, 55 N. W. 113; Hughes v. Olson, 74 Minn. 237, 77 N. W. 42; Clark v. Butts, 78 Minn. 373, 81 N. W. 11.

[8] Watkins v. Hackett, 20 Minn. 106 Gil. 92.

[9] Whitney v. Burd, 29 Minn. 203, 12 N. W. 530; Nelson v. Rogers, 65 Minn. 246, 68 N. W. 18.

[10] Hospes v. Sanborn, 28 Minn. 48, 8 N. W. 905; Buchanan v. Reid, 43 Minn. 172, 45 N. W. 172.

[11] Whitney v. Burd, 29 Minn. 203, 12 N. W. 530; Nelson v. Rogers, 65 Minn. 246, 68 N. W. 18.

[12] Willis v. Jelineck, 27 Minn. 18, 6 N. W. 373; Martin v. Sprague, 29 Minn. 53, 11 N. W. 143; O'Brien v. Krenz, 36 Minn. 136, 30 N. W. 458; Tinkcom v. Lewis, 21 Minn. 132.

[13] Willis v. Jelineck, 27 Minn. 18, 6 N. W. 373.

[14] Bovey De Laittre Lumber Co. v. Tucker, 48 Minn. 223, 50 N. W. 1038.

[15] Hughes v. Olson, 74 Minn. 237, 77 N. W. 44. See Atwater v. Manchester Savings Bank, 45 Minn. 341, 48 N. W. 187.

[16] Clark v. Butts, 73 Minn. 361, 76 N. W. 199; Todd v. Johnson, 50 Minn. 310, 52 N. W. 864.

[17] Scheibel v. Anderson, 77 Minn. 54, 79 N. W. 594.

[18] Maurin v. Carnes, 71 Minn. 308, 74 N. W. 139.

[19] Gates v. Ege, 57 Minn. 465, 59 N. W. 495.

[20] Todd v. Johnson, 56 Minn. 60, 57 N. W. 320.

[21] Willard v. Finnegan, 42 Minn. 476, 44 N. W. 585.

[22] Martin v. Baldwin, 30 Minn. 537, 16 N. W. 449.

[23] Martin v. Sprague, 29 Minn. 53, 11 N. W. 143.

[24] Willis v. Jelineck, 27 Minn. 18, 6 N. W. 373; O'Brien v. Krenz, 36 Minn. 136, 30 N. W. 458.

[25] Swanson v. Realization etc. Corp. 70 Minn. 380, 73 N. W. 165.

How made—statute.

§ 2188. "Redemption shall be made as follows: the person desiring to redeem shall pay to the person holding the right acquired under such sale, or for him to the sheriff who made the sale, or his successor in office, the amount required by law for such redemption, and shall produce to such person or officer—

(1) A certified copy of the docket of the judgment, or the deed of conveyance or mortgage, or of the record or files, evidencing any other lien under which he claims a right to redeem, certified by the officer in whose custody such docket, record, or files shall be.

(2) Any assignment necessary to establish his claim, verified by the affidavit of himself or the subscribing witness thereto, or of some person acquainted with the signature of the assignor.

(3) An affidavit of himself or his agent, showing the amount then actually due on his lien.

Within twenty-four hours after such redemption is made, the party redeeming shall cause the documents so required to be produced to be filed in the office of the register of deeds of the county in which the mortgaged lands are situated, and the register of deeds

Digitized by Google

shall indorse thereon the date and hour of receiving the same, and shall preserve such documents in his office for one year thereafter, for which service he shall be entitled to receive one dollar: provided, that in case such redemption shall be made at any place other than the county seat, it shall be deemed a sufficient compliance herewith to forthwith deposit such documents in the nearest post-office, addressed to such register of deeds, with the postage thereon prepaid."

[G. S. 1894 § 6042] See §§ 1537, 1538.

Certificate of redemption—effect of redemption—statute.

§ 2189. "The person or officer from whom such redemption is made, shall make, and deliver to the person redeeming, a certificate under his hand and seal, containing—

(1) The name of the person redeeming, and the amount paid by him on such redemption.

(2) A description of the sale for which such redemption is made, and of the property redeemed.

(3) Stating upon what claim such redemption is made; and, if upon a lien, the amount claimed to be due thereon at the date of redemption.

Such certificate shall be executed, proved or acknowledged, and recorded, as provided by law for conveyances of real estate; and if not so recorded within four days after such redemption, such redemption and certificate is void as against any person in good faith making redemption from the same person or lien; provided, the owner of the property redeemed or his assigns may record the certificate of redemption within four days after the expiration of the year allowed him for redemption.

If such redemption is made by the owner of the property sold, his heirs or assigns, such redemption annuls such sale; if by a creditor holding a lien on the property, or some part thereof, said certificate, so executed, proved or acknowledged, and recorded, operates as an assignment to him of the right acquired under such sale, subject to such right of any other person to redeem as is or may be provided by law."

[G. S. 1894 § 6043 as amended by Laws 1901 ch. 38] See § 1539.

REMEDIES

Purchaser may obtain possession summarily.

§ 2190. Under the unlawful detainer act the purchaser has a summary remedy for obtaining possession from the mortgagor after the expiration of the period of redemption.

G. S. 1894 § 6118; Anderson v. Schultz, 37 Minn. 76, 33 N. W. 440; Pioneer Savings etc. Co. v. Powers, 47 Minn. 269, 50 N. W. 227; Cullen v. Minnesota Loan & Trust Co. 60 Minn. 6, 61 N. W. 818; Heaton v. Darling, 66 Minn. 262, 68 N. W. 1087; Preiner v. Meyer, 67 Minn. 197, 69 N. W. 887; Aultman & Taylor Co. v. O'Dowd, 73 Minn. 58, 75 N. W. 756.

Digitized by Google

Remedies of mortgagor—general statement.

§ 2191. The mortgagor has several remedies for a void sale. He may bring an action to set it aside [1] or for the recovery of damages.[2] He may attack it in an action of ejectment brought against him by the purchaser;[3] in an action to determine adverse claims;[4] or in an action against him to restrain waste during the year of redemption.[5] He may remain in possession until the purchaser takes affirmative action and no statute of limitations can run against him.[6] If the sale is not void but merely voidable different rules apply and he must himself take affirmative action with promptness.[7] The mortgagor cannot bring an action of ejectment against a mortgagee in possession.[8]

[1] Hull v. King, 38 Minn. 349, 37 N. W. 792; Lowell v. North, 4 Minn. 32 Gil. 15.
[2] Lowell v. North, 4 Minn. 32 Gil. 15.
[3] Lowry v. Mayo, 41 Minn. 388, 43 N. W. 78.
[4] Merchant v. Woods, 27 Minn. 396, 7 N. W. 82; Casey v. McIntyre, 45 Minn. 526, 48 N. W. 402.
[5] Jordan v. Humphrey, 31 Minn. 495, 18 N. W. 450.
[6] Sanborn v. Petter, 35 Minn. 449, 29 N. W. 64. See § 83.
[7] See cases under § 2192.
[8] Johnson v. Sandhoff, 30 Minn. 197, 14 N. W. 889; Backus v. Burke, 63 Minn. 272, 65 N. W. 459; Jones v. Rigby, 41 Minn. 530, 43 N. W. 390; Cargill v. Thompson, 57 Minn. 534, 550, 59 N. W. 638; Pace v. Chadderdon, 4 Minn. 499 Gil. 390; Lanes v. Holmes, 55 Minn. 379, 57 N. W. 132.

Waiver and estoppel.

§ 2192. The mortgagor does not waive compliance with an essential requirement of foreclosure by failing to object to the sale. It is for the party foreclosing to see to it, at his peril, that every essential step is taken.[1] But the mortgagor is often held to have waived mere irregularity by his silence or neglect to move promptly. Thus, objection that several tracts are improperly sold as a whole must be taken promptly or it is waived.[2] If a mortgagor allows a usurious mortgage to be foreclosed without objection he waives the defence as against a bona fide purchaser at the sale but not as to others.[3] And if a mortgagor allows a mortgage which has been paid to remain on the records unsatisfied he is estopped as to a bona fide purchaser at the sale.[4] If the mortgagor allows a purchaser at a defective sale to go into possession and remain until the period for redemption expires he waives his legal remedies and the purchaser acquires the legal title.[5] The mortgagor may waive irregularity in a sale and tender the mortgagee a deed and if he does so the mortgagee cannot repudiate the sale and maintain an action on the mortgage note.[6]

[1] Hull v. King, 38 Minn. 349, 37 N. W. 792; Lowry v. Mayo, 41 Minn. 388, 43 N. W. 78; Casey v. McIntyre, 45 Minn. 526, 48 N. W. 402.
[2] Abbott v. Peck, 35 Minn. 499, 29 N. W. 194; Hull v. King, 38

Digitized by Google

Minn. 349, 37 N. W. 792; Clark v. Kraker, 51 Minn. 444, 53 N. W. 706.

[3] Jordan v. Humphrey, 31 Minn. 495, 18 N. W. 450; Exley v. Berryhill, 37 Minn. 182, 33 N. W. 567; Chase v. Whitten, 51 Minn. 485, 53 N. W. 767.

[4] Merchant v. Woods, 27 Minn. 396, 7 N. W. 826. See Misener v. Gould, 11 Minn. 166 Gil. 105.

[5] See § 2174 (18).

[6] Saxe v. Rice, 64 Minn. 190, 66 N. W. 268.

Action for recovery of surplus.

§ 2193. Where a mortgagee forecloses under a power of sale and in his notice claims as due an amount greater than is allowed by the terms of the mortgage, after deducting payments, and bids in the property at that amount, he is liable to the mortgagor for the excess, in an action as for money had and received.[1] The only way that the mortgagee can escape liability is to show some ground for a court of equity to set aside the sale and order a new foreclosure.[2] To entitle him to recover a mortgagor must move with diligence.[3] No demand is necessary before bringing suit.[4]

[1] Seiler v. Wilber, 29 Minn. 307, 13 N. W. 136; Bennett v. Healey, 6 Minn. 240 Gil. 158; Bailey v. Merritt, 7 Minn. 159 Gil. 102; Spottswood v. Herrick, 22 Minn. 548; Fagan v. Peoples' Savings etc. Assoc. 55 Minn. 437, 57 N. W. 142; Eliason v. Sidle, 61 Minn. 285, 63 N. W. 730; Simmer v. Blabon, 74 Minn. 341, 77 N. W. 233; Gray v. Blabon, 74 Minn. 344, 77 N. W. 234; Maudlin v. American S. & L. Assoc. 63 Minn. 358, 65 N. W. 645; Babcock v. American S. & L. Assoc. 67 Minn. 151, 69 N. W. 718; Wyatt v. Quinby, 65 Minn. 537, 68 N. W. 109; Trafton v. Cornell, 62 Minn. 442, 64 N. W. 1148.

[2] Lanes v. Holmes, 55 Minn. 379, 57 N. W. 132; Fagan v. Peoples' Savings etc. Assoc. 55 Minn. 437, 57 N. W. 142; Truesdale v. Sidle, 65 Minn. 315, 67 N. W. 1004; Babcock v. American Savings & Loan Assoc. 67 Minn. 151, 69 N. W. 718.

[3] Ayer v. Stewart, 14 Minn. 97 Gil. 68.

[4] Bailey v. Merritt, 7 Minn. 159 Gil. 102.

§ 2194. Where a mortgagor stands by and without objection permits the mortgagee to foreclose under a power for an amount authorized by the express terms of the mortgage but for more than the legal effect of the mortgage requires he is estopped from claiming the excess. The basis of this rule is that if a man expressly agrees to pay more than the law will enforce against him he may abide by the terms of his contract if he chooses; and he does abide by them if he remains silent while the other party is proceeding to enforce the contract according to its terms.

Bidwell v. Whitney, 4 Minn. 76 Gil. 45; Dickerson v. Hayes, 26 Minn. 100, 1 N. W. 834; Taylor v. Burgess, 26 Minn. 547, 6 N. W. 350; Seiler v. Wilber, 29 Minn. 307, 13 N. W. 136; Fagan v. Peoples' Savings etc. Assoc. 55 Minn. 437, 57 N. W. 142; Lane v. Holmes, 55 Minn. 379, 57 N. W. 132; Culbert-

Digitized by Google

son v. Lennon, 4 Minn. 51 Gil. 26; Potter v. Marvin, 4 Minn. 525 Gil. 410.

Injunction.

§ 2195. The mortgagor may frequently enjoin an illegal foreclosure, and under certain conditions a failure to apply for an injunction is held a waiver of the defect.

Bidwell v. Whitney, 4 Minn. 76 Gil. 45; Dickerson v. Hayes, 26 Minn. 100, 1 N. W. 834; O'Brien v. Oswald, 45 Minn. 59, 47 N. W. 316; Conkey v. Dike, 17 Minn. 457 Gil. 434; Armstrong v. Sanford, 7 Minn. 49 Gil. 34; Buettel v. Harmount, 46 Minn. 481, 49 N. W. 250; Yager v. Merkle, 26 Minn. 429, 4 N. W. 819; Devlin v. Quigg, 44 Minn. 534, 47 N. W. 258; Bay View Land Co. v. Myers, 62 Minn. 265, 64 N. W. 816; Hughes v. Olson, 74 Minn. 237, 77 N. W. 44; Hamilton v. Wood, 55 Minn. 482, 57 N. W. 208; Nolan v. Dyer, 75 Minn. 231, 77 N. W. 786; Smith v. Fletcher, 75 Minn. 189, 77 N. W. 800; Thielen v. Randall, 75 Minn. 332, 77 N. W. 992; Gerdes v. Burnham, 78 Minn. 511, 81 N. W. 516.

Void foreclosure no bar.

§ 2196. A void sale or an arrested sale is no bar to a subsequent sale under the same power.[1] And a void foreclosure by advertisement is not a bar to a subsequent foreclosure by action.[2]

[1] Bottineau v. Aetna Life Ins. Co. 31 Minn. 125, 16 N. W. 849; Cobb v. Bord, 40 Minn. 479, 42 N. W. 396; Rogers v. Benton, 39 Minn. 39, 38 N. W. 765.

[2] Rogers v. Benton, 39 Minn. 39, 38 N. W. 765. See Morey v. City of Duluth, 69 Minn. 5, 71 N. W. 694.

Validating acts.

§ 2197. The legislature is constantly passing acts validating defective foreclosure proceedings but it is held that such acts cannot go so far as to impair vested rights.

Lowry v. Mayo, 41 Minn. 388, 43 N. W. 78; Farnsworth Loan & Realty Co. v. Com. Title etc. Co. 84 Minn. 62, 86 N. W. 877. See McCord v. Sullivan, 85 Minn. 344, 88 N. W. 989.

Who may object to irregular sale.

§ 2198. When it is sought to impeach a foreclosure sale the court will consider the object of the particular statutory requirement which it is claimed has not been complied with and it is not enough to warrant the granting of relief to one seeking to have a foreclosure set aside or adjudged ineffectual as to him that there has been an omission of some prescribed act which cannot have affected him and cannot have been prescribed for his benefit.

Holmes v. Crummett, 30 Minn. 23, 13 N. W. 924; Bottineau v. Aetna Life Ins. Co. 31 Minn. 125, 16 N. W. 849; Peaslee v. Ridgway, 82 Minn. 288, 84 N. W. 1024; Saxe v. Rice, 64 Minn. 190, 66 N. W. 268; Swain v. Lynd, 74 Minn. 72, 76 N. W. 958.

Digitized by Google

Sale for inadequate price.

§ 2199. Where there is no fraud or irregularity in the sale mere inadequacy in the price realized is no ground for setting aside the sale.

Johnson v. Cocks, 37 Minn. 530, 35 N. W. 436; Lalor v. McCarthy, 24 Minn. 417.

Recovery of treble costs—statute.

§ 2200. "That the mortgagor, his heir or assigns, at any time within one year after foreclosure, may recover from the owner of the mortgage at the time of foreclosure three times the amount of any costs or disbursements not absolutely paid for said foreclosure, and three times the amount of any bonuses or interest over and above twelve per cent. embraced in said foreclosure, and for which the property was sold, unless said surplus has been paid to the mortgagor or his assigns."

[G. S. 1894 § 6052]

§ 2201. An action may be brought under this section immediately after the sale.[1] Good faith is no defence to an action under this section. The burden of proof rests upon the plaintiff to show how much a charge is beyond what is reasonable.[2] The remedy afforded by this section is not exclusive and the one year limitation is not applicable to an ordinary action for the surplus.[3] One of the objects of requiring an affidavit of costs and disbursements is to enable the mortgagor to determine whether he has a cause of action under this section.[4] Whether a right of action under this section is assignable is an open question.[5]

[1] Beal v. White, 28 Minn. 6, 8 N. W. 829.

[2] Hobe v. Swift, 58 Minn. 87, 59 N. W. 831.

[3] Eliason v. Sidle, 61 Minn. 285, 63 N. W. 730; Brown v. Baker, 65 Minn. 133, 67 N. W. 793.

[4] Johnson v. N. W. Loan etc. Assoc. 60 Minn. 393, 62 N. W. 381.

[5] Lynott v. Dickerman, 65 Minn. 470, 67 N. W. 1143.

Attorney's fees.

§ 2202. The subject of attorney's fees upon foreclosure is regulated by statute.

See G. S. 1894 §§ 6074–6076; Seibert v. Minneapolis etc. Ry. Co. 58 Minn. 58, 57 N. W. 1068; Campbell v. Worman, 58 Minn. 561, 60 N. W. 668; Rogers v. Hastings & Dakota Ry. Co. 22 Minn. 25; Deane v. Hodge, 35 Minn. 146, 27 N. W. 917; Morse v. Home Savings etc. Assoc. 60 Minn. 316, 62 N. W. 112; Johnson v. N. W. Loan etc. Assoc. 60 Minn. 393, 62 N. W. 381; Mjones v. Yellow Medicine County Bank, 45 Minn. 335, 47 N. W. 1072; Swift v. Board of County Com'rs, 76 Minn. 194, 78 N. W. 1107; Merrick v. Putnam, 73 Minn. 240, 75 N. W. 1047; Johnson v. Cocks, 37 Minn. 530, 35 N. W. 436; Coles v. Yorks, 28 Minn. 464, 10 N. W. 775.

Digitized by Google

CHAPTER XXVIII

RECEIVERS

General statute.

§ 2203. "A receiver may be appointed:

(1) Before judgment, on the application of either party, when he establishes an apparent right to property which is the subject of the action, and which is in the possession of an adverse party, and the property or its rents and profits are in danger of being lost, or materially injured or impaired, except in cases where judgment upon failure to answer may be had without application to the court.

(2) After judgment, to carry the judgment into effect.

(3) After judgment, to dispose of the property according to the judgment, or to preserve it during the pendency of an appeal, or when an execution has been returned unsatisfied, and the judgment debtor refuses to apply his property in satisfaction of the judgment.

(4) In the cases provided by law, when a corporation has been dissolved, or is insolvent, or in imminent danger of insolvency, or has forfeited its corporate rights; and, in like cases, of the property, within this state, of foreign corporations.

(5) In such other cases as are now provided by law, or may be in accordance with the existing practice, except as otherwise provided herein."

[G. S. 1894 § 5351]

In what actions and proceedings granted.

§ 2204. A receiver may be appointed in an action for the dissolution of a partnership;[1] in an action for the foreclosure of a mortgage;[2] in supplementary proceedings;[3] in sequestration proceedings under chapter 76;[4] in insolvency proceedings;[5] in proceedings against railroads;[6] to protect reversionary interests in land;[7] to collect rents pending an action to determine the title and right of possession to land;[8] in divorce proceedings;[9] to wind up a corporation at instance of the attorney general;[10] to wind up an insolvent corporation at instance of stockholder or member;[11] to wind up a building and loan association, on the application of a minority of the stockholders, when the purposes for which it was organized have failed;[12] to wind up corporations whose charters have expired or which are dissolved upon application of a majority of the stockholders or members;[13] to manage temporarily a corporation whose officers have been removed by the court;[14] in proceedings against insolvent banks and insurance companies;[15] in actions to foreclose a mechanic's lien;[16] of a mismanaged solvent corporation at instance of minority stockholder;[17] in proceedings to enforce the liability of stockholders under Laws 1899 ch. 272.[18]

[1] See § 2205.
[2] See § 2206.
[3] See § 1620.

Digitized by Google

[4] See Dunnell, Minn. Pl. 1159–1188; Laws 1899 ch. 272; Straw & Ellsworth Mfg. Co. v. L. D. Kilbourne Boot & Shoe Co. 80 Minn. 125, 83 N. W. 36; Bailey v. Stearnes, 80 Minn. 354, 83 N. W. 1118; Argall v. Sullivan, 83 Minn. 71, 85 N. W. 931; Taylor v. Mitchell, 80 Minn. 492, 83 N. W. 418; Town of Hinckley v. Kettle River Ry. Co. 80 Minn. 32, 82 N. W. 1088; Willoughby v. St. Paul German Ins. Co. 80 Minn. 432, 83 N. W. 377; Helm v. Smith-Fee Co. 79 Minn. 297, 82 N. W. 639; Janney v. Minneapolis Industrial Exposition, 79 Minn. 488, 82 N. W. 984; Lane v. Hale, 78 Minn. 421, 81 N. W. 218; Seymour v. Burton, 78 Minn. 79, 80 N. W. 846; Neilson v. Pennsylvania Coal & Oil Co. 78 Minn. 113, 80 N. W. 859; Scandinavian-American Bank v. Mechanics' Building Society, 78 Minn. 483, 81 N. W. 528; Blien v. Rand, 77 Minn. 110, 79 N. W. 606; Winthrop Nat. Bank v. Minneapolis Terminal Elevator Co. 77 Minn. 329, 79 N. W. 1010.

[5] See § 2207.

[6] G. S. 1894 § 5902; Hodge v. Eastern Ry. Co. 70 Minn. 193, 72 N. W. 1074.

[7] St. Paul Trust Co. v. Mintzer, 65 Minn. 124, 67 N. W. 657.

[8] Schmitt v. Cassilius, 31 Minn. 7, 16 N. W. 453.

[9] G. S. 1894 § 4810; Donahue v. Quackenbush, 62 Minn. 132, 64 N. W. 141; Id. 75 Minn. 43, 77 N. W. 430.

[10] State v. Cannon River Manufacturers' Assoc. 67 Minn. 14, 69 N. W. 621. See G. S. 1894 §§ 2512, 5972.

[11] Knutson v. N. W. Loan & Building Assoc. 67 Minn. 201, 69 N. W. 889.

[12] Sjoberg v. Security Savings & Loan Assoc. 73 Minn. 203, 75 N. W. 1116; In re Youth's Temple of Honor, 73 Minn. 319, 76 N. W. 59.

[13] G. S. 1894 § 3432; In re People's Live Stock Ins. Co. 56 Minn. 180, 57 N. W. 468; Olson v. Cook, 57 Minn. 552, 59 N. W. 635; Kalkhoff v. Nelson, 60 Minn. 284, 62 N. W. 332; Minneapolis Paper Co. v. Swinburne Printing Co. 66 Minn. 378, 69 N. W. 144; Minneapolis Baseball Co. v. City Bank, 66 Minn. 441, 69 N. W. 331; In re Youth's Temple of Honor, 73 Minn. 319, 76 N. W. 59; Minneapolis Baseball Co. v. City Bank, 74 Minn. 98, 76 N. W. 1024.

[14] G. S. 1894 § 5895.

[15] G. S. 1894 §§ 5900–5902. See Dunnell Minn. Pl. § 1185; Buffum v. Hale, 71 Minn. 190, 73 N. W. 856.

[16] G. S. 1894 § 6238.

[17] See § 2208.

[18] Straw etc. Mfg. Co. v. L. D. Kilbourne etc. Co. 80 Minn. 125, 83 N. W. 36; London etc. Co. v. St. Paul etc. Co. 84 Minn. 144, 86 N. W. 872; Potts v. St. Paul etc. Assoc. 84 Minn. 217, 87 N. W. 604.

In actions for the dissolution of partnerships.

§ 2205. In an action for the dissolution of a partnership a receiver is appointed almost as a matter of course.[1] Such a receiver,

Digitized by Google

at least if authorized by the order of his appointment to bring suits to collect debts due the firm, may maintain an action in his own name.[2] Such a receiver does not so far represent creditors or bona fide purchasers that he can maintain an action to have a chattel mortgage on the firm property set aside because it was not filed.[3] One partner cannot bring an action against his co-partners for an accounting and for the appointment of a receiver and join all the debtors, real or supposed, of the partnership, obtain an order directing them to pay to the receiver the amount claimed to be due from them to the firm and to compel such payment by punishing them for contempt if they refuse.[4] The expenses of the receivership are ordinarily chargeable against all the partners.[5] A receiver of the insolvent estate of one member of a partnership cannot maintain an action to set aside as preferential a conveyance of property belonging to a partnership given to secure a firm debt.[6]

[1] See Barron v. Mullin, 21 Minn. 374; Johnson v. Garrett, 23 Minn. 565; Henning v. Raymond, 35 Minn. 303, 29 N. W. 132; Berlin Machine Works v. Security Trust Co. 60 Minn. 161, 61 N. W. 1131; Walsh v. St. Paul School Furniture Co. 60 Minn. 397, 62 N. W. 383; State v. District Court, 71 Minn. 383, 73 N. W. 1092; Moon v. Allen, 82 Minn. 89, 84 N. W. 654; Dispatch Printing Co. v. George, 83 Minn. 309, 86 N. W. 339.

[2] Henning v. Raymond, 35 Minn. 303, 29 N. W. 132.

[3] Berlin Machine Works v. Security Trust Co. 60 Minn. 161, 61 N. W. 1131; Walsh v. St. Paul School Furniture Co. 60 Minn. 397, 62 N. W. 383.

[4] State v. District Court, 71 Minn. 383, 73 N. W. 1092.

[5] Johnson v. Garrett, 23 Minn. 565.

[6] Masterman v. Lumbermen's Nat. Bank, 61 Minn. 299, 63 N. W. 723.

In actions to foreclose mortgages.

§ 2206. Under our statute a mortgage conveys no legal title to the mortgagee. It is but security for the debt. The mortgagor has the legal title, and is entitled to the possession until a sale has been made, and the title of the purchaser has become absolute at the expiration of the year for redemption. A mortgage binds only the land, and the rents and profits of the premises do not enter into, or form any part of, the security. Hence a receiver cannot be appointed on the theory that the rents and profits are a part of the security. The only ground upon which a receiver of the rents and profits can be appointed is the equitable one that it is necessary to prevent waste, and protect and preserve the premises themselves; and this is the only purpose for which a receivership can be exercised or for which the rents and profits can be used. The fact that the premises are inadequate security, or that the mortgagor is insolvent, or both combined, is, of itself alone, no ground for the appointment of a receiver, although it might be a very material consideration in passing upon the propriety or necessity of appointing a receiver for the purpose of preserving the premises. To hold otherwise would de-

Digitized by Google

feat the provisions of the statute which give the right of possession to the mortgagor, to deprive him of those substantial rights which it was the evident intent he should have, and to allow the mortgagee to do indirectly what he cannot do directly.[1] A mortgagee purchasing the property at a foreclosure sale, or a third party purchasing it, may, after the time of sale, and during the time for redemption, appear in the action, and apply for the appointment of a receiver to protect and preserve the mortgage security and prevent waste.[2] A receiver may be appointed in an action to foreclose a junior mortgage where the mortgagor is insolvent and refuses or neglects to pay the interest on a senior mortgage, the mortgaged premises being in his possession and being insufficient security for the payment of both mortgages.[3] The appointment of a receiver in foreclosure proceedings rests in the discretion of the court—a discretion to be exercised with great caution and with reference to all the facts of the particular case.[4] While a court should ordinarily require a somewhat stronger showing for the appointment of a receiver of a homestead than in the case of other property, yet, when a debtor mortgages his homestead, he subjects it to all the ordinary legal and equitable rights of a mortgagee, among which is the right to have a receiver appointed when necessary to prevent waste or to preserve the property. The same facts that would justify a court in appointing a receiver during the pendency of an action would justify it in providing in the final judgment that the receivership should be continued.[5] A receiver may be appointed in the foreclosure of a mortgage on a railroad as in other cases.[6] A receivership, however general the language of the appointment, affects only the property covered by the mortgage. Its purpose is to preserve the mortgaged property for the benefit of the mortgagee. It does not prevent the appointment of another receiver under chapter 76 to sequester all the property of a corporation.[7] Where a receiver has been appointed the right to the rents and profits cannot be determined in a collateral action, where all the parties interested are not before the court and there has been no accounting or settlement with the receiver.[8]

[1] Marshall & Ilsley Bank v. Cady, 76 Minn. 112, 78 N. W. 978. See Lowell v. Doe, 44 Minn. 144, 46 N. W. 297; Nat. Fire Ins. Co. v. Broadbent, 77 Minn. 175, 79 N. W. 676; Haugan v. Netland, 51 Minn. 552, 53 N. W. 873; Seibert v. Minneapolis etc. Ry. Co. 52 Minn. 246, 53 N. W. 257; State v. Egan, 62 Minn. 280, 64 N. W. 813; Farmers' Nat. Bank v. Backus, 64 Minn. 43, 66 N. W. 5; St. Louis Car Co. v. Stillwater St. Ry. Co. 53 Minn. 129, 54 N. W. 1064; Paget v. Electrical Engineering etc. Co. 67 Minn. 31, 69 N. W. 475; Farmers' Nat. Bank v. Backus, 67 Minn. 43, 69 N. W. 638; Whiting v. Clugston, 73 Minn. 6, 75 N. W. 759; Esch v. White, 82 Minn. 462, 85 N. W. 238, 718; Marshall & Isley Bank v. Cady, 75 Minn. 241, 77 N. W. 831; McIlrath v. Snure, 22 Minn. 391; Manchester Locomotive Works v. Truesdale, 44 Minn. 115, 46 N. W. 301; Shadewald v. White, 74 Minn. 208, 77 N. W. 42.

Digitized by Google

[2] Nat. Fire Ins. Co. v. Broadbent, 77 Minn. 175, 79 N. W. 676.
[3] Haugan v. Netland, 51 Minn. 552, 53 N. W. 873; Farmers' Nat. Bank v. Backus, 64 Minn. 43, 66 N. W. 5; Id. 67 Minn. 43, 69 N. W. 638; Seibert v. Minneapolis etc. Ry. Co. 52 Minn. 246, 53 N. W. 1151.
[4] Lowell v. Doe, 44 Minn. 144, 46 N. W. 297; Nat. Fire Ins. Co. v. Broadbent, 77 Minn. 175, 79 N. W. 676; Bean v. Heron, 65 Minn. 64, 67 N. W. 805.
[5] Marshall & Ilsley Bank v. Cady, 75 Minn. 241, 77 N. W. 831; Lowell v. Doe, 44 Minn. 144, 46 N. W. 297.
[6] Manchester Locomotive Works v. Truesdale, 44 Minn. 115, 46 N. W. 301; Seibert v. Minneapolis etc. Ry. Co. 52 Minn. 246, 53 N. W. 257; Id. 58 Minn. 53, 59 N. W. 879; McIlrath v. Snure, 22 Minn. 391.
[7] St. Louis Car Co. v. Stillwater Street Ry. Co. 53 Minn. 129, 54 N. W. 1064.
[8] Esch v. White, 82 Minn. 462, 85 N. W. 238, 718.

Under the state insolvent law.

§ 2207. Although our state insolvent law has been superseded by the federal bankruptcy act the decisions under it relating to receivers are still valuable as precedents by way of analogy. A receiver has the same right to avoid fraudulent conveyances as the creditors whom he represents [1] and he is not required to have the claims reduced to judgment [2] or to obtain leave of court.[3] He may sue in his own name.[4] After the appointment of a receiver the creditors cannot maintain an action.[5] Where an insolvent debtor has transferred his personal property to defraud creditors his assignee or receiver in insolvency may avoid such sale by demanding of the fraudulent vendee a return of the property; and, if the demand is refused, he may replevy the property, or sue the vendee for the value thereof. He is not required first to bring an equitable action to set aside the sale.[6] In an action by a receiver on a contract made by his insolvent he stands in the shoes of the insolvent.[7] A voluntary assignment for the benefit of creditors may defeat a pending application for a receiver.[8] In order to prevent the running of the 60 day limitation provided for in G. S. 1894 § 4241, the creditors must, within the 60 days, file with the clerk of the district court their petition for the appointment of a receiver or commence the proceedings by service of the order to show cause on the creditor about to be preferred within that time, or, if G. S. 1894 § 5144 applies, place such order in the hands of the sheriff for service within the 60 days.[9] An order appointing a receiver of an insolvent debtor upon the petition of creditors alleging that the debtor has preferred creditors does not constitute an adjudication of the question whether the alleged preferential payment is voidable.[10] A creditor with a claim not yet due and secured by the liability of a third person as surety may petition for a receiver.[11] A receiver may be appointed for the estate of an insolvent non-resident doing business in this state.[12] If a receiver sells property of the insolvent fraudulently he is liable

Digitized by Google

for its value. An ex parte order confirming such a sale is not conclusive on the creditors but may be set aside in direct proceedings for that purpose.[13] Provision is made by statute for the removal of a receiver for cause.[14] Where an insolvent debtor is entitled to a mechanic's lien his receiver may enforce the same.[15] An assignee of an insolvent being removed and replaced by a receiver the latter may sue on the bond of the former.[16]

[1] Weston v. Loyhed, 30 Minn. 221, 14 N. W. 892; Bliss v. Doty, 36 Minn. 168, 30 N. W. 465; Beardslee v. Beaupre, 44 Minn. 1, 46 N. W. 137; Merrill v. Ressler, 37 Minn. 82, 33 N. W. 117; Chamberlain v. O'Brien, 46 Minn. 80, 48 N. W. 447; Thomas Mfg. Co. v. Foote, 46 Minn. 240, 48 N. W. 1019; Rossman v. Mitchell, 73 Minn. 198, 76 N. W. 48, 1053; Farmers' Loan & Trust Co. v. Minneapolis Engine & Machine Works, 35 Minn. 543, 29 N. W. 349; Gallagher v. Rosenfield, 47 Minn. 507, 50 N. W. 696; Clerihew v. West Side Bank, 50 Minn. 538, 52 N. W. 967; Baumann v. Cunningham, 48 Minn. 292, 51 N. W. 611; Joseph Schlitz Brewing Co. v. Childs, 65 Minn. 409, 68 N. W. 65; Williamson v. Hatch, 55 Minn. 344, 57 N. W. 56; Thompson v. Johnson, 55 Minn. 515, 57 N. W. 223; Hawkes v. Fraser, 52 Minn. 201, 53 N. W. 1144; Penny v. Haugan, 61 Minn. 279, 63 N. W. 728; Hay v. Tuttle, 67 Minn. 56, 69 N. W. 696.

[2] Chamberlain v. O'Brien, 46 Minn. 80, 48 N. W. 447.

[3] Moore v. Hayes, 35 Minn. 205, 28 N. W. 238.

[4] Henning v. Raymond, 35 Minn. 303, 29 N. W. 132; Ueland v. Haughan, 70 Minn. 349, 73 N. W. 169. See Dunnell Minn. Pl. § 49.

[5] Rossman v. Mitchell, 73 Minn. 198, 76 N. W. 418.

[6] Id.

[7] Head v. Miller, 45 Minn. 446, 48 N. W. 192.

[8] Hyde v. Weitzner, 45 Minn. 35, 47 N. W. 311.

[9] Foot v. Ofstie, 70 Minn. 212, 73 N. W. 4.

[10] Baker v. Wyman, 47 Minn. 177, 49 N. W. 649.

[11] Citizens' Nat. Bank v. Minge, 49 Minn. 454, 52 N. W. 42; Minneapolis Land Co. v. McMillan, 79 Minn. 287, 82 N. W. 591.

[12] Rollins v. Rice, 60 Minn. 358, 62 N. W. 325.

[13] In re Shea, 57 Minn. 415, 59 N. W. 494.

[14] Nicolin v. Weiland, 55 Minn. 130; Lyman-Eliel Drug Co. v. Spencer, 70 Minn. 183, 72 N. W. 1066; In re Mast, 58 Minn. 313, 59 N. W. 1044; Gunn v. Smith, 71 Minn. 281, 73 N. W. 842; Clark v. Stanton, 24 Minn. 232.

[15] Miller v. Condit, 52 Minn. 455, 55 N. W. 47.

[16] Prosser v. Hartley, 35 Minn. 340, 29 N. W. 156.

Receiver of solvent corporation.

§ 2208. The appointment of a receiver of a solvent corporation on the application of a minority of the stock is a very drastic remedy which can be justified only in a very strong case. But the management of the corporate affairs by the directors, elected by a majority of the stock, might, even in the absence of positive fraud or illegal

Digitized by Google

acts, be so grossly incompetent or negligent as to justify the appointment of a receiver to preserve the property from destruction.[1] When the managers and majority of the stockholders of a corporation divert it and its assets and property from their legitimate purposes to the use and benefit of one or more of such majority a minority stockholder may apply in his own name for the appointment of a receiver,[2] unless he is estopped by conduct amounting to acquiescence.[3]

[1] Rothwell v. Robinson, 44 Minn. 538, 47 N. W. 255; Pinkus v. Minneapolis Linen Mills, 65 Minn. 40, 67 N. W. 643.

[2] Rothwell v. Robinson, 39 Minn. 1, 38 N. W. 772.

[3] Pinkus v. Minneapolis Linen Mills, 65 Minn. 40, 67 N. W. 643.

Nature of office.

§ 2209. A receiver is a person indifferent between the parties appointed by a court as its officer to take charge of property involved in litigation. He is not the agent of the parties. He is the representative of the court and is at all times subject to its control. He is not subject to the control of the parties. His possession is the possession of the court and the property under his control is in custodia legis. He occupies a fiduciary relation and cannot use the property to his own advantage.

Henning v. Raymond, 35 Minn. 303, 29 N. W. 132; Thomas Mfg. Co. v. Foote, 46 Minn. 240, 48 N. W. 1019; Schmidt v. Gayner, 59 Minn. 303, 61 N. W. 333, 62 N. W. 265; O'Gorman v. Sabin, 62 Minn. 46, 64 N. W. 84; Shadewald v. White, 74 Minn. 208, 77 N. W. 42; Kalkhoff v. Nelson, 60 Minn. 284, 62 N. W. 332.

Powers.

§ 2210. The powers of a receiver are defined by the orders of the court,[1] by statute, and by customary equity practice. They largely depend upon the nature of the litigation in which the receiver is appointed. It is never safe for a receiver to take any important step without an order of court as his implied authority is extremely limited.[2] Except when authorized by statute a receiver has no authority to bring an action without an order of court.[3]

[1] See McIlrath v. Snure, 22 Minn. 391; Seibert v. Minneapolis etc. Ry. Co. 58 Minn. 53, 59 N. W. 879; St. Paul Trust Co. v. St. Paul Globe Pub. Co. 60 Minn. 105, 61 N. W. 813; Nelson v. Kalkhoff, 60 Minn. 305, 62 N. W. 335; O'Gorman v. Sabin, 62 Minn. 46, 64 N. W. 84; Swing v. Wurst, 76 Minn. 198, 79 N. W. 94; Henning v. Raymond, 35 Minn. 303, 29 N. W. 132; Tozer v. O'Gorman, 60 Minn. 42, 61 N. W. 895.

[2] Minneapolis etc. Ry. Co. v. Minneapolis etc. Ry. Co. 61 Minn. 502, 63 N. W. 1035; Windham County Savings Bank v. O'Gorman, 66 Minn. 361, 69 N. W. 317; O'Gorman v. Sabin, 62 Minn. 46, 64 N. W. 84; Tozer v. O'Gorman, 65 Minn. 1, 67 N. W. 666; Cumbey v. Ueland, 72 Minn. 453, 75 N. W. 727.

[3] Minneapolis etc. Ry. Co. v. Minneapolis etc. Ry. Co. 61 Minn. 502, 63 N. W. 1035.

Digitized by Google

Appointment discretionary.

§ 2211. It is generally laid down that the appointment of a receiver is discretionary with the court.[1] This means little more than that the power of appointment is to be exercised with reference to the facts of the particular case and in furtherance of justice.[2] In other words, no general rule can be laid down. Much depends on the nature of the litigation. In an action for the dissolution of a partnership a receiver is appointed as a matter of course while in an action to foreclose a mortgage a court proceeds with great caution. Under some statutes a party has an absolute right to the appointment of a receiver on complying with certain conditions.[3] But the general rule is that a receiver is appointed with caution. Placing a person's property in the hands of a receiver is at best a drastic proceeding, usually very expensive and frequently absorbing the greater part of the estate. It is against the general policy of the law to permit a creditor to resort to it where he has other adequate remedies.[4] "A receivership, the costs of which have to be paid, if any property is reached, out of the debtor's estate, is a very drastic remedy, and is subject to great abuses. At the present day it unfortunately is often more beneficial to the receiver and his attorney than to the creditor. It should therefore be resorted to with great caution and sparingly."[5] Equitable principles, which are always very flexible, should be taken into account in determining whether a receiver should be appointed.[6]

[1] Lowell v. Doe, 44 Minn. 144, 46 N. W. 297; Nat. Fire Ins. Co. v. Broadbent, 77 Minn. 175, 79 N. W. 676; Bean v. Heron, 65 Minn. 64, 67 N. W. 805.

[2] See Poppitz v. Rognes, 76 Minn. 109, 78 N. W. 964.

[3] State v. Bank of New England, 55 Minn. 139, 56 N. W. 575.

[4] Poppitz v. Rognes, 76 Minn. 109, 78 N. W. 964; Nat. Fire Ins. Co. v. Broadbent, 77 Minn. 175, 79 N. W. 676; Grant v. Webb, 21 Minn. 39.

[5] Bean v. Heron, 65 Minn. 64, 67 N. W. 805.

[6] Id.; Nat. Fire Ins. Co. v. Broadbent, 77 Minn. 175, 79 N. W. 676.

Application for receiver—practice.

§ 2212. The mode of applying for a receiver depends upon the nature of the receivership. An application for a statutory receiver is generally made by petition supported by affidavits.[1] On the other hand an application for a receiver pendente lite is made on a verified complaint with or without supporting affidavits.[2] Regularly the motion is made on notice[3] or order to show cause.[4] In exceptional cases the application may be made ex parte.[5] The burden of proof is always on the petitioner and he must establish the facts with reasonable certainty. The evidence should be clear, direct and convincing.[6] Ordinarily oral evidence is not admissible.[7] Except in supplementary proceedings the application should be addressed to the court rather than to the judge. But in our practice this distinction is not vital.[8] Counter affidavits are customarily admitted and the pleadings if verified are treated as affidavits.[9]

Digitized by Google

[1] See Prouty v. Hallowell, 53 Minn. 488, 55 N. W. 623.
[2] See State v. Bank of New England, 55 Minn. 139, 56 N. W. 575.
[3] Haugan v. Netland, 51 Minn. 552, 53 N. W. 873.
[4] See Prouty v. Hallowell, 53 Minn. 488, 55 N. W. 623; State v. Bank of New England, 55 Minn. 139, 56 N. W. 575.
[5] Haugan v. Netland, 51 Minn. 552, 53 N. W. 873; French v. Gifford, 30 Iowa, 148.
[6] Nat. Fire Ins. Co. v. Broadbent, 77 Minn. 175, 79 N. W. 676; Hinckley v. Pfister, 83 Wis. 64.
[7] State v. Egan, 62 Minn. 280, 64 N. W. 813. See Prouty v. Hallowell, 53 Minn. 488, 55 N. W. 623.
[8] See § 2086.
[9] See McRoberts v. Washburne, 10 Minn. 23 Gil. 8; Stees v. Kranz, 32 Minn. 313, 20 N. W. 241; McGregor v. Case, 80 Minn. 214, 83 N. W. 140.

Order of appointment.

§ 2213. The nature of the order of appointment depends on the nature of the receivership.[1] In an order appointing a statutory receiver it is not necessary to define his powers or direct the conveyance to him of real estate as in the case of receivers appointed under the general equity powers of the court. In all cases provision should be made for a bond and the property should be described, at least in general terms or by reference to the complaint or petition. If the receiver is not authorized by statute to bring actions the order should authorize him to do so if any are necessary.[2] An order directing a receiver to sell all the real estate of a firm is sufficient authority to sell a tract not included in a description of the firm's property in the complaint.[3] An order directing a receiver to take possession of all the property of a corporation does not authorize the receiver to take possession of property sold on execution against the corporation before his appointment.[4] An order that a receiver be appointed to take charge of certain goods does not in itself place such goods in custodia legis, there being no appointment in fact.[5] In proceedings against an insolvent debtor under Laws 1881 ch. 148 § 2, the court cannot, in the order appointing a receiver, vacate prior attachments or garnishments of the debtor's property. The statute gives that effect only to the appointment and qualification of the receiver.[6] An order appointing a receiver of an insolvent debtor upon the petition of creditors, alleging that the debtor has preferred creditors, does not constitute an adjudication of the point as to whether the alleged preferential payment is voidable.[7] It is not improper to provide in the order of appointment for the employment of counsel.[8]

[1] See High, Receivers §§ 82 et seq.
[2] See Minneapolis etc. Ry. Co. v. Minneapolis etc. Ry. Co. 61 Minn. 502, 63 N. W. 1035; McIlrath v. Snure, 22 Minn. 391; Henning v. Raymond, 35 Minn. 303, 29 N. W. 132.
[3] Barron v. Mullin, 21 Minn. 374.
[4] McIlrath v. Snure, 22 Minn. 391.
[5] Dutcher v. Culver, 24 Minn. 584.
[6] In re Shakopee Mfg. Co. 37 Minn. 91, 33 N. W. 219.

Digitized by Google

[7] Baker v. Wyman, 47 Minn. 177, 49 N. W. 649.
[8] Olson v. State Bank, 72 Minn. 320, 75 N. W. 378.

Collateral attack—demurrer.

§ 2214. The regularity, propriety and validity of the appointment of a receiver cannot be questioned collaterally,[1] unless the court was without jurisdiction of the subject matter.[2] Where a receiver brings an action and alleges his due appointment the objection that he was not duly appointed or is not authorized to maintain the action cannot be raised by a general demurrer. The proper ground of demurrer in such cases is that the plaintiff has not capacity to sue.[3]

[1] Basting v. Ankeny, 64 Minn. 133, 66 N. W. 266.
[2] Thurber v. Miller, S. D. (1898) 75 N. W. 900.
[3] Walsh v. Byrnes, 39 Minn. 527, 40 N. W. 831.

Foreign receivers.

§ 2215. Where there are no domestic creditors whose rights are to be protected, the courts of this state will recognize a non-resident receiver, and permit him to prosecute an action therein, or to move to set aside a judgment fraudulent as to the creditors represented by him, in virtue of the comity existing between the states.

Comstock v. Frederickson, 51 Minn. 350, 53 N. W. 713. See Mercantile Nat. Bank v. Macfarlane, 71 Minn. 497, 74 N. W. 287; Langworthy v. Garding, 74 Minn. 325, 77 N. W. 207; Gilbert v. Hewetson, 79 Minn. 326, 82 N. W. 655; Swing v. Wurst, 76 Minn. 198, 79 N. W. 94; Henning v. Raymond, 35 Minn. 303, 29 N. W. 132.

Duties administrative.

§ 2216. The duties of a receiver for an insolvent are strictly administrative or executive; and he is not required, because he happens to be an attorney to perform legal services in behalf of the estate. A receiver is under obligation to perform such duties in respect to the trust as any ordinarily competent business man is presumed to be capable of performing.

Olson v. State Bank, 72 Minn. 320, 75 N. W. 378.

Successive receivers.

§ 2217. The fact that a receiver has been appointed at the instance of a party on one ground is no obstacle to the appointment of another receiver at the instance of another party on another ground. But the court will ordinarily appoint the same person.

St. Louis Car Co. v. Stillwater Street Ry. Co. 53 Minn. 129, 54 N. W. 1064.

A receiver is a trustee and liable for breach of trust.

§ 2218. A receiver occupies a fiduciary relation and is trustee for all parties interested in the property intrusted to his charge by the court and cannot exercise his powers for the individual benefit of himself or a third party.[1] A clerk or agent of a receiver is under like disability.[2] An agreement by a receiver to turn over to another

Digitized by Google

the control and management of the property and business intrusted to his charge is void. He cannot thus abdicate his powers or tie himself up in the performance of his official duties.[3]

[1] Clark v. Stanton, 24 Minn. 232; Schadewald v. White, 74 Minn. 208, 77 N. W. 42; Gilbert v. Hewetson, 79 Minn. 326, 82 N. W. 655; In re Shea, 57 Minn. 415, 59 N. W. 494; Donahue v. Quackenbush, 62 Minn. 132, 64 N. W. 141; King v. Remington, 36 Minn. 15, 29 N. W. 352; In re Shotwell, 49 Minn. 176, 51 N. W. 909, 52 N. W. 1078; Moon v. Allen, 82 Minn. 89, 84 N. W. 654.

[2] Gilbert v. Hewetson, 79 Minn. 326, 82 N. W. 655.

[3] Shadewald v. White, 74 Minn. 208, 77 N. W. 42.

Compensation.

§ 2219. Generally the receiver is to be paid out of the funds coming into his hands,[1] but if they are insufficient the court will sometimes compel the parties securing his appointment to pay him.[2] Where a receiver is appointed to wind up a partnership all the parties should share the expense equally if they are equally benefited.[3] A receiver cannot be retained merely to enable him to get assets into his hands with which to pay his fees.[4] An attorney for intervening creditors of an insolvent corporation who realizes nothing from his action is not entitled to compensation out of the corporate assets.[5] A party who is compelled to sue a receiver to recover his own property wrongfully held by the receiver is not liable for the expenses of the receiver in the litigation.[6] The fees of a receiver of an insolvent were formerly regulated by a statute on a percentage basis with provision for extra allowance in extraordinary cases.[7] A receiver is not required to perform legal services. Reasonable attorney's fees are allowed by the court.[8] A court may discharge a receiver and reserve the matter of his compensation for future determination.[9]

[1] Farmers' Nat. Bank v. Backus, 74 Minn. 264, 77 N. W. 142; Joslyn v. Athens Coach & Car Co. 43 Minn. 534, 46 N. W. 77.

[2] Farmers Nat. Bank v. Backus, 74 Minn. 264, 77 N. W. 142.

[3] Johnson v. Garrett, 23 Minn. 565.

[4] Joslyn v. Athens Coach & Car Co. 43 Minn. 534, 46 N. W. 77.

[5] Dwinnell v. Badger, 74 Minn. 405, 77 N. W. 219.

[6] Clark v. B. B. Richards Lumber Co. 74 Minn. 305, 77 N. W. 213.

[7] In re Shotwell, 49 Minn. 170, 51 N. W. 909, 52 N. W. 1078; Gallagher v. Walsh, 60 Minn. 527, 63 N. W. 108; Reeves v. Hastings, 61 Minn. 254, 63 N. W. 633. See Laws 1895 ch. 66.

[8] Olson v. State Bank, 72 Minn. 320, 75 N. W. 378; In re State Bank, 57 Minn. 361, 59 N. W. 365; In re Shotwell, 49 Minn. 170, 51 N. W. 909; Helm v. Smith-Fee Co. 79 Minn. 297, 82 N. W. 639; Lane v. Hale, 78 Minn. 421, 81 N. W. 218.

[9] Joslyn v. Athens Coach & Car Co. 43 Minn. 534, 46 N. W. 77.

Sales.

§ 2220. An order directing a receiver to sell all the real estate of a firm authorizes the sale of a tract not included in the complaint but in fact belonging to the firm. A purchaser from a receiver may

Digitized by Google

oppose the confirmation of the receiver's report of the sale and if he does not do so or consents he will be deemed to have adopted it, and be bound by the order confirming it, and cannot afterwards object to the performance of his contract of purchase on the ground that the sale included property not included in the report.[1] The rule of caveat emptor applies to sales by receivers both as to the title and as to the condition of the property.[2] An order of court directing the sale of "all the assets, property and business" of an insolvent corporation only authorizes the sale of such property as belonged to the corporation, or causes of action which it might have enforced, in its own right, and not causes of action which the receiver might have maintained only in the right of creditors, as, for example, capital withdrawn and refunded by the corporation to its shareholders without payment of the corporate debts.[3] The court may refuse to confirm a sale made by a receiver on the ground that the price received was inadequate.[4] A sale made by a receiver is not subject to redemption.[5] When a party stands by and knowingly allows a receiver to sell his property as that of the insolvent he will be estopped to assert his right as against an innocent purchaser at the sale.[6] A receiver cannot purchase at his own sale,[7] nor should his attorney.[8] The receiver must follow the order of the court implicitly in the conduct of the sale and he is liable if he fails to do so.[9] A director of an insolvent corporation may in good faith purchase corporate property at a receiver's sale.[10] A party objecting to a receiver's sale must act promptly.[11] It is the duty of the receiver to protect the interests of all interested parties and obtain the largest possible price at the sale.[12]

[1] Barron v. Mullin, 21 Minn. 374.

[2] Id. See Jackson v. Holbrook, 36 Minn. 494, 32 N. W. 852; Johnson v. Laybourn, 56 Minn. 332, 57 N. W. 935.

[3] Minnesota Thresher Mfg. Co. v. Langdon, 44 Minn. 37, 46 N. W. 310.

[4] Merchants' Bank v. Moore, 68 Minn. 468, 71 N. W. 671. See Minneapolis Trust Co. v. Menage (Minn. 1902) 90 N. W. 3.

[5] Watkins v. Minnesota Thresher Mfg. Co. 41 Minn. 150, 42 N. W. 862.

[6] Brown v. Union Depot etc. Co. 65 Minn. 508, 68 N. W. 107.

[7] Donahue v. Quackenbush, 62 Minn. 132, 64 N. W. 141; Id. 75 Minn. 43, 77 N. W. 430.

[8] Tozer v. O'Gorman, 60 Minn. 42, 61 N. W. 895.

[9] Id.

[10] Janney v. Minneapolis Industrial Exposition, 79 Minn. 488, 82 N. W. 984.

[11] Id.

[12] Lane v. Hale, 78 Minn. 421, 81 N. W. 218.

Actions by.

§ 2221. Except as authorized by statute a receiver has no authority to bring an action without an order of court.[1] In bringing an action a receiver must plead his appointment. It is held that an allegation in general terms that at such a time, in such an action or pro-

Digitized by Google

ceeding and by such a court or officer the plaintiff was duly appointed receiver of the estate of such a person, is sufficient.[2] A receiver may bring an action in his own name and such is the proper practice.[3] The insolvent is not a necessary party to an action by his receiver.[4] It is a general rule, subject to exceptions, that the receiver stands in the shoes of the insolvent as regards the defences, setoffs and counterclaims which the defendant may set up.[5] Actions by receivers in insolvency,[6] in supplementary proceedings [7] and in sequestration proceedings under chapter 76 [8] have been considered elsewhere. A receiver may maintain an action on an undertaking entered into by him in violation of the orders of the court.[9] An assignee of an insolvent being removed and replaced by a receiver the latter may sue on the bond of the former.[10]

[1] Minneapolis etc. Ry. Co. v. Minneapolis etc. Ry. Co. 61 Minn. 502, 63 N. W. 1035; Ueland v. Haugan, 70 Minn. 349, 73 N. W. 169.

[2] Rossman v. Mitchell, 73 Minn. 198, 76 N. W. 48, 1053. See Sawyer v. Harrison, 43 Minn. 297, 45 N. W. 434; Tvedt v. Mackel, 67 Minn. 24, 69 N. W. 475; Nelson v. Nugent, 62 Minn. 203, 64 N. W. 392; Northern Trust Co. v. Jackson, 60 Minn. 116, 61 N. W. 908.

[3] Ueland v. Haugan, 70 Minn. 349, 73 N. W. 169; Henning v. Raymond, 35 Minn. 303, 29 N. W. 132.

[4] See Dunnell, Minn. Pl. §§ 48–52.

[5] See Dickson v. Kittson, 75 Minn. 168, 77 N. W. 820; Basting v. Ankeny, 64 Minn. 133, 66 N. W. 266; Northern Trust Co. v. Hiltgen, 62 Minn. 361, 64 N. W. 909; Atwater v. Stromberg, 75 Minn. 277, 77 N. W. 963; Richardson v. Merritt, 74 Minn. 354, 77 N. W. 234, 407, 968; Markell v. Ray, 75 Minn. 138, 77 N. W. 788; Becker v. Seymour, 71 Minn. 394, 73 N. W. 1096; Cumbey v. Ueland, 72 Minn. 453, 75 N. W. 727; Atwater v. Smith, 73 Minn. 507, 76 N. W. 507; Laybourn v. Seymour, 53 Minn. 105, 54 N. W. 941; Langworthy v. Washburn Flouring Mills Co. 77 Minn. 256, 79 N. W. 974.

[6] See § 2207.

[7] See § 1620.

[8] See § 2204 (4) and Dunnell, Minn. Pl. §§ 1159–1188.

[9] O'Gorman v. Sabin, 62 Minn. 46, 64 N. W. 84.

[10] Prosser v. Hartley, 35 Minn. 340, 29 N. W. 156.

Actions against receivers.

§ 2222. "Every receiver, assignee or manager of any property appointed by a court or managing the same under the direction of any court of this state, may be sued in respect to any act or transaction of his in carrying on the business connected with such property or corporation without the previous leave of the court by whom or in which such receiver, assignee or manager was appointed or under which he is acting. Any such suit may be brought in such county or jurisdiction as the same could have been brought against the person or corporation represented by such receiver, assignee or manager before such receiver, assignee or manager had been appointed or

Digitized by Google

taken charge of such property, and such action shall be tried against such receiver, assignee or manager in the same manner and subject to the same rules of procedure as against the person or corporation for whom he acts under the court in case no receiver, assignee or manager had been appointed. Any judgment recovered as aforesaid against such receiver, assignee or manager in any court shall be paid by said receiver as a part of the expenses of managing said property." [1] Aside from this statute it is the rule that an action cannot be brought against a receiver without first obtaining leave of the court appointing him.[2] The statute is applicable to actions against receivers appointed by the federal courts.[3] It is to be observed that the statute is not applicable, if it is to be construed literally, to all actions against receivers. The omission to obtain leave is not a ground of demurrer.[4] An indebtedness incurred by the receivers of a railroad company, appointed by a federal court, while operating the road under the authority of the court, may be garnished in a state court. But no executory process can be issued against the receivers on the judgment rendered therein. It can only be satisfied, as other demands are satisfied, by an application to the court in which the receivership proceeedings are pending for an order directing its payment.[5] An action to recover a debt incurred by a receiver may be brought in any court having jurisdiction of the amount involved.[6] A receiver, being an officer of the court, incurs no personal liability for acts done under and in strict conformity to the order of the court. For such acts an action will lie against him only in his official capacity, and judgment must be rendered against him as receiver, payable and enforceable only out of property held by him in that capacity.[7] A receiver cannot, while exercising the franchises and powers of a corporation, claim immunity from the police regulations and liabilities which have been imposed upon the corporation by the state. He is liable under the fellow servant act.[8] An independent action against a receiver of an insolvent bank, appointed by the court under the provisions of G. S. 1894 §§ 5900 et seq. to recover judgment upon a claim existing against the insolvent when the receivership proceedings were instituted, or to establish or to have such claim allowed against the trust fund, cannot be maintained. The exclusive remedy of the creditor is that provided by § 5911.[9] An action will not lie to recover money held by a receiver as such,[10] but an action may sometimes be maintained to have certain moneys in the hands of a receiver adjudged a trust fund for the plaintiff.[11] An action will lie against a domestic receiver on a judgment obtained against him in a sister state.[12] Money and property in the hands of a receiver as such is in custodia legis and cannot be reached by executory process.[13] An action will lie against a receiver by a landlord of the insolvent whom the receiver represents in a lease which the receiver refuses to adopt.[14] An attorney appearing for a defendant sued in an individual capacity has no implied authority to allow the complaint to be amended so as to make the action one against the defendant as receiver.[15]

[1] G. S. 1894 §§ 5174–5176.

Digitized by Google

[3] Leuthold v. Young, 32 Minn. 122, 19 N. W. 652; Schmidt v. Gayner, 59 Minn. 303, 61 N. W. 333, 62 N. W. 265.
[4] 24 U. S. St. ch. 373; 25 U. S. St. ch. 866; Irwin v. McKechnie, 58 Minn. 145, 59 N. W. 987.
[5] Leuthold v. Young, 32 Minn. 122, 19 N. W. 652.
[6] Irwin v. McKechnie, 58 Minn. 145, 59 N. W. 987.
[7] Church v. St. Paul etc. Co. 58 Minn. 472, 59 N. W. 1103.
[8] Schmidt v. Gayner, 59 Minn. 303, 61 N. W. 333, 62 N. W. 265; Erskine v. McIlrath, 60 Minn. 485, 62 N. W. 1130; Irwin v. McKechnie, 58 Minn. 145, 59 N. W. 987; Hayes v. Crane, 48 Minn. 39, 50 N. W. 925; Holcombe v. Johnson, 27 Minn. 353, 7 N. W. 364.
[9] Mikkelson v. Truesdale, 63 Minn. 137, 65 N. W. 260.
[10] Buffum v. Hale, 71 Minn. 190, 73 N. W. 856. See Clark v. Richards Lumber Co. 72 Minn. 397, 75 N. W. 605.
[11] Schmidt v. Gayner, 59 Minn. 303, 61 N. W. 333, 62 N. W. 265.
[12] See Merchants Nat. Bank v. Allemania Bank, 71 Minn. 477, 74 N. W. 203.
[13] Thomas v. Hale, 82 Minn. 423, 85 N. W. 156.
[14] See Schmidt v. Gayner, 59 Minn. 303, 61 N. W. 333, 62 N. W. 265; Irwin v. McKechnie, 58 Minn. 145, 59 N. W. 987; Lord v. Meachem, 32 Minn. 66, 19 N. W. 346; Elwell v. Goodnow, 71 Minn. 390, 73 N. W. 1095; Wright, Barrett & Stillwell Co. v. Robinson, 79 Minn. 272, 82 N. W. 632; Dispatch Printing Co. v. George, 83 Minn. 309, 86 N. W. 339.
[15] Kalkhoff v. Nelson, 60 Minn. 284, 62 N. W. 332. See Forepaugh v. Westfall, 57 Minn. 121, 58 N. W. 689; Nelson v. Kelkhoff, 60 Minn. 305, 62 N. W. 335.
[16] Erskine v. McIlrath, 60 Minn. 485, 62 N. W. 1130.

Actions against directors—unaffected by receivership.

§ 2223. The fact that the affairs of a corporation have been placed in the hands of a receiver neither takes away nor suspends the right of individual creditors to bring an action against directors on their statutory liability.

Patterson v. Stewart, 41 Minn. 84, 42 N. W. 926. Doubted in Minnesota Thresher Mfg. Co. v. Langdon, 44 Minn. 37, 46 N. W. 310. See Dunnell, Minn. Pl. §§ 1159–1188.

Notice to receiver.

§ 2224. From the fact that a receiver is not the agent or representative of the creditors and is not subject to their control it follows that notice to the receiver is not notice to the creditors.

Thomas Mfg. Co. v. Foote, 46 Minn. 240, 48 N. W. 1019.

Digitized by Google

CHAPTER XXIX

CRIMINAL PROCEDURE

PRELIMINARY EXAMINATION

Who are committing magistrates.

§ 2225. All judges of courts of record, court commissioners and justices of the peace are conservators of the peace and authorized to examine persons charged with a criminal offence and commit them for trial.

G. S. 1894 § 7132; Hoskins v. Baxter, 64 Minn. 226, 66 N. W. 969; City of St. Paul v. Umstetter, 37 Minn. 15, 33 N. W. 115 (clerk of municipal court authorized to receive complaints and issue warrants).

A statutory procedure.

§ 2226. The preliminary examination of offenders by a committing magistrate is purely statutory.[1] Our statutes are in the main like those in Wisconsin,[2] Michigan, Kansas, and Massachusetts.

[1] State v. Huegin, (Wis.) 85 N. W. 1046.

[2] State v. Keyes, 75 Wis. 288.

Nature and object of proceeding.

§ 2227. A preliminary examination is a judicial proceeding but it is not an action or trial. The word "trial," which means the judicial hearing upon the issues in a cause for the purpose of determining it, cannot properly be applied to such an examination, which is a mere preliminary inquiry to ascertain if the evidence is such that the accused ought to be put upon trial for the offence charged. If he is discharged, new proceedings may be at once commenced against him for the same offence, if he is held, that fact can have no influence on his guilt when he is put on his trial to have it determined.[1] At common law the practice was to issue a warrant on a complaint of mere suspicion. Statutes requiring a preliminary examination were enacted to protect the citizen against the abuses of this practice.[2]

[1] State v. Bergman, 37 Minn. 407, 34 N. W. 737; Wagener v. Board of County Com'rs, 76 Minn. 368, 79 N. W. 166; State v. Huegin, (Wis.) 85 N. W. 1058.

[2] State v. Keyes, 75 Wis. 288.

When necessary.

§ 2228. A preliminary examination is not necessary if an indictment has been found,[1] or the offence is punishable by a justice of the peace,[2] or the accused waives it.[3] But there may be such an examination even as to offences punishable by a justice of the peace.[4]

[1] People v. Goldenson, 76 Cal. 328.

[2] G. S. 1894 § 5097.

Digitized by Google

[3] State v. Grant, 10 Minn. 39 Gil. 22.
[4] State v. Sargent, 71 Minn. 28, 73 N. W. 626.

Complaint and warrant—statute.

§ 2229. "Upon complaint being made to any such magistrate that a criminal offence has been committed, he shall examine on oath the complainant, and any witness provided by him, and shall reduce the complaint to writing, and shall cause the same to be subscribed by the complainant; and if it appears that any such offence has been committed, the court or justice shall issue a warrant, reciting the substance of the accusation, and requiring the officer to whom it is directed forthwith to take the person accused, and bring him before the said court or justice, or before some other court or magistrate of the county, to be dealt with according to law; and, in the same warrant, may require the officer to summon such witnesses as are therein named, to appear and give evidence on the examination."

[G. S. 1894 § 7133] Note that this is substantially the same as the statute for bringing offenders before a justice for trial. See G. S. 1894 § 5095.

§ 2230. A criminal complaint subscribed and sworn to before a magistrate and purporting to have been made after the complainant had been duly sworn is a sufficient "examination" of the complainant under this section.[1] A complaint which contains a substantial statement of the offence in positive terms is sufficient.[2] The complaint need not be attached to the warrant.[3] The magistrate is not confined to the examination of such witnesses as the complainant may "provide," but may subpoena others and examine them and it is sometimes his duty to do so before issuing a warrant.[4] The warrant must charge some specific offence. Of course it need not be the offence charged in the complaint. Prior to the issuing of the warrant the proceedings are general and not confined to any particular offence; but after the warrant issues the proceedings must be confined to the offence charged therein. If it appears, upon the examination, that a different offence has been committed a new warrant should be issued charging the proper offence. Under our statutes the warrant rather than the complaint is the foundation of the proceedings.[5] After the warrant issues the complaint is functus officio.[6] A complaint and warrant for the arrest of a person who has been released from a commitment by habeas corpus need not be any different from what they would be if there had been no prior arrest and discharge.[7]

[1] State v. Evans, 88 Wis. 255; State v. Nerbovig, 33 Minn. 480, 24 N. W. 321.
[2] State v. Evans, 88 Wis. 255; Butler v. State, 102 Wis. 364. See State v. Messolongitis, 74 Minn. 165, 77 N. W. 29 (sufficiency of complaint under Minneapolis municipal court act).
[3] State v. Evans, 88 Wis. 255.
[4] State v. Keyes, 75 Wis. 288.
[5] Yaner v. People, 34 Mich. 286; Redmond v. State, 12 Kans. 172.
[6] Redmond v. State, 12 Kans. 172.
[7] State v. Hohn, 37 Minn. 405, 34 N. W. 748.

Digitized by Google

The examination—statutes.

§ 2231. "The magistrate before whom any person is brought upon a charge of having committed an offence, shall, as soon as may be, examine the complainant and the witnesses to support the prosecution, on oath, in the presence of the party charged, in relation to any matter connected with such charge which may be deemed pertinent." [1] * * * "After the testimony to support the prosecution is finished, the witnesses for the prisoner, if he has any, shall be sworn and examined, and he may be assisted by counsel in such examination, and also in the cross-examination of the witnesses in support of the prosecution." [2] * * * "The magistrate, while examining any witness, may in his discretion exclude from the place of examination all the other witnesses; he may also, if requested, or if he sees cause, direct the witnesses for or against the prisoner to be kept separate, so that they cannot converse with each other, until they are examined." [3] * * * "The testimony of the witnesses examined shall be reduced to writing by the magistrate, or under his direction, and shall be signed by the witnesses, if required by the magistrate." [4]

[1] G. S. 1894 § 7143. [2] G. S. 1894 § 7144.
[3] G. S. 1894 § 7145. [4] G. S. 1894 § 7146.

§ 2232. The examination may be conducted for the prosecution by a private attorney employed by the complainant and it is not necessary for the county attorney to be present.[1] But it is made the duty of the county attorney to "attend all preliminary examinations of criminals, when the magistrate before whom such examination is held, shall request his attendance, and furnish him with a copy of the complaint." [2] No provision is made by our statutes for the examination of the accused.[3] If a sufficient number of witnesses are examined to justify the magistrate in binding over the accused it is no objection that the complainant and some other witnesses are not examined.[4] The examination should be limited to the offence charged; but if it appears that a different offence has been committed by the accused a new warrant may be issued charging the proper offence.[5]

[1] McCurdy v. N. Y. Life Ins. Co. 115 Mich. 20. See State v. Rue, 72 Minn. 296, 75 N. W. 235.
[2] G. S. 1894 § 803.
[3] See People v. Gibbons, 43 Cal. 557.
[4] Emery v. State, 92 Wis. 146.
[5] Yaner v. People, 34 Mich. 286.

Discharge of prisoner—statute.

§ 2233. "If it appears to the magistrate, upon the whole examination, that no offence has been committed, or that there is not probable cause for charging the prisoner with the offence, he shall be discharged."

[G. S. 1894 § 7147]

§ 2234. A discharge is not a bar to subsequent prosecution for the same offence.[1] If the evidence shows the accused probably not guilty of the offence charged but probably guilty of a different of-

Digitized by Google

fence the magistrate may hold him a reasonable time until a new warrant may be issued.[2]

[1] State v. Bergman, 37 Minn. 407, 34 N. W. 737; State v. Holm, 37 Minn. 405, 34 N. W. 748; Com. v. Hamilton, 129 Mass. 479.

[2] State v. Sargent, 71 Minn. 28, 73 N. W. 626 (this case speaks of a fresh "complaint"—under our practice it should be a fresh "warrant").

Binding over—commitment—statute.

§ 2235. "If it appears that an offence has been committed, and that there is probable cause to believe the prisoner guilty, and if the offence is bailable by the magistrate, and the prisoner offers sufficient bail, or the amount of money in lieu thereof, it shall be taken, and the prisoner discharged; but if no sufficient bail is offered, or the offence is not bailable by the magistrate, the prisoner shall be committed for trial."

[G. S. 1894 § 7149]

§ 2236. It is not necessary that there should be a formal adjudication by the magistrate that the alleged offence has been committed and that there is probable cause to believe the prisoner guilty. The fact that the magistrate holds to bail or commits to jail is equivalent to such an adjudication.[1] If the magistrate is a justice of the peace and the offence is within his jurisdiction he is not bound to turn the case over to the district court but may set it down for immediate trial in his own court.[2] If he does so the accused should be informed that he is to be subjected to trial, rather than to a mere preliminary examination, for he may wish to demand a jury trial.[3] Of course the justice may bind the accused over to the grand jury although the offence is within his jurisdiction.[4] If the offence charged is not within the jurisdiction of a justice the accused cannot be placed on trial without indictment and hence he must necessarily be bound over or committed to await the action of the grand jury. If the grand jury is not in session or is not to be impaneled within a short time a person charged with an offence cognizable by a justice of the peace cannot be bound over to await the action of the grand jury.[5] Whether, if the crime charged is cognizable by the justice conducting the examination, the accused has a right to demand a trial before the justice is apparently an open question in this state.[6] It is not necessary that a warrant of commitment under which one is confined in jail to await the action of the grand jury set forth, as in an indictment, all of the facts essential to constitute a crime. It is sufficient if it clearly designates the offence of which the prisoner is accused and shows that, upon examination before the committing magistrate, it appears that such offence had been committed and that there was probable cause to believe the accused to be guilty thereof.[7] The sufficiency of the evidence to justify a commitment may be questioned on habeas corpus.[8] When one is held by an examining magistrate to answer in the district court for a felony a prosecution for felony is pending in that court.[9] When a person has been held to answer for a public offence, if an indictment is not found against him

Digitized by Google

at the next term of the court at which he is held to answer, the court shall order the prosecution to be dismissed, unless good cause to the contrary be shown.[10]

[1] State v. Leicham, 41 Wis. 565.
[2] G. S. 1894 § 5097; Com. v. Hamilton, 129 Mass. 479.
[3] State v. Sargent, 71 Minn. 28, 73 N. W. 626.
[4] Com. v. Hamilton, 129 Mass. 479.
[5] State v. Sargent, 71 Minn. 28, 73 N. W. 626.
[6] See Matter of Donnelly, 30 Kans. 424 (holding that he has).
[7] Collins v. Brackett, 34 Minn. 339, 25 N. W. 708; State v. Huegin, (Wis.) 85 N. W. 1046.
[8] In re Snell, 31 Minn. 110, 16 N. W. 692; State v. Hayden, 35 Minn. 283, 28 N. W. 659; State v. Holm, 37 Minn. 405, 34 N. W. 748; State v. Huegin, (Wis.) 85 N. W. 1046.
[9] State v. Grace, 18 Minn. 398 Gil. 359.
[10] G. S. 1894 § 6278.

Waiver of examination.

§ 2236a. It is everyday practice for accused persons to waive preliminary examination and the right to do so is well established.

State v. Grant, 10 Minn. 39 Gil. 22.

Recognizance and bail.

§ 2237. In this state the subject of recognizance and bail in connection with preliminary examinations is minutely regulated by statute.

See G. S. 1894 § 7135 et seq.; State v. Grace, 18 Minn. 398 Gil. 359 (recognizance of witness—when witness may be committed); State v. Perry, 28 Minn. 455, 10 N. W. 778 (recognizance of accused—waiver of objections as to mode of procedure—time of filing with clerk); State v. Grant, 10 Minn. 39 Gil. 22 (definition of recognizance—default); State v. Bartlett, 70 Minn. 199, 72 N. W. 1067 (several statutes relating to bail construed—right of justice to admit to bail pending an adjournment of the hearing); Cressey v. Gierman, 7 Minn. 398 Gil. 316 (authority of justice to receive deposit as security upon an adjournment); Flanagan v. City of Minneapolis, 36 Minn. 406, 31 N. W. 359 (authority of clerk of Minneapolis municipal court to receive amount of forfeited recognizance).

Return.

§ 2238. All examinations and recognizances taken by any magistrate must be certified and returned by him to the clerk of the court before which the party charged is bound to appear on or before the first day of the sitting thereof.[1] The examination prior to the issuance of the warrant need not be returned.[2] If a recognizance is of record in the proper court, at the time when the parties who entered into it are called upon to perform its conditions, it is in time as respects filing. The statute is merely directory as to time of filing.[3] The district court may require a further return.[4] The depositions of witnesses upon an examination are not generally competent evi-

Digitized by Google

dence in an action for malicious prosecution.[5] When one is held by an examining magistrate to answer in the district court for a felony a prosecution for felony is pending in that court although the return has not been filed.[6]

[1] G. S. 1894 § 7156.
[2] People v. Caldwell, 107 Mich. 374.
[3] State v. Perry, 28 Minn. 455, 10 N. W. 778.
[4] People v. Wright, 89 Mich. 70.
[5] Chapman v. Dodd, 10 Minn. 350 Gil. 277.
[6] State v. Grace, 18 Minn. 398 Gil. 359.

Change of venue—statute.

§ 2239. "Whenever any person charged with having committed an offence shall be brought before any justice of the peace, or court commissioner, for examination in accordance with the provisions of this chapter, if such person shall, before the commencement of the examination, make oath that from prejudice or other cause, he believes that the justice or court commissioner will not decide impartially in the matter, then said justice or court commissioner shall immediately transmit all the papers in the case to a justice of the peace of the same or an adjoining election district, in the same county, qualified by law to conduct the examination, who shall proceed with the examination in the same manner as though said person had first been brought before him; but no case shall be so removed after a second adjournment had therein, and only one removal shall be allowed in the same case."

[G. S. 1894 § 7169 as amended by Laws 1899 ch. 159]

§ 2240. This statute is mandatory. The filing of a proper affidavit gives the accused an absolute right to a change and divests the magistrate of jurisdiction to proceed.[1] The affidavit must not be in the alternative—"prejudice or other cause." Where the party does not rely on prejudice but upon some "other cause" the affidavit must state the facts constituting such "other cause."[2] The general statute as to change of venue is not applicable.[3]

[1] State v. Weltner, 7 N. D. 522, 75 N. W. 779; State v. Sorenson, 84 Wis. 27.
[2] Billings v. Noble, 75 Wis. 325.
[3] State v. Bergman, 37 Minn. 407, 34 N. W. 737.

RIGHT OF INDICTMENT BY GRAND JURY

Constitutional provision.

§ 2241. "No person shall be held to answer for a criminal offence unless on the presentment or indictment of a grand jury, except in cases of impeachment or in cases cognizable by justices of the peace, or arising in the army or navy, or in the militia when in actual service in time of war or public danger."

[Const. Minn. Art. 1 § 7]

§ 2242. Violations of municipal ordinances, punishable by fine or imprisonment, are criminal offences within the meaning of this provi-

Digitized by Google

sion, and consequently, where the prescribed punishment may exceed three months' imprisonment or one hundred dollars, a person can be held to answer for them only on the indictment or information of a grand jury.[1] A violation of the state military code in time of peace is not a criminal offence within the meaning of this provision.[2]

[1] State v. West, 42 Minn. 147, 43 N. W. 845; State v. Anderson, 47 Minn. 270, 50 N. W. 226.

[2] State v. Wagener, 74 Minn. 518, 77 N. W. 424.

ARRAIGNMENT

Time and general object of—statute.

§ 2243. "When the indictment is filed the defendant shall be arraigned thereon before the court in which it is found, if it is triable therein; or if not, before the court to which it is sent or removed."

[G. S. 1894 § 7264]

§ 2244. The arraignment is the first step in court against a person indicted.[1] Its object is to identify the accused, inform him of the crime of which he is charged and obtain his answer to the indictment.[2] While it is probable that the accused may, even in a prosecution for a felony, waive a formal arraignment and plead directly,[3] it is better for the court to insist upon the regular order. It is the duty of the county attorney to bring on the arraignment immediately after the filing of the indictment [4] and an unreasonable delay will be ground for a dismissal of the indictment.[5] That there is ground for postponing the trial is not an excuse for postponing the arraignment.[6] It is not necessary that there should be a second arraignment on a new trial [7] or after an amendment of the indictment.[8] When several are jointly indicted they may be arraigned separately.[9] Special provision is made for the arraignment of corporations.[10]

[1] 1 Chitty, Cr. Law 418.

[2] People v. Frost, 5 Park. Cr. Rep. (N. Y.) 52; Dix v. State, 13 Fla. 631.

[3] Dix v. State, 13 Fla. 631.

[4] Douglass v. State, 3 Wis. 820.

[5] State v. Thompson, 32 Minn. 144, 19 N. W. 730; State v. Radoicich, 66 Minn. 294, 69 N. W. 25.

[6] State v. Thompson, 32 Minn. 144, 19 N. W. 730.

[7] People v. McElvaine, 125 N. Y. 596.

[8] State v. Beatty, 45 Kans. 492.

[9] Rex v. White, 17 Howell St. Tr. 1079.

[10] See Laws 1895 ch. 217.

When defendant must be present—statute.

§ 2245. "If the indictment is for a felony, the defendant shall be personally present; but if for a misdemeanor only, his personal appearance is unnecessary, and he may appear upon the arraignment by counsel."

[G. S. 1894 § 7265]

Digitized by Google

Bench warrant—bail.

§ 2246. Provision is made by statute to compel the attendance of the accused by means of a bench warrant. Bail may be fixed by indorsement on the warrant. If the offence is a misdemeanor the accused may be taken before a magistrate in another county and give bail to answer the indictment.

See G. S. 1894 §§ 7266–7276.

Right of counsel—statute.

§ 2247. "If the defendant appears for arraignment without counsel, he shall be informed by the court that it is his right to have counsel before being arraigned, and shall be asked if he desires the aid of counsel."

[G. S. 1894 § 7277] See People v. Villarino, 66 Cal. 228; Territory v. Hargrave, 1 Ariz. 95.

Mode of arraignment—statute.

§ 2248. "The arraignment shall be made by the court, or by the clerk or county attorney, under its direction, and consists in reading the indictment to the defendant, and delivering to him a copy thereof, and of the indorsements thereon, including the list of witnesses indorsed on it or appended thereto, and asking him whether he pleads guilty or not guilty to the indictment."[1] * * * "When the defendant is arraigned, he shall be informed that if the name by which he is indicted is not his true name, he shall then declare his true name, or be proceeded against by the name in the indictment. If he gives no other name, the court may proceed accordingly."[2] * * * "If he alleges that another name is his true name, the court shall direct an entry thereof in the minutes of the arraignment; and the subsequent proceedings on the indictment may be had against him by that name, referring also to the name by which he is indicted."[3]

[1] G. S. 1894 § 7278.

[2] G. S. 1894 § 7299; State v. Timmens, 4 Minn. 325 Gil. 241.

[3] G. S. 1894 § 7380.

§ 2249. Where the accused was served with a defective copy of the indictment it was held proper for the court to set aside the arraignment and order a new arraignment before entertaining a motion to set aside the indictment.[1] If the accused appears and pleads to the indictment it is immaterial that the indictment is not read to him and he is not asked whether he pleads guilty or not guilty.[2]

[1] State v. Gut, 13 Minn. 341 Gil. 315.

[2] Dix v. State, 13 Fla. 631.

Time to answer indictment—statute.

§ 2250. "If, on the arraignment, the defendant requires it, he shall be allowed until the next day, or such further time may be allowed him as the court deems reasonable, to answer the indictment."

[G. S. 1894 § 7281]

Demurrer—plea—motion to set aside when made—statute.

§ 2251. "If the defendant does not require time, as provided in the last section, or if he does, then on the next day, or at such further

Digitized by Google

day as the court may have allowed him, he may, in answer to the arraignment, either move the court to set aside the indictment, or may demur or plead thereto."

[G. S. 1894 § 7282]

§ 2251a. A motion to set aside the indictment [1] or an objection to the jurisdiction of the court [2] over the person must be made before a demurrer or plea is entered. And a demurrer must be disposed of before a plea is entered.[3] Any irregularity in the commitment must be raised at the time of the arraignment.[4]

[1] G. S. 1894 §§ 7285, 7286; State v. Arbers, 70 Minn. 462, 73 N. W. 403; State v. Thomas, 19 Minn. 484 Gil. 418.

[2] State v. Fitzgerald, 51 Minn. 534, 53 N. W. 799.

[3] G. S. 1894 § 7300.

[4] People v. Bowden, 90 Cal. 195.

SETTING ASIDE INDICTMENT

Statutory provisions.

§ 2252. "The indictment shall be set aside by the court in which the defendant is arraigned, upon his motion, in either of the following cases:

(1) When it is not found, indorsed and presented, as prescribed in the chapter relating to grand juries.[1]

(2) When the names of the witnesses examined before the grand jury are not inserted at the foot of the indictment, or indorsed thereon.[2]

(3) When a person is permitted to be present during the session of the grand jury, while the charge embraced in the indictment was under consideration, except as provided in section thirty nine of said chapter." [3]

"If the motion to set aside the indictment is not made, the defendant is precluded from afterward taking the objections mentioned in the last section." [4] * * * "The motion shall be heard at the time of the arraignment, unless, for good cause, the court postpones the hearing to another time." [5] * * * "If the motion is denied, the defendant shall immediately answer the indictment, either by demurring or pleading thereto." [6] * * * "If the motion is granted, the court shall order that the defendant, if in custody, be discharged therefrom, or if admitted to bail, that his bail be exonerated, or if he has deposited money instead of bail, that the money be refunded to him; unless it directs that the case be re-submitted to the same or another grand jury." [7] * * * "If the court directs that the case be re-submitted, the defendant, if already in custody, shall so remain, unless he is admitted to bail; or if already admitted to bail, or money deposited instead thereof, the bail or money is answerable for the appearance of the defendant, to answer a new indictment." [8] * * * Unless a new indictment is found before the next grand jury of the county is discharged, the court shall, on the discharge of such grand jury, order that the defendant be discharged from cus-

Digitized by Google

tody, or if he has been admitted to bail that his bail be exonerated, or if he has deposited money instead of bail, that the money be refunded to him.[9] * * * An order to set aside an indictment as provided by statute is no bar to a future prosecution for the same offence.[10]

[1] State v. Shippey, 10 Minn. 223 Gil. 178; State v. Schumm, 47 Minn. 373, 50 N. W. 362; State v. Dick, 47 Minn. 375, 50 N. W. 362; State v. Greenman, 23 Minn. 209; State v. Thomas, 19 Minn. 484 Gil. 418; State v. Froiseth, 16 Minn. 313 Gil. 277; State v. Hawks, 56 Minn. 129, 57 N. W. 455; State v. Cooley, 72 Minn. 476, 75 N. W. 729; State v. Goodrich, 67 Minn. 176, 69 N. W. 815; State v. Arbes, 70 Minn. 462, 73 N. W. 403.

[2] State v. Hawks, 56 Minn. 129, 57 N. W. 455.

[3] G. S. 1894 § 7283.

[4] G. S. 1894 § 7284. State v. Shippey, 10 Minn. 223 Gil. 178; State v. Schumm, 47 Minn. 373, 50 N. W. 362; State v. Dick, 47 Minn. 375, 50 N. W. 362; State v. Thomas, 19 Minn. 484 Gil. 418.

[5] G. S. 1894 § 7285. [6] G. S. 1894 § 7286. [7] G. S. 1894 § 7287.
[8] G. S. 1894 § 7288. [9] G. S. 1894 § 7289. [10] G. S. 1894 § 7290.

§ 2253. The statutory grounds for setting aside an indictment are not exclusive. Thus an indictment may be set aside because the defendant was compelled to testify against himself before the grand jury,[1] or because, in a prosecution for adultery, complaint was not made by the husband or wife.[2] An indictment will not be set aside because there is another indictment pending in the same court against the same defendant for the same offence;[3] because one of the grand jurors was not present when the grand jury was charged, but was present during the examination of the charge against defendant and voted upon the finding;[4] because, when the grand jury was impaneled and sworn the defendant was in jail;[5] because the names of witnesses before the grand jury whose testimony was not considered in finding the indictment are not indorsed on the indictment;[6] because the grand jury was filled out by a special venire;[7] because less than a full panel of grand jurors found the indictment;[8] because the grand jury was reconvened at an adjourned term of court;[9] because of an immaterial irregularity in drawing the grand jury list.[10] It is not an abuse of discretion for the court to deny defendant leave to withdraw his plea of not guilty for the purpose of enabling him to move to set aside the indictment on the ground that two members of the grand jury were aliens.[11] One who is held to answer at a term of the district court for a criminal offence must make any objection that he has to the manner of procuring the grand jury by challenge and not by motion to set aside the indictment.[12] An indictment should not be set aside for any "defect or imperfection in matter of form, which does not tend to the prejudice of the substantial rights of the defendant upon the merits."[13] The accused need not be present at the hearing of the

Digitized by Google

motion.[14] The affidavit of a grand juror is not admissible to show misconduct on the party of the grand jury.[15]

[1] State v. Froiseth, 16 Minn. 296 Gil. 260; State v. Hawks, 56 Minn. 129, 57 N. W. 455; State v. Gardiner, 92 N. W. ——.
[2] State v. Brecht, 41 Minn. 50, 42 N. W. 602.
[3] State v. Gut, 13 Minn. 341 Gil. 315.
[4] State v. Froiseth, 16 Minn. 313 Gil. 277.
[5] State v. Hoyt, 13 Minn. 132 Gil. 125.
[6] State v. Hawks, 56 Minn. 129, 57 N. W. 455.
[7] State v. Russell, 69 Minn. 502, 72 N. W. 832.
[8] State v. Cooley, 72 Minn. 476, 75 N. W. 729.
[9] State v. Goodrich, 67 Minn. 176, 69 N. W. 815.
[10] Id.
[11] State v. Arbes, 70 Minn. 462, 73 N. W. 403.
[12] State v. Greenman, 23 Minn. 209.
[13] G. S. 1894 § 7248.
[14] Epps v. State, 102 Ind. 539.
[15] State v. Beebe, 17 Minn. 241 Gil. 218. See § 998.

DEMURRER

General statutory provisions.

§ 2254. "The only pleading on the part of the defendant is a demurrer or a plea."[1] * * * "Both the demurrer and the plea shall be put in in open court, either at the time of the arraignment, or at such other time as may be allowed to the defendant for that purpose."[2] * * * "The demurrer shall be in writing, signed either by the defendant or his counsel; it shall distinctly specify the ground of objection to the indictment, or it may be disregarded."[3] * * * "Upon the demurrer being filed, the objection presented thereby shall be heard, either immediately, or at such time as the court may appoint."[4]

[1] G. S. 1894 § 7291.
[2] G. S. 1894 § 7292. But not at the same time. The demurrer should be disposed of before a plea is entered.
[3] G. S. 1894 § 7294.
[4] G. S. 1894 § 7295.

Grounds of demurrer—statute.

§ 2255. "The defendant may demur to the indictment when it appears from the face thereof, either,

(1) That the grand jury by which it was found had no legal authority to inquire into the offence charged, by reason of its not being within the local jurisdiction of the county.

(2) That it does not substantially conform to the requirements of sections one, two, three and four of chapter one hundred and eight [G. S. 1894 §§ 7238–7241], as the same are qualified by section ten of the same chapter [G. S. 1894 § 7247]; or was not found within the time prescribed by section eighteen [G. S. 1894 § 7255].

Digitized by Google

(3) That more than one offence is charged in the indictment, except in cases where it is allowed by statute.

(4) That the facts stated do not constitute a public offence.

(5) That the indictment contains any matter which, if true, would constitute a legal justification or excuse of the offence charged, or other legal bar to the prosecution."

[G. S. 1894 § 7293]

§ 2256. The statutory grounds are exclusive.[1] Uncertainty is not a ground.[2] A general demurrer to an indictment containing two counts one of which is sufficient is properly overruled.[3] An indictment is not insufficient because "of a defect or imperfection in matter of form which does not tend to the prejudice of the substantial rights of the defendant upon the merits."[4]

[1] People v. Schmidt, 64 Cal. 260 (similar statute).

[2] People v. Markham, 64 Cal. 157. See State v. Hinkley, 4 Minn. 345 Gil. 261.

[3] People v. Ferris, 56 Cal. 442.

[4] G. S. 1894 § 7248; State v. Howard, 66 Minn. 309, 68 N. W. 1096; State v. Munch, 22 Minn. 67; State v. Harris, 50 Minn. 128, 52 N. W. 387, 531; State v. Holong, 38 Minn. 368, 37 N. W. 587.

Judgment on demurrer—statute.

§ 2257. "Upon considering the demurrer, the court shall give judgment, either allowing or disallowing it, and an order to that effect shall be entered upon the minutes."

[G. S. 1894 § 7296] See People v. Biggins, 65 Cal. 566; State v. McGrorty, 2 Minn. 225 Gil. 187 (form of order sustaining demurrer).

Effect of allowance—statute.

§ 2258. "If the demurrer is allowed, the judgment is final upon the indictment demurred to, and is a bar to another prosecution for the same offence,[1] unless the court allows an amendment where the defendant will not be unjustly prejudiced thereby,[2] or, being of opinion that the objection on which the demurrer is allowed may be avoided in a new indictment, directs the case to be re-submitted to the same or another grand jury."

[G. S. 1894 § 7297]

[1] State v. Comfort, 22 Minn. 271; State v. McGrorty, 2 Minn. 225 Gil. 187; People v. Richards, 44 Hun (N. Y.) 288.

[2] State v. Armstrong, 4 Minn. 335 Gil. 251.

§ 2259. The allowance of an amendment, or direction for re-submission must be by matter of record, made at the same time when the demurrer is allowed, and ought regularly to be made in the order or judgment allowing the demurrer.[1] An order directing the charge to be submitted "to the same or another grand jury" is sufficient.[2] Any subsequent grand jury may find an indictment for the same offence when such an order is made. The limitation in G. S. 1894 § 7289 is not applicable.[3] The dismissal of an indictment on the

Digitized by Google

motion of the county attorney after the same has been attacked by demurrer is not equivalent to a decision of the court sustaining the demurrer, so as to prevent the case from being re-submitted to the same or another grand jury, without an order of court.[4]

[1] State v. Comfort, 22 Minn. 271.
[2] Ex parte Job, 17 Nev. 184 (similar statute).
[3] Id.
[4] State v. Peterson, 61 Minn. 73, 63 N. W. 171.

Discharge of defendant—statute.

§ 2260. "If the court does not allow an amendment or direct the case to be re-submitted, the defendant, if in custody, shall be discharged, or if admitted to bail, his bail is exonerated, or if he has deposited money instead of bail, the money shall be refunded to him."

[G. S. 1894 § 7298] See People v. Jordan, 63 Cal. 219; State v. McGrorty, 2 Minn. 225 Gil. 187 (form of discharge).

Proceedings when case submitted anew—statute.

§ 2261. "If the court directs that the case be submitted anew, the same proceedings shall be had thereon as are prescribed in sections six and seven of chapter one hundred and ten [G. S. 1894 §§ 7288, 7289.]"

[G. S. 1894 § 7299]

§ 2262. The limitation as to the next grand jury stated in § 7289 is not applicable. Any subsequent grand jury may find an indictment for the same offence.

Ex parte Job, 17 Nev. 184 (similar statutes).

Effect of overruling demurrer—statute.

§ 2263. "If the demurrer is disallowed or the indictment amended, the court shall permit the defendant, at his election, to plead, which he must do forthwith, or at such time as the court may allow. If he does not plead, judgment shall be pronounced against him."

[G. S. 1894 § 7300]

§ 2264. The designation of the time within which to plead over is within the discretion of the court and the time originally fixed may be extended.[1] If the defendant refuses to plead judgment as upon a plea of guilty should be entered against him.[2] The court ought not to pronounce judgment without fully advising the accused of his right to plead over.

[1] State v. Abrisch, 42 Minn. 202, 43 N. W. 1115.
[2] Id.; People v. King, 28 Cal. 266 (similar statute); People v. Joselyn, 29 Cal. 563.

Objections waived by failure to demur.

§ 2265. "When the objections mentioned in section three [§ 2255 supra] appear upon the face of the indictment, they can only be taken by demurrer, except that the objection to the jurisdiction of the court over the subject of the indictment, or that the facts

Digitized by Google

stated do not constitute a public offence,[1] may be taken at the trial, under the plea of not guilty, and in arrest of judgment."

[G. S. 1894 § 7301]

[1] State v. Tracy, 82 Minn. 317, 84 N. W. 1015.

PLEAS

Kinds.

§ 2266. "There are three pleas to an indictment:

(1) Guilty.

(2) Not guilty.

(3) A former judgment of conviction or acquittal of the offence charged, which may be pleaded either with or without the plea of not guilty."

[G. S. 1894 § 7302]

§ 2267. In this state there is no plea in abatement,[1] or plea of benefit of clergy.[2] But a plea of former jeopardy has been sustained, though not expressly authorized.[3] By entering a plea a party waives objection to the jurisdiction of the court over his person.[4] It has been held that a plea of some kind is indispensable and that the record must show affirmatively that one was entered.[5] But the better view is that if the defendant appears in person and by counsel and proceeds to trial without objection as if upon a plea of not guilty he waives the want of a formal plea and entry thereof in the record and cannot raise the objection on motion in arrest of judgment or on appeal.[6] It is not necessary that there should be a new plea on a new trial[7] or after an amendment of the indictment.[8]

[1] State v. Brecht, 41 Minn. 50, 42 N. W. 602.

[2] State v. Bilansky, 3 Minn. 246 Gil. 169.

[3] State v. Sommers, 60 Minn. 90, 61 N. W. 907.

[4] State v. Fitzgerald, 51 Minn. 534, 53 N. W. 799.

[5] Crain v. U. S. 162 U. S. 625; Browning v. State, 54 Neb. 203, 74 N. W. 631.

[6] State v. Cassady, 12 Kans. 550; Moore v. State, 51 Ark. 130, Com. v. McKenna, 125 Mass. 397; State v. Bowman, 78 Iowa 519. See dissenting opinion in Crain v. U. S. 162 U. S. 625 and § 2360 (7).

[7] People v. McElvaine, 125 N. Y. 596.

[8] State v. Merrick, 101 Wis. 162, 77 N. W. 719.

Plea must be oral—statute.

§ 2268. "Every plea shall be oral, and be entered upon the minutes of the court."

[G. S. 1894 § 7303]

§ 2269. A plea in writing is unavailing for any purpose.

People v. Johnson, 47 Cal. 122; People v. Redinger, 55 Cal. 218; People v. O'Leary, 77 Cal. 30.

Form and entry—statute.

§ 2270. "The plea shall be entered in substantially the following form:

Digitized by Google

(1) If the defendant pleads guilty: 'the defendant pleads that he is guilty of the offence charged in this indictment.'

(2) If he pleads not guilty: 'the defendant pleads that he is not guilty of the offence charged in this indictment.'

(3) If he pleads a former conviction or acquittal: 'the defendant pleads that he has already been convicted (or acquitted, as the case may be) of the offence charged in this indictment, by the judgment of the court of (naming it) rendered at (naming the place) on the day of .'"

[G. S. 1894 § 7304]

§ 2271. If there is an oral plea and a written plea the latter cannot aid the plea actually entered in the minutes.[1] Only a substantial compliance with this statute is necessary.[2] By proceeding to trial without objection the defendant waives compliance with the statute [3] and if there was in fact a plea the record may be amended to accord with the fact.[4] A plea need not be re-entered on a second trial of the same indictment.[5]

[1] People v. O'Leary, 77 Cal. 30.
[2] People v. Wallace, 101 Cal. 281; Preuitt v. People, 5 Neb. 377.
[3] State v. Cassady, 12 Kans. 550.
[4] Territory v. Clayton, 8 Mont. 1.
[5] People v. McElvaine, 125 N. Y. 596.

By whom put in—statute.

§ 2272. "A plea of guilty can in no case be put in, except by the defendant himself, in open court, unless upon an indictment against a corporation, in which case, it may be put in by counsel."

[G. S. 1894 § 7305]

§ 2273. A plea of not guilty may always be put in by counsel, but if the prosecution is for a felony the accused must be present.

State v. Jones, 70 Iowa 505.

Withdrawal of plea of guilty—statute.

§ 2274. "The court may, at any time before judgment upon plea of guilty, permit it to be withdrawn, and a plea of not guilty substituted."

[G. S. 1894 § 7306]

§ 2275. This is allowed almost as a matter of course. But a court will rarely allow the accused to withdraw a plea for the purpose of moving to set aside the indictment or to demur but will rather entertain a motion to quash, allowing the plea to stand.

See Com. v. Chapman, 11 Cush. Mass. 422; Richards v. Com. 81 Va. 110.

Withdrawal of plea of not guilty.

§ 2276. Allowing a party to withdraw a plea of not guilty for the purpose of moving to set aside an indictment for defects in the grand jury is discretionary with the court.

State v. Arbes, 70 Minn. 462, 73 N. W. 403.

Digitized by Google

Effect of plea of not guilty—statute.

§ 2277. "The plea of not guilty is a denial of every material allegation in the indictment."

[G. S. 1894 § 7307]

§ 2278. The plea of not guilty is unlike a special plea in a civil action, which, admitting the case averred, seeks to establish substantive ground of defence by a preponderance of evidence. It is not in confession and avoidance, but it is a plea that controverts the existence of every fact essential to constitute the crime charged. Upon that plea the accused may stand, shielded by the presumption of his innocence, until it appears that he is guilty.

Davis v. United States, 160 U. S. 485.

Evidence admissible under plea of not guilty—statute.

§ 2279. "All matters of fact tending to establish a defence other than that specified in the third subdivision of section one [§ 2266 supra], may be given in evidence under the plea of not guilty."

[G. S. 1894 § 7308]

§ 2280. Evidence of a former conviction or acquittal is admissible under the general issue if the defendant did not have an opportunity to plead it.[1] Evidence of former jeopardy short of acquittal or conviction is admissible under the general issue;[2] so is evidence or insanity[3] or drunkenness.[4]

[1] State v. Martin, 30 Wis. 322.

[2] People v. Cage, 48 Cal. 324. See State v. Sommers, 60 Minn. 90, 61 N. W. 907.

[3] People v. Alwell, 28 Cal. 456.

[4] People v. King, 27 Cal. 507; People v. Ferris, 55 Cal. 588.

Refusal to plead—statute.

§ 2281. "If the defendant refuses to answer the indictment by demurrer or plea a plea of not guilty shall be entered."

[G. S. 1894 § 7312]

§ 2282. If, after his demurrer to the indictment is overruled, the defendant refuses to plead, judgment as upon a plea of guilty should be pronounced against him.

G. S. 1894 § 7300; People v. King, 28 Cal. 266.

Former conviction or acquittal—former jeopardy.

§ 2283. "No person for the same offence shall be put twice in jeopardy of punishment."[1] * * * "If the defendant was formerly acquitted on the ground of a variance between the indictment and the proof, or the indictment was dismissed upon an objection to its form or substance, without a judgment of acquittal, it is not an acquittal of the same offence."[2] * * * "When, however, he was acquitted on the merits, he is deemed acquitted of the same offence, notwithstanding a defect in the form or substance in the indictment on which he was acquitted."[3] * * * "When the defendant is convicted or acquitted upon an indictment for an offence consisting of different degrees, the conviction or acquittal is a bar to another

Digitized by Google

indictment for the offence charged in the former, or for any inferior degree of that offence, or for an attempt to commit the same, or for an offence necessarily included therein, of which he might have been convicted under that indictment." [4]

[1] Const. Minn. Art. 1 § 7.
[2] G. S. 1894 § 7309. See G. S. 1894 §§ 7297, 7337, 7338.
[3] G. S. 1894 § 7310.
[4] G. S. 1894 § 7311.

§ 2284. The accused is "put in jeopardy of punishment" in the legal and constitutional sense, when a jury is impaneled and sworn to try his case, upon a valid indictment, or, as it was expressed at common law, "when the jury is charged with the defendant." After a jury is thus charged with the defendant he is entitled to have it proceed to verdict unless some intervening necessity prevents. Inability of the jury to agree is such a necessity, yet, in a prosecution for a felony, the defendant has a right to be present throughout the trial and if a jury is discharged for inability to agree without the consent of the defendant and during his enforced absence in prison he cannot be tried again for the same offence.[1] A former conviction fraudulently obtained is no bar to a second trial.[2] The term "offence," in criminal law, is not identical in meaning with the word "act." It imports, in its legal sense, an infraction of a law—the wilful doing of an act which is forbidden by law or omitting to do what the law commands. The same act may transgress two distinct laws, as, for example, a state and a federal law or a municipal ordinance and a state law. If so there are two offences and both may be punished.[3] A former conviction or acquittal of a higher offence is a bar to a prosecution for the same act charged as a less offence, if, on the trial of the former, the defendant might have been upon any competent evidence legally convicted of the latter.[4] Conversely, a former conviction or acquittal of a minor offence is a bar to a prosecution for the same act, charged as a higher crime, whenever the defendant, on trial of the latter, might be legally convicted of the former, had there been no other prosecution.[5] Burglary and larceny are distinct offences.[6] If, after a conviction, the defendant obtains a new trial he waives the immunity.[7] A conviction in a court without jurisdiction is not a bar.[8] A conviction under an invalid law is not a bar.[9] An erroneous judgment operates as a bar if the court had jurisdiction.[10] A judgment allowing a demurrer is a bar.[11] The uttering as true of a forged mortgage and a forged note, which the mortgage purports to secure at one time and to the same party, is a single act, and constitutes only one offence. A conviction on an indictment for uttering the mortgage is a bar to a subsequent conviction for uttering the note.[12] A verdict must pass into judgment before it is a bar.[13]

[1] State v. Sommers, 60 Minn. 90, 61 N. W. 907.
[2] State v. Simpson, 28 Minn. 66, 9 N. W. 78.
[3] State v. Oleson, 26 Minn. 507, 5 N. W. 959; State v. Lee, 29 Minn. 445, 13 N. W. 913; State v. Harris, 50 Minn. 128, 52 N. W. 387, 531.

Digitized by Google

[6] State v. Hackett, 47 Minn. 425, 50 N. W. 472.
[7] State v. Wiles, 26 Minn. 381, 4 N. W. 615; State v. Lessing, 16 Minn. 75 Gil. 64.
[8] State v. Hackett, 47 Minn. 425, 50 N. W. 472; Sharp v. State (Neb.) 85 N. W. 38.
[9] State v. Brecht, 41 Minn. 50, 42 N. W. 602; State v. Coon, 18 Minn. 518 Gil. 464.
[10] State v. Charles, 16 Minn. 474 Gil. 426.
[11] State v. Oleson, 26 Minn. 507, 5 N. W. 959.
[12] State v. Bowen, 45 Minn. 145, 47 N. W. 650.
[13] G. S. 1894 § 7297; State v. Comfort, 22 Minn. 271.
[14] State v. Moore (Minn. 1902) 90 N. W. 787.
[15] Id.

Practice on plea of former conviction or acquittal.

§ 2285. The plea of former conviction or acquittal raises an issue of fact for the jury subject to the right of the court to rule on the admissibility of evidence thereon.[1] There is no provision in our statute for a demurrer to the plea.[2] If it is insufficient in law it may no doubt be properly stricken out on motion. There is no necessity for a formal denial or replication. An issue is formed upon the plea alone.[3] If the plea is joined with a plea of not guilty there must be a special finding on the former before there can be a valid judgment of conviction or acquittal on the latter.[4] The better practice is not to proceed to the trial of the issue on the plea of not guilty until the issue on the plea of former conviction or acquittal is disposed of.[5] The burden of proof is on the defendant.[6] He must introduce a certified copy of the judgment but this is not enough. He must introduce a witness who was present at the former trial to prove the identity of the person and the crime.[7] If the jury find for the state it is probably not necessary that any formal judgment should be entered.[8]

[1] G. S. 1894 § 7318; State v. Johnson, 11 Nev. 272.
[2] See State v. Sommers, 60 Minn. 90, 61 N. W. 907.
[3] G. S. 1894 § 7318; State v. Swepson, 81 N. C. 571.
[4] People v. Fuqua, 61 Cal. 377.
[5] Lee v. State, 22 Ark. 260. See State v. Respass, 85 N. C. 534.
[6] People v. Trimble, 60 Hun (N. Y.) 364.
[7] Bishop, Crim. Proc. § 816.
[8] People v. Trimble, 60 Hun (N. Y.) 364; Id. 131 N. Y. 364.

VENUE

Place of trial.

§ 2286. Our constitution provides that "the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the county or district wherein the crime shall have been committed, which county or district shall have been previously ascertained by law."[1] By statute it is provided that "all criminal causes shall be tried in the county where the offence was committed";[2] or, as expressed in another statute, "an issue of fact shall be tried by a jury

Digitized by Google

of the county in which the indictment was found."[3] Special statutes regulate the place of trial where the offence is committed on the boundary between two counties or within one hundred rods of the dividing line;[4] where the offence is committed on a public conveyance;[5] or vessel;[6] where the offence is committed in one county and death ensues in another;[7] where felonious homicide is committed in this state and death results in another state;[8] for libel by newspapers;[9] for bringing stolen goods into state;[10] for bringing stolen goods from another county;[11] for kidnapping;[12] for maintaining a ferry;[13] for prize fight out of state;[14] for sending letter;[15] for violation of game and fish laws.[16] The general rule as to venue has been thus expressed: "It is for his acts that defendant is responsible. They constitute his offence. The place where they are committed must be the place where his offence is committed, and there the place where he should be indicted and tried."[17]

[1] Const. Minn. Art. 1 § 6.
[2] G. S. 1894 § 7313.
[3] G. S. 1894 § 7319.
[4] G. S. 1894 § 7258; State v. Robinson, 14 Minn. 447 Gil. 333; State v. Anderson, 25 Minn. 66; State v. Masteller, 45 Minn. 128, 47 N. W. 541.
[5] G. S. 1894 § 7257.
[6] G. S. 1894 § 7256; State v. Timmens, 4 Minn. 325 Gil. 241.
[7] G. S. 1894 §§ 7259, 7260.
[8] G. S. 1894 § 7261; State v. Gessert, 21 Minn. 369; State v. Smith, 78 Minn. 362, 81 N. W. 17.
[9] G. S. 1894 § 6503. [10] G. S. 1894 § 6721. [11] G. S. 1894 § 6722.
[12] G. S. 1894 § 6468. [13] G. S. 1894 § 6632. [14] G. S. 1894 § 6656.
[15] G. S. 1894 § 6822. [16] G. S. 1894 § 2189.
[17] State v. Gessert, 21 Minn. 369; State v. Smith, 78 Minn. 362, 81 N. W. 17.

Laying venue in indictment.

§ 2287. The indictment must state the place where the crime was committed in order that it may appear to have been committed within the jurisdiction of the court and the defendant be fully informed of the charge and be able to plead the judgment rendered upon the indictment in bar to any second indictment for the same offence.[1] But it is not necessary to allege that the offence was committed at any particular place in the county.[2]

[1] State v. Robinson, 14 Minn. 447 Gil. 333.
[2] O'Connell v. State, 6 Minn. 279 Gil. 190.

Change of venue.

§ 2288. "All criminal causes shall be tried in the county where the offence was committed, except where otherwise provided by law, unless it appears to the satisfaction of the court, by affidavit, that a fair and impartial trial cannot be had in such county, in which case the court before whom the cause is pending, if the offence charged in the indictment is punishable with death or imprisonment in the state prison, may direct the person accused to be tried in some other coun-

Digitized by Google

ty, in the same or any other judicial district in the state, where a fair and impartial trial can be had; but the party accused is entitled to a change of venue but once and no more."[1] The state may also obtain a change of venue on like terms.[2] The trial is conducted in all respects as if the indictment had been found in the county to which the venue is changed. All the costs and expenses of the prosecution and trial in the county to which the venue is changed, including the fees of officers, witnesses, and jurors, are payable by the county in which the offence was committed.[3] Witnesses for the state must recognize to appear before the court in which the trial is to be had,[4] and provision is made to secure the attendance of the accused.[5]

[1] G. S. 1894 § 7313.
[2] G. S. 1894 § 7317; State v. Miller, 15 Minn. 344 Gil. 277.
[3] Laws 1902 ch. 31. Overruling Board of County Com'rs v. Board of County Com'rs, 84 Minn. 267, 87 N. W. 846.
[4] G. S. 1894 § 7316.
[5] G. S. 1894 § 7315.

§ 2289. An application for a change of venue is addressed to the discretion of the trial court and its action will rarely be reversed on appeal.[1] Counter affidavits may be received.[2] Popular prejudice, to justify a change of venue, must extend throughout the county to such an extent that an impartial jury cannot be secured from any part of the county.[3] The court may examine jurors to ascertain the state of feeling.[4] The denial of a change of venue, asked on the ground of local prejudice will not be disturbed where a jury is obtained without serious difficulty and before the accused exhausts his peremptory challenges and there is no evidence that the jury was improperly influenced.[5] An order denying a change cannot be reviewed on certiorari.[6]

[1] State v. Stokely, 16 Minn. 282 Gil. 249; State v. Gut, 13 Minn. 341 Gil. 315; State v. Miller, 15 Minn. 344 Gil. 277; State v. Heacock, 106 Iowa 191, 76 N. W. 654; State v. Williams (Iowa) 88 N. W. 194; Argabright v. State (Neb.) 87 N. W. 146.
[2] State v. Stokely, 16 Minn. 282 Gil. 249.
[3] State v. Moats, 108 Iowa 13, 78 N. W. 701; Power v. People, 17 Colo. 178.
[4] Territory v. Manton, 8 Mont. 95; State v. Gray, 19 Nev. 212.
[5] People v. Swartz, 118 Mich. 292, 76 N. W. 491.
[6] State v. Weston, 23 Minn. 366.

RIGHT OF TRIAL BY JURY

Constitutional provision.

§ 2290. "In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the county or district wherein the crime shall have been committed, which county or district shall have been previously ascertained by law."
[Const. Minn. Art. 1 § 6]

Digitized by Google

Statute.

§ 2291. "An issue of fact shall be tried by a jury of the county in which the indictment was found, unless the action is removed, by order of the court, as provided in the preceding chapter."

[G. S. 1894 § 7319]

Scope of constitutional right.

§ 2292. An accused person has a constitutional right to trial by jury in all prosecutions for the commission of offences against the state regardless of the grade of the offence, the extent of the punishment or the court in which the trial is had.[1] But the violation of a municipal ordinance, at least if the punishment is not excessive, may be punished summarily without trial by jury.[2] A member of the national guard may be punished by court martial without trial by jury, even in time of peace.[3] A convict conditionally pardoned may be re-committed without trial by jury unless an issue is raised as to his identity.[4]

[1] State v. Everett, 14 Minn. 439 Gil. 330; City of Mankato v. Arnold, 36 Minn. 62, 30 N. W. 305; State v. West, 42 Minn. 147, 43 N. W. 845.

[2] City of Mankato v. Arnold, 36 Minn. 62, 30 N. W. 305; State v. Harris, 50 Minn. 128, 52 N. W. 387, 531; State v. Robetshek, 60 Minn. 123, 61 N. W. 1023; State v. Grimes, 83 Minn. 460, 86 N. W. 449.

[3] State v. Wagener, 74 Minn. 518, 77 N. W. 424.

[4] State v. Wolfer, 53 Minn. 135, 54 N. W. 1065.

Waiver of right.

§ 2293. In a criminal prosecution for an offence cognizable by a justice of the peace the accused may waive a jury and consent to trial by the court.[1] A jury under the constitution means a jury of twelve men;[2] but an accused person may, when permitted by the court, the state not objecting, consent to a trial by eleven jurors.[3] A waiver once made cannot be recalled at will.[4]

[1] State v. Woodling, 53 Minn. 142, 54 N. W. 1068; State v. Bannock, 53 Minn. 419, 55 N. W. 558; State v. Green, 32 Minn. 433, 21 N. W. 547 (findings by the court).

[2] State v. Everett, 14 Minn. 439 Gil. 330.

[3] State v. Sackett, 39 Minn. 69, 38 N. W. 773.

[4] State v. Bannock, 53 Minn. 419, 55 N. W. 558.

Jury of the county.

§ 2294. A jury impaneled under a statute providing for the selection of jurors exclusively from the qualified electors of a city is a "jury of the county."

State v. Kemp, 34 Minn. 61, 24 N. W. 349.

Digitized by Google

OBJECTIONS TO INDICTMENT ON TRIAL

General statement.

§ 2295. The only objections to the indictment, appearing on its face, that can be raised of right on the trial are (1) that the court has not jurisdiction over the subject of the indictment and (2) that the facts stated do not constitute a public offence.[1] The following objections to the indictment cannot be raised by the accused as of right on the trial; that it is not found, indorsed and presented as provided by statute; that the names of the witnesses examined before the grand jury are not inserted at the foot of the indictment or indorsed thereon;[2] that a person was unlawfully present during the session of the grand jury while the indictment was being considered;[2] that the grand jury had not jurisdiction of the offence, if the want of jurisdiction appears on the face of the indictment;[3] that the form of the indictment does not conform to the statutory requirements;[3] that it was not found within the time prescribed by the statute of limitations, unless such defect is not apparent on the face of the indictment;[3] that more than one offence is charged in the indictment contrary to the statute;[4] that the indictment contains any matter which, if true, would constitute a legal justification or excuse of the offence charged or other legal bar to the prosecution;[3] that the indictment is not signed by the foreman of the grand jury;[5] that the grand jury list in the clerk's office is not signed and certified by the chairman of the board of county commissioners;[6] that a portion of the grand jury were improperly called by special venire;[7] that an indictment for adultery does not state that the prosecution was commenced on the complaint of the wife or husband;[8] that a defective copy of the indictment was served upon the accused at the time of his arraignment;[9] that the court has not jurisdiction of his person.[10]

[1] G. S. 1894 §§ 7301, 7284.
[2] G. S. 1894 §§ 7283, 7284.
[3] G. S. 1894 §§ 7293, 7301.
[4] Id.; State v. Henn, 39 Minn. 465, 40 N. W. 564; State v. Briggs, 84 Minn. 357, 87 N. W. 935.
[5] State v. Shippey, 10 Minn. 223 Gil. 178.
[6] State v. Schumm, 47 Minn. 373, 50 N. W. 362; State v. Dick, 47 Minn. 375, 50 N. W. 362.
[7] Id.
[8] State v. Brecht, 41 Minn. 50, 42 N. W. 602.
[9] State v. Comings, 54 Minn. 359, 56 N. W. 50.
[10] State v. Fitzgerald, 51 Minn. 534, 53 N. W. 799.

Digitized by Google

BURDEN OF PROOF

General statement.

§ 2296. If the commission of a crime is directly in issue in any criminal proceeding it must be proved beyond a reasonable doubt and the burden of proving that any person has been guilty of a crime is on the person who asserts it.[1] In other words "the burden of proof is upon the prosecutor. All the presumptions of law independent of evidence are in favor of innocence and every person is presumed to be innocent until he is proved guilty. If upon such proof there is a reasonable doubt remaining the accused is entitled to the benefit of it by an acquittal."[2] The doubt entitling to acquittal must result from a consideration of all the evidence; each evidentiary fact need not be proved beyond a reasonable doubt.[3] But the state has the burden of proving beyond a reasonable doubt every essential ingredient of the crime charged.[4] The foregoing rules apply to prosecutions for all grades of crime,[5] to actions for the recovery of a penalty or forfeiture,[6] and to proceedings for criminal contempt.[7] According to the better view the burden of proving guilt rests upon the state throughout the trial and never shifts and to secure an acquittal the accused need go no further than raise a reasonable doubt upon an essential point.[8] In this state, however, matters of defence like insanity,[9] license [10] and irresponsible drunkenness [11] must be proved by the accused by a fair preponderance of evidence.

[1] Stephen, Ev. Art. 94.
[2] Shaw, C. J. 5 Cush. 320; 10 Am. Law Rev. 642; 17 Am. Law Rev. 894; Thayer, Ev. 551.
[3] State v. Johnson, 37 Minn. 493, 35 N. W. 493.
[4] State v. Dineen, 10 Minn. 407, Gil. 325; State v. Lautenschlager, 22 Minn. 514.
[5] State v. Dineen, 10 Minn. 407 Gil. 325.
[6] U. S. v. Shapleigh, 54 Fed. 126.
[7] State v. District Court, 65 Minn. 146, 67 N. W. 796.
[8] Lewis v. U. S. 160 U. S. 469.
[9] See § 2303.
[10] See § 2302.
[11] See § 2303.

Statutes.

§ 2297. "A defendant in a criminal action is presumed to be innocent until the contrary is proved; and in case of a reasonable doubt whether his guilt is satisfactorily shown, he is entitled to an acquittal."[1] * * * "When it appears that a defendant has committed a public offence, and there is reasonable ground of doubt of which of two or more degrees he is guilty, he can be convicted of the lowest of these degrees only."[2] * * * "A person is presumed to be responsible for his acts. The burden of proving that he is irresponsible is upon the accused person, except as otherwise prescribed in this code."[3]

Digitized by Google

[1] G. S. 1894 § 6273. See § 2296.
[2] G. S. 1894 § 6274; State v. Laliyer, 4 Minn. 368 Gil. 277.
[3] G. S. 1894 § 6299. See § 2303.

Presumption of innocence is not evidence.

§ 2298. The rule that every person is presumed innocent until he is proved guilty is simply a form of stating one part of the rule as to the burden of proof in criminal cases. It is sometimes incorrectly stated to be an item of evidence to be weighed by the jury in favor of the defendant.

Thayer, Ev. 551; Coffin v. U. S. 156 U. S. 432.

Effect of statutory presumptions.

§ 2299. When statutes make certain facts prima facie evidence of guilt the jury may disregard the presumption for they must in all cases be convinced beyond a reasonable doubt.

People v. Cannon, 139 N. Y. 32; Com. v. Williams, 6 Gray (Mass.) 1.

Bastardy proceedings.

§ 2300. Bastardy proceedings under the statute are not criminal in their nature and a preponderance of the evidence is all that is required.

State v. Nichols, 29 Minn. 357, 13 N. W. 153.

Burden as to chastity.

§ 2301. Although women are ordinarily presumed chaste this presumption does not relieve the state from the burden of proving the previous chaste character of the prosecutrix in a prosecution for seduction under a promise of marriage.

State v. Timmens, 4 Minn. 325 Gil. 241; State v. Brinkhaus, 34 Minn. 285, 25 N. W. 642; State v. Wenz, 41 Minn. 196, 42 N. W. 933; State v. Lockerby, 50 Minn. 363, 52 N. W. 958.

Burden as to liquor license.

§ 2302. In prosecutions for selling liquor without a license the burden of proving a license is on the accused.

State v. Schmail, 25 Minn. 370; State v. Bach, 36 Minn. 234, 30 N. W. 764; State v. Ahern, 54 Minn. 195, 55 N. W. 959.

Insanity and drunkenness.

§ 2303. Our code provides that, "a person is presumed to be responsible for his acts. The burden of proving that he is irresponsible is upon the accused person, except as otherwise prescribed in this code." This constitutes an exception to the general rules stated in § 2296. Insanity is held to be a matter of defence which the accused must prove by a fair preponderance of evidence; it is not enough to raise a reasonable doubt of his sanity.[1] The rule is otherwise in the federal courts.[2] So irresponsible drunkenness as a defence must be proved by the accused by a fair preponderance of the evidence.[3]

[1] Bonfanti v. State, 2 Minn. 123 Gil. 99; State v. Brown, 12 Minn.

Digitized by Google

538 Gil. 448; State v. Gut, 13 Minn. 341 Gil. 315; State v. Hanley, 34 Minn. 430, 26 N. W. 397.

[2] Lewis v. U. S. 160 U. S. 469.

[3] State v. Grear, 29 Minn. 221, 13 N. W. 140.

Justification for libel.

§ 2304. In a criminal prosecution for libel, upon proof of the publication of the libel, the burden is on the defendant to show that it was published upon grounds of belief in its truth and for good motives to justify the same.

State v. Shippman, 83 Minn. 441, 86 N. W. 431.

Burden of proving intent.

§ 2305. Except in certain crimes of omission criminal intent is an essential element of all crimes [1] and the burden of proving it rests upon the state. Criminal intent means either (1) doing an unlawful act intentionally or (2) doing an indifferent act with a specific unlawful intent.[2] When an act is in itself unlawful the criminal intent is presumed from the doing of the act [3] and this presumption makes out a prima facie case for the state. If there is evidence in the case, introduced either by the prosecution or the accused tending to rebut this presumption the question of intent is one of fact for the jury to determine upon all the evidence and the burden, except as stated in § 2303, is upon the prosecution to prove intent beyond a reasonable doubt.[4] Frequently the unlawful act is the natural consequence of an antecedent act. In such cases the presumption of intent is rebuttable only as regards the antecedent act. If an act is done of which the natural and probable consequence under the circumstances is the accomplishment of a substantive crime it is no defence that the accused did not foresee and intend such consequence. This substantive rule of law is commonly disguised in the form of a conclusive presumption, namely, that every man is conclusively presumed to intend the natural consequences of his voluntary acts.[5] This irrebutable presumption of law is to be distinguished from the rebuttable presumption (properly of fact but frequently treated as of law) that men intend the natural consequences of their voluntary acts. When an act, in itself indifferent, becomes criminal only when done with a specific unlawful intent there is no presumption of law that the act was done with such intent. The criminal intent in such cases is a fact to be proved by the prosecution beyond a reasonable doubt without the aid of presumptions, except as stated in § 2303.[6]

[1] State v. Welch, 21 Minn. 26.

[2] 2 Stephen, History Crim. Law 112; Holmes, Common Law, ch. 2; State v. King, 86 N. C. 606 (when an act forbidden by law is intentionally done the intent to do the act is the criminal intent which imparts to it the character of an offence).

[3] State v. Lautenschlager, 22 Minn. 524; State v. Brown, 41 Minn. 319, 43 N. W. 69; State v. Welch, 21 Minn. 22; State v. Brown, 12 Minn. 538 Gil. 448; State v. Kortgaard, 62 Minn. 7, 64 N. W. 51; State v. McGregory, 92 N. W. 458.

Digitized by Google

[4] State v. Lautenschlager, 22 Minn. 524; State v. Brown, 41 Minn. 319, 43 N. W. 69; 17 Am. Law Rev. 894.
[5] Holmes, Common Law, ch. 2.
[6] State v. Kortgaard, 62 Minn. 7, 64 N. W. 51; State v. Borgstrom, 69 Minn. 508, 72 N. W. 799, 975; State v. Garvey, 11 Minn. 154 Gil. 95; State v. Dineen, 10 Minn. 407 Gil. 325; Bonfanti v. State, 2 Minn. 124 Gil. 99; State v. Welch, 21 Minn. 26.

Burden of proving premeditation.

§ 2306. Premeditation is an essential element of the crime of murder in the first degree and must be proved by the state beyond a reasonable doubt and this burden is not relieved by any presumptions. There are some expressions in one or two of our early cases on this point that are erroneous and misleading. Thus it has been said that where the mere act of killing a human being is proved and nothing more the presumption is that it was intentional and malicious "and an act of murder." [1] As the mere act of killing "and nothing more" is rarely, if ever, proved, this old presumption of the common law, which was nothing but a rule of construction in the case of special verdicts, is utterly meaningless at the present time.[2] It has no existence where, as in this state, murder has been divided into degrees.[3] In one of our cases an instruction that "the law presumes a premeditated design from the naked fact of killing" was held not prejudicial because the evidence clearly showed premeditation.[4] Of course there is no such presumption of law. The question of premeditation is one of fact for the jury to determine upon all the evidence uncontrolled by any presumptions of law.[5]

[1] State v. Shippey, 10 Minn. 223 Gil. 178; State v. Brown, 12 Minn. 538 Gil. 448; State v. Brown, 41 Minn. 319, 43 N. W. 69.
[2] Wharton, Crim. Ev. § 734; Best, Ev. (Cham. Ed.) § 296 note; 2 Bishop, Crim. Pro. § 603.
[3] Stokes v. People, 53 N. Y. 164; People v. Downs, 123 N. Y. 564; People v. Fish, 125 N. Y. 136.
[4] State v. Lautenschlager, 22 Minn. 514.
[5] People v. Conroy, 153 N. Y. 174; Lovett v. State, 30 Fla. 142; State v. Brown, 41 Minn. 319, 43 N. W. 69.

Definition of reasonable doubt.

§ 2307. Though it is quite customary for judges to attempt an explanation of the phrase "reasonable doubt" it is better not to do so unless requested by the jury.[1] As our court has said "it is difficult to make the meaning of this expression more clear by any circumlocution." [2] It is well settled that it is sufficient to instruct the jury simply that they must be satisfied of the defendant's guilt beyond a reasonable doubt without any explanation of the phrase.[3] If the court desires to explain the meaning of the phrase or the jury request an explanation the following approved statement should be given: "Proof beyond a reasonable doubt is such as would impress the judgment of ordinarily prudent men with a conviction upon which they would act without hesitation in their own most important

Digitized by Google

affairs and concerns of life."[4] The court is not required to explain to the jury the reason for the rule.[5]

[1] 1 Bishop, Crim. Pro. § 1094; 2 Thompson, Trials, § 2463; State v. Sauer, 38 Minn. 438, 38 N. W. 355.

[2] State v. Staley, 14 Minn. 105 Gil. 75. To same effect, State v. Sauer, 38 Minn. 438, 38 N. W. 355.

[3] Com. v. Costley, 118 Mass. 25.

[4] State v. Pearce, 56 Minn. 226, 55 N. W. 652, 57 N. W. 1065. In the following cases instructions upon this point were considered: State v. Dineen, 10 Minn. 407 Gil. 325; State v. Hogard, 12 Minn. 293 Gil. 191; State v. Staley, 14 Minn. 105 Gil. 75; State v. Shettleworth, 18 Minn. 208 Gil. 191; State v. Johnson, 37 Minn. 493, 35 N. W. 373; State v. Sauer, 38 Minn. 438, 38 N. W. 355; State v. Rue, 72 Minn. 296, 75 N. W. 235.

[5] State v. Johnson, 37 Minn. 493, 35 N. W. 373.

Necessity of calling certain witnesses.

§ 2308. The state is not required to call and examine as its witnesses all persons whose names are indorsed on the indictment. It may call or refuse to call any competent witness. As a prosecuting officer represents the public interest and should try a case rather as a minister of justice than as a partisan, there may be circumstances where it would be wrong for him to decline to call a witness to the defendant, and doubtless, in such a case, the court, on its own motion, might require the witness to be called and examined.

State v. Smith, 78 Minn. 362, 81 N. W. 17.

Testimony of accomplice.

§ 2309. "A conviction cannot be had upon the testimony of an accomplice, unless he is corroborated by such other evidence as tends to convict the defendant of the commission of the offence, and the corroboration is not sufficient if it merely shows the commission of the offence or the circumstances thereof."

[G. S. 1894 § 5767]

§ 2310. While the corroborating evidence must be such as tends to show some connection of the defendant with the acts constituting the crime charged yet it is not necessary that there should be corroboration as to every probative fact. A reasonable construction of this section does not require a case to be made out against the prisoner sufficient for his conviction before the testimony of an accomplice can be considered. The corroborating evidence must, independently of the testimony of the accomplice, tend in some degree to establish the guilt of the accused, but need not be sufficiently weighty or full, as, standing alone, to justify a conviction.[1] Evidence in corroboration must relate to a material fact relevant to the issue [2] and tend to connect the accused with the commission of the acts constituting the offence.[3] It need not be direct and positive, but may be circumstantial.[4] The wife of the accomplice may corroborate him.[5] Whether a witness is an accomplice is for the jury;[6] but it is for the court to determine whether evidence has any tend-

Digitized by Google

ency to corroborate or connect the defendant with the commission of the crime.[7] If it has a reasonable tendency in that direction its weight is for the jury.[8] The test as to whether a witness is an accomplice is, could he himself have been indicted for the offence, either as principal or as accessory?[9] The following persons have been held not to be accomplices: a person purchasing beer on Sunday;[10] a person paying money for the suppression of evidence of a crime;[11] a woman submitting to an abortion;[12] a person giving or offering a bribe.[13] Corroboration is not necessary in a prosecution for rape[14] or under the bastardy act.[15] If, in the prosecution of a party for subornation of perjury, it is sought to establish the fact that perjury was committed by the person suborned, his testimony must be corroborated as to such fact. But the alleged fact that he was induced to commit the crime by the accused may be established by his uncorroborated testimony if it satisfies the jury beyond a reasonable doubt.[16]

[1] State v. Lawlor, 28 Minn. 216, 9 N. W. 698; State v. Clements, 82 Minn. 434, 85 N. W. 234; State v. Brin, 30 Minn. 522, 16 N. W. 406; State v. Adamson, 73 Minn. 282, 76 N. W. 34.

[2] Com. v. Scott, 123 Mass. 238; Com. v. Chase, 147 Mass. 599.

[3] Com. v. Holmes, 127 Mass. 424; State v. Coudotte, 7 N. D. 109, 72 N. W. 913; State v. Levers, 12 S. D. 265, 81 N. W. 294.

[4] Com. v. Drake, 124 Mass. 21; Com. v. Holmes, 127 Mass. 424. See State v. Brin, 30 Minn. 522, 16 N. W. 406; State v. Brinkhaus, 34 Minn. 285, 25 N. W. 285.

[5] Haskins v. People, 16 N. Y. 344.

[6] State v. Lawlor, 28 Minn. 216, 9 N. W. 698.

[7] State v. Levers, 12 S. D. 265, 81 N. W. 294.

[8] State v. Clements, 82 Minn. 434, 85 N. W. 234.

[9] State v. Durnam, 73 Minn. 150, 75 N. W. 1127.

[10] State v. Baden, 37 Minn. 212, 34 N. W. 24.

[11] State v. Quinlan, 40 Minn. 55, 41 N. W. 299.

[12] State v. Owens, 22 Minn. 238: State v. Pearce, 56 Minn. 226, 55 N. W. 652, 57 N. W. 1065.

[13] State v. Sargent, 71 Minn. 28, 73 N. W. 626; State v. Durnam, 73 Minn. 150, 75 N. W. 1127.

[14] State v. Connelly, 57 Minn. 482, 59 N. W. 479.

[15] State v. Nichols, 29 Minn. 357, 13 N. W. 153.

[16] State v. Renswick, 85 Minn. 19, 88 N. W. 22.

Abduction—statute.

§ 2311. "No conviction can be had for abduction or compulsory marriage upon the testimony of the female abducted or compelled unsupported by other evidence."

[G. S. 1894 § 6530]

§ 2312. The corroborating evidence must extend to every essential ingredient of the offence, but it need not be sufficient in itself to establish the guilt of the defendant.

State v. Keith, 47 Minn. 559, 50 N. W. 691.

Digitized by Google

Seduction under promise of marriage.

§ 2313. No conviction can be had for the seduction of a female of previous chaste character under a promise of marriage upon the testimony of the female seduced unsupported by other evidence.[1] The corroboration must extend to all the essential elements of the crime, to-wit, the promise to marry, the seduction under such promise and the previous chaste character of the woman.[2] The statute does not require direct or positive corroborative evidence, much less evidence sufficient to convict independently of that of the prosecutrix, but simply such facts or circumstances as fairly tend to support her evidence, and shall satisfy the jury that she is worthy of credit. And when there is some such evidence its sufficiency is for the jury.[3] Conversations of the prosecutrix with her parents concerning her marriage and her preparations for the same are competent evidence to corroborate her testimony as to the promise.[4] Mere social attentions are insufficient for that purpose.[5] Previous chaste character must be proved and the testimony of the prosecutrix corroborated. The usual presumption of chastity does not relieve the state of this burden.[6] Reputation for chastity is competent in corroboration and this may be of a negative character.[7]

[1] G. S. 1894 § 6533.
[2] State v. Timmens, 4 Minn. 325 Gil. 241.
[3] State v. Brinkhaus, 34 Minn. 285, 25 N. W. 285.
[4] State v. Timmens, 4 Minn. 325 Gil. 241.
[5] Rice v. Com. 102 Pa. St. 408.
[6] State v. Wenz, 41 Minn. 196, 42 N. W. 933; State v. Lockerby, 50 Minn. 363, 52 N. W. 958.
[7] State v. Lockerby, 50 Minn. 363, 52 N. W. 958; State v. Brinkhaus, 34 Minn. 285, 25 N. W. 285.

Perjury.

§ 2314. If upon a trial for perjury the only evidence against the defendant is the oath of one of the witnesses contradicting the oath on which the perjury is assigned, and if no circumstances are proved which corroborate such witness, the defendant is entitled to be acquitted.[1] It is not necessary that there should be any witnesses if the admissions of the defendant are of such a nature as to prove beyond a reasonable doubt the falsity of the oath.[2] Nor is it necessary to have a second and corroborating witness if collateral contradictory declarations on oath are proved.[3] But the general rule is that there must be two witnesses for the state. In addition to one directly opposing witness there must be established by independent evidence strong corroborating circumstances of such a character as clearly to turn the scale and overcome the oath of the defendant and the legal presumption of innocence.[4] Any circumstantial evidence is competent for corroborating purposes.[5] The necessity for corroboration is confined to the question of falsity; one witness is sufficient to prove the oath.[6]

[1] Stephen, Ev. Art. 122.
[2] U. S. v. Wood, 14 Pet. (U. S.) 430.
[3] State v. Molier, 1 Dev. (N. C.) 263.

Digitized by Google

[4] Com. v. Parker, 2 Cush. (Mass.) 212; Com. v. Butland, 119 Mass 324.
[5] State v. Raymond, 20 Iowa 582.
[6] Com. v. Pollard, 12 Met. (Mass.) 225. See State v. Madigan, 57 Minn. 425, 59 N. W. 490.

ISSUES AND MODE OF TRIAL

When issue of fact arises—statute.

§ 2315. "An issue of fact arises:
(1) Upon a plea of not guilty.
(2) Upon a plea of a former conviction or acquittal of the same offence."
[G. S. 1894 § 7318]

Presence of accused.

§ 2316. "If the indictment is for a misdemeanor, the trial may be had in the absence of the defendant, if he appears by counsel; but if for a felony, he shall be personally present." [1] * * * "In all criminal prosecutions, the accused shall enjoy the right * * * to be confronted with the witnesses against him." [2]
[1] G. S. 1894 § 7320.
[2] Const. Minn. Art. 1 § 6.

§ 2317. Our statute is merely an affirmation of the common law rule.[1] In a prosecution for a felony a jury cannot properly be discharged for inability to agree in the absence of the accused.[2] In a prosecution for a felony the accused must be present during the impaneling of the jury.[3] After the jury retire further instructions cannot be given in the absence of the accused even though his counsel is present and fails to object and the appellate court will not consider the correctness of such instructions.[4] The accused must be present when the verdict is returned.[5] He need not be present on a motion to quash the indictment; [6] on the hearing of a demurrer; [7] on the hearing of a plea in abatement; [8] on a motion for a continuance, [9] or change of venue; [10] on a motion for a new trial; [11] at the entry of judgment; [12] or on appeal.[13] In this state a view is not granted for the purpose of obtaining evidence and it is probably unnecessary for the accused to be present.[14] But in the absence of any decision on the point the court, as a matter of prudence, should offer to allow the accused to be present at the view and have any waiver of the privilege appear affirmatively of record. According to the better view an accused person may waive the right to be personally present at the trial by escaping or by deliberately and wilfully absenting himself [15] or by unruly conduct.[16] A casual, temporary and voluntary absence from the trial is not fatal.[17] Objection that the accused was not personally present cannot be raised by habeas corpus.[18] The presumption of regularity in judicial proceedings applies to criminal prosecutions [19] and the mere fact that the record does not show that the accused was present is not fatal to a

Digitized by Google

verdict or judgment. The absence of the accused must be made to appear affirmatively.[20] The rule is otherwise in the federal courts.[21]

[1] State v. Reckards, 21 Minn. 47; Hopt v. Utah, 110 U. S. 574.
[2] State v. Sommers, 60 Minn. 90, 61 N. W. 907; State v. Sheriff of Hennepin Co. 24 Minn. 87.
[3] Hopt v. Utah, 110 U. S. 574; Lewis v. U. S. 146 U. S. 370.
[4] Maurer v. People, 43 N. Y. 1.
[5] State v. Muir, 32 Kans. 481.
[6] Epps v. State, 102 Ind. 539.
[7] Miller v. State, 29 Neb. 437.
[8] Id.
[9] Id.
[10] State v. Elkins, 63 Mo. 159.
[11] Com. v. Costello, 121 Mass. 371.
[12] G. S. 1894 § 7398.
[13] Donnelly v. State, 26 N. J. L. 463.
[14] Shular v. State, 105 Ind. 298.
[15] Sahlinger v. People, 102 Ill. 241; Fight v. State, 7 Ohio 180; Price v. State, 36 Miss. 531. See State v. Sommers, 60 Minn. 90, 61 N. W. 907.
[16] U. S. v. Davis, 6 Blatch. 464.
[17] People v. Bragle, 88 N. Y. 585.
[18] State v. Sheriff of Hennepin Co. 24 Minn. 87.
[19] See § 2360 (7).
[20] State v. Brown, 41 Minn. 319, 43 N. W. 69. See the very sensible dissenting opinions in Lewis v. U. S. 146 U. S. 370 and Crain v. U. S. 162 U. S. 646.
[21] Lewis v. U. S. 146 U. S. 370; Crain v. U. S. 162 U. S. 646.

Presence of family and friends.

§ 2318. An accused person is entitled to have his family, relatives and friends present at the trial. But this is a mere incident of the right to a public trial and may be regulated by the court within reasonable limits.

See State v. Reid, 39 Minn. 277, 39 N. W. 796.

Continuance—statute.

§ 2319. "When an indictment is called for trial, or at any time previous thereto, the court may, upon sufficient cause shown by either party, direct the trial to be postponed to another day in the same term, or to another term; the affidavits read upon the application shall at the same time be filed with the clerk."

[G. S. 1894 § 7321] See State v. McCartey, 17 Minn. 76 Gil. 54; State v. Nerbovig, 33 Minn. 480, 24 N. W. 321.

Defendant committed though bail given—statute.

§ 2320. "When a defendant, who has given bail, appears for trial, the court may, in its discretion, at any time after his appearance for trial, order him to be committed to the custody of the proper officer of the county, to abide the judgment or further order of the court."

[G. S. 1894 § 7322]

Digitized by Google

Separate trial of defendants jointly indicted—statute.

§ 2321. "When two or more defendants are jointly indicted for a felony, any defendant requiring it shall be tried separately; in other cases, defendants jointly indicted may be tried separately or jointly, in the discretion of the court."

[G. S. 1894 § 7323]

§ 2322. At common law the granting of a separate trial of persons jointly indicted is discretionary in all cases.[1] This rule is changed by the statute as respects felonies;[2] but even in such cases a party is not entitled to a separate trial as of right unless he makes a seasonable demand. Ordinarily a demand after the impaneling of the jury begins is too late.[3] A severance may be ordered on the application of the state.[4] The absence of a formal order of severance is not ordinarily fatal.[5] As respects misdemeanors the action of the trial court in granting or refusing a separate trial will rarely be reversed on appeal.[6] The mere fact that the parties have separate and antagonistic defences or that evidence admissible against one would be inadmissible and prejudicial as to the other is not a conclusive reason for granting a severance.[7]

[1] U. S. v. Marchant, 12 Wheat. (U. S.) 480; U. S. v. Ball, 163 U. S. 662.

[2] State v. Thaden, 43 Minn. 325, 45 N. W. 614.

[3] Hullinger v. State, 25 Ohio St. 441; State v. Mason, 19 Wash. 94; People v. Alviso, 55 Cal. 230.

[4] State v. Thaden, 43 Minn. 325, 45 N. W. 614.

[5] Id.

[6] State v. Davis, 13 Mont. 384; State v. Jamison, 110 Iowa 377, 81 N. W. 594.

[7] Emery v. State, 101 Wis. 627, 78 N. W. 145; Com. v. Bingham, 158 Mass. 169; Com. v. Seeley, 167 Mass. 163.

Discharge of defendant to become a witness.

§ 2323. The statutes authorizing the discharge of one of several defendants in order that he may become a witness for the state or for his codefendants have been repealed by subsequent inconsistent legislation.

State v. Thaden, 43 Minn. 325, 45 N. W. 614.

Minors excluded.

§ 2324. All persons under the age of seventeen years, not being parties, or witnesses, or directly interested, are forbidden to be present at any criminal trial.

[G. S. 1894 §§ 7326–7228]

Juror as a witness—statute.

§ 2325. "If a juror has any personal knowledge respecting a fact in controversy in a cause, he shall declare it in open court, during the trial; if, during the retirement of a jury, a juror declares a fact which could be evidence in the cause, as of his own knowledge, the jury must return into court; in either of these cases, the juror making the

Digitized by Google

statement shall be sworn as a witness and examined in the presence of the parties."

[G. S. 1894 § 7329]

Granting a view—statute.

§ 2326. "The court may order a view by any jury impaneled to try a criminal case."

[G. S. 1894 § 7330]

§ 2327. Under this provision the matter of granting a view is in the discretion of the trial court. If the accused wishes the jury instructed as to the purposes of a view and their conduct thereon he should make a timely request therefor.

Chute v. State, 19 Minn. 271 Gil. 230.

Province of court and jury—statute.

§ 2328. "On the trial of an indictment for any offence, questions of law are to be decided by the court, except in cases of libel, saving the right of the defendant to except. Questions of fact, by the jury; and although the jury have the power to find a general verdict which includes questions of law as well as of fact, they are bound, nevertheless, to receive as law what is laid down as such by the court."

[G. S. 1894 § 7331]

§ 2329. Note the distinction between the "power" and the "right" of the jury to disregard the law as laid down by the court. In all criminal actions the jury has the power to disregard the instructions of the court for the reason that an acquittal ends the prosecution; the court having no authority to grant a new trial to the state however much the verdict may be contrary to the evidence or the law.[1] The statute was intended to put at rest a long controversy as to the right of the jury to judge the law as well as the facts.[2] All questions of issuable fact are for the jury as, for example, whether the circumstances warranted the use of force in self-defence and the degree of force necessary;[3] whether an accused person charged with the murder of an officer knew that the deceased was an officer and as such was attempting the arrest of the accused;[4] whether a peace officer had reasonable cause to believe that a felony had been committed and the person arrested guilty of the offence;[5] whether a witness is an accomplice in the commission of a crime for which the accused is on trial;[6] whether the accused is insane;[7] whether a crime was committed with premeditation;[8] whether there was cooling time;[9] whether there was provocation.[10] Intent appears in the criminal law in the twofold aspect of (1) doing an act with specific unlawful intent and (2) intent to do the act constituting the offence.[11] When an act becomes criminal only in case it was done with a certain intention the existence of such intention is always for the jury, as, for example, embezzlement of public funds;[12] assault with intent to do great bodily harm;[13] mayhem;[14] assault with intent to murder.[15] Intent in the sense of doing the act constituting the crime purposely and not accidentally or involuntarily is a question for the jury. But in the absence of evidence tending to prove that the act was done

Digitized by Google

accidentally or involuntarily the court may instruct the jury that it is their duty to draw the inference of intent in accordance with the presumption that men intend their voluntary acts.[16] In prosecutions for libel the jury are judges both of the law and the facts.[17]

[1] Thayer, Ev. 253 et seq.
[2] Id.
[3] Gallagher v. State, 3 Minn. 270 Gil. 185. See State v. Rheams, 34 Minn. 18, 24 N. W. 302; State v. O'Neil, 58 Minn. 478, 59 N. W. 1101.
[4] State v. Spaulding, 34 Minn. 361, 25 N. W. 793.
[5] Cochran v. Toher, 14 Minn. 385 Gil. 293.
[6] State v. Lawlor, 28 Minn. 216, 9 N. W. 698.
[7] State v. Hawley, 34 Minn. 430, 26 N. W. 397.
[8] State v. Brown, 41 Minn. 319, 43 N. W. 69.
[9] State v. Hoyt, 13 Minn. 132 Gil. 125.
[10] State v. Hoyt, 13 Minn. 132 Gil. 125. See State v. Gut, 13 Minn. 341 Gil. 315; State v. Shippey, 10 Minn. 223 Gil. 178; State v. Hawley, 34 Minn. 430, 26 N. W. 397.
[11] See § 2205.
[12] State v. Borgstrom, 69 Minn. 508, 72 N. W. 799, 975; State v. Kortgaard, 62 Minn. 7, 64 N. W. 51; State v. Rue, 72 Minn. 296, 75 N. W. 235.
[13] State v. Dineen, 10 Minn. 407 Gil. 325; State v. Garvey, 11 Minn. 154 Gil. 95.
[14] State v. Hair, 37 Minn. 351, 34 N. W. 893.
[15] Bonfanti v. State, 2 Minn. 124 Gil. 99.
[16] State v. Welch, 21 Minn. 22; State v. Lautenschlager, 22 Minn. 514; State v. Brown, 41 Minn. 319, 43 N. W. 69; State v. Lenz, 45 Minn. 177, 47 N. W. 720.
[17] State v. Ford, 82 Minn. 452, 85 N. W. 217; State v. Shippman, 83 Minn. 441, 86 N. W. 431.

Order of argument—statute.

§ 2330. "When the evidence is concluded upon the trial of any indictment in the district courts or courts of common pleas in this state, unless the cause is submitted on either or both sides without argument, the plaintiff shall commence, and the defendant shall conclude, the argument to the jury."

[G. S. 1894 § 7332] See State v. Beebe, 17 Minn. 241 Gil. 218 (decided prior to statute); State v. Wagner, 23 Minn. 544 (applicable only to trial of indictments—inapplicable to trials in municipal and justice courts).

Charging the jury—statute.

§ 2331. "In charging the jury, the court shall state to them all matters of law which it thinks necessary for their information in giving their verdict; and, if it presents the facts of the case, shall, in addition to what it may deem its duty to say, inform the jury that they are the exclusive judges of all questions of fact."

[G. S. 1894 § 7333]

Digitized by Google

§ 2332. The general rules as to instructions are given elsewhere.[1] The accused must be present when instructions are given.[2] The court cannot refer in any way to the fact that the accused does not take the stand.[3] If the accused takes the stand the court should not single him out and charge specifically as to the credit to be given his testimony.[4] If evidence of the good character of the accused is introduced the court should leave the jury perfectly free to give it what effect they please. It is improper to charge that such evidence is only to be considered when the other evidence leaves a reasonable doubt of the guilt of the accused in the minds of the jury; that it can be resorted to solve such a doubt but not to create it. The accused is entitled to the full effect of such evidence without regard to whether the other evidence is strong or weak, direct or circumstantial.[5] When evidence is admissible only as to some collateral question the court should charge the jury not to consider it as applicable to the main issue.[6] Unless requested by the jury the court should not attempt any definition of reasonable doubt.[7] It is customary and proper to charge generally as to the burden of proof.[8] It is not necessary for the court to instruct the jury as to the reasons for the rule requiring proof beyond a reasonable doubt.[9] In a proper case the court should charge with reference to a conviction on the testimony of accomplices.[10] The omission of the court to charge upon a particular point is not error unless a timely request was made.[11]

[1] See §§ 1113 et seq.; 2343. [2] See § 2317. [3] See § 696.
[4] § 895.
[5] State v. Holmes, 65 Minn. 230, 68 N. W. 11; State v. Sauer, 38 Minn. 438, 38 N. W. 355; State v. Dumphey, 4 Minn. 438 Gil. 340; State v. Hogard, 12 Minn. 293 Gil. 191; State v. Beebe, 17 Minn. 241 Gil. 218.
[6] See § 896. [7] See § 2307. [8] See §§ 2296 et seq.
[9] State v. Johnson, 37 Minn. 493, 35 N. W. 373.
[10] State v. Lawlor, 28 Minn. 216, 9 N. W. 698.
[11] Id. See § 1120.

§ 2333. Under the statutes of this state, it is not improper for the court, in its charge, to review and analyze the evidence. It is not error for the court to state to the jury that certain evidence is material, or that it tends to prove certain facts, or to comment upon the testimony, when it is done fairly and the jury are fully advised of their duty and responsibility in the premises. An intelligent analysis and review of the testimony, as circumstances may require, by the presiding judge, is eminently proper to aid the jury in their investigation of the truth, provided their independence and responsibility, subject to the law given them, are in no way interfered with.[1] But it is error for the court in its charge to indicate to the jury its opinion of the facts unless it informs them that they are the exclusive judges of all questions of fact.[2]

[1] State v. Rose, 47 Minn. 47, 49 N. W. 404; State v. Taunt, 16 Minn. 109 Gil. 99.
[2] State v. Kobe, 26 Minn. 150, 1 N. W. 1054.

Digitized by Google

What papers may be taken to jury-room—statute.

§ 2334. "Upon retiring for deliberation, the jury may take with them all papers which have been received as evidence in the cause, or copies of such parts of public records or private documents, given in evidence, as ought not, in the opinion of the court, to be taken from the person having them in possession; they may also take with them notes of the testimony or other proceedings on the trial, taken by themselves, or any of them, but none taken by any other person."

[G. S. 1894 § 7335]

§ 2335. The statute says "may" take. This does not mean that the jury have the absolute right to take. Allowing the jury to take papers to the jury-room is a matter of discretion with the court [1] and this discretion ought to be freely exercised in excluding papers which might mislead or incline the jury to place too much importance on particular evidence. Depositions should not go to the jury. Diagrams, charts and the like are not evidence within the statute.[2]

[1] People v. Cochran, 61 Cal. 548 (similar statute).

[2] Id.

Custody of jury while deliberating—statute.

§ 2336. "After hearing the charge the jury may either decide in court, or may retire for deliberation; if they do not agree without retiring, one or more officers shall be sworn to take charge of them; they shall be kept together in some private and convenient place, without food or drink, except bread and water, unless otherwise ordered by the court, and no person shall be permitted to speak to or communicate with them, unless it is by order of the court, nor listen to their deliberations; and they shall be returned into court when they have so agreed, or when ordered by the court."

[G. S. 1894 § 7334] See § 1004.

Jury may return into court for information—statute.

§ 2337. "After the jury have retired for deliberation, if there is a disagreement between them as to any part of the testimony, or if they desire to be informed of a point of law arising in the cause, they shall require the officer to conduct them into court. Upon their being brought into court, the information required shall be given in the presence of, or after notice to, the prosecuting officer, and the defendant or his counsel."

[G. S. 1894 § 7336]

§ 2338. It is probably not enough to give notice to the defendant or his counsel as provided by this section. They must be present in court. The statute cannot impair the constitutional right to be present at every stage of the trial.

See § 2316.

Discharge of jury without verdict—second trial—statute.

§ 2339. "If, after the retirement of the jury one of them becomes so sick as to prevent the continuance of his duty, or if they are unable to agree upon a verdict, or any other accident or cause occurs to

Digitized by Google

prevent their being kept together for deliberation, the jury may be discharged by the court. In all cases where a jury are discharged or prevented from giving a verdict, by reason of accident, disagreement, or other cause, except when the defendant is discharged from the indictment during the progress of the trial, or after the cause is submitted to them, the cause may be again tried at the same or another term."

[G. S. 1894 §§ 7337, 7338] See § 2284.

Verdict—sufficiency generally.

§ 2340. In an early case it was said that a verdict "should be certain, positive, and free from all ambiguity; any obscurity which renders it at all doubtful will be fatal to it."[1] But this is not in harmony with modern doctrine. There is no set form of words in which a verdict is required to be rendered, and therefore the only rational general rule that can be adopted is, does it show clearly and without any doubt, the intention of the jury and their finding on the issues submitted to them? If it does it cannot be declared bad without sacrificing substance and justice to form.[2] A general verdict of "guilty" convicts a defendant of all that the indictment well alleges against him. Hence, where the charge is of larceny of several articles of values specified, such a verdict is a finding that the defendant stole every one of them and that their several values were as averred.[3] It is not necessary that a verdict should be entitled at all and any slight defect in entitling is immaterial.[4] Upon an indictment for a crime of which there are several degrees a general verdict of "guilty" is sufficient. It is necessary for the verdict to specify the degree only when the jury find a verdict for a lesser degree than the one charged.[5]

[1] State v. Coon, 18 Minn. 518 Gil. 464.

[2] State v. Ryan, 13 Minn. 370 Gil. 343 (verdict for murder); State v. New, 22 Minn. 76 (verdict for embezzlement); State v. Snure, 29 Minn. 132, 12 N. W. 347 (bastardy proceedings).

[3] State v. Colwell, 43 Minn. 378, 45 N. W. 847.

[4] State v. Framness, 43 Minn. 490, 45 N. W. 1098.

[5] Bilansky v. State, 3 Minn. 427 Gil. 314; State v. Eno, 8 Minn. 220 Gil. 190.

Sealed verdict.

§ 2341. The court is not authorized to direct the jury to return a sealed verdict if the defendant objects.[1] There is so much doubt as to the authority to do so even with the express consent of the defendant that the court should not risk the chance of a mistrial.[2]

[1] State v. Anderson, 41 Minn. 104, 42 N. W. 786.

[2] State v. Rogan, 18 Wash. 43 (no authority—similar statute).

Verdict for lesser degrees or offences than charged—statute.

§ 2342. "Upon an indictment for an offence consisting of different degrees, the jury may find the defendant not guilty of the degree charged in the indictment, and guilty of any degree inferior thereto; upon an indictment for any offence, the jury may find the defendant

Digitized by Google

not guilty of the commission thereof, and guilty of an attempt to commit the same; upon an indictment for murder, if the jury find the defendant not guilty thereof, they may, upon the same indictment, find the defendant guilty of manslaughter in any degree. In all other cases, the defendant may be found guilty of any offence, the commission of which is necessarily included in that with which he is charged in the indictment."

[G. S. 1894 § 7339]

§ 2343. If the jury have a reasonable doubt whether the accused is guilty of a higher or lower degree of crime they must find him guilty of the latter.[1] If evidence is introduced reasonably tending to reduce the crime charged to one of a lesser degree it is the duty of the court to instruct the jury as to the different degrees and their right to find the accused guilty of the lesser crime;[2] and they should be instructed that if they find for a lesser degree than charged they must specify in their verdict of what degree they find the accused guilty.[3] The court may refuse to instruct the jury as to lesser degrees if there is no evidence reasonably tending to justify a verdict for such lesser degrees.[4] In an unequivocal case the court may instruct the jury that there is no evidence in the case justifying a verdict for a lesser degree than the one charged or that it is their duty either to find the accused guilty as charged or to acquit him.[5] Upon an indictment for a crime of which there are several degrees a general verdict of guilty is sufficient. It is necessary for the verdict to specify the degree only when the jury find the accused guilty of a lesser degree than charged.[6] The accused may be found guilty of an assault, upon an indictment for assault with intent to murder;[7] of an assault with intent to commit rape, upon an indictment for rape;[8] of taking indecent liberties, upon an indictment for assault with intent to carnally know and abuse a child;[9] of assault in the second degree, upon an indictment for rape;[10] of simple larceny, upon an indictment for larceny from the person;[11] of an attempt to carnally know and abuse a child, upon an indictment for unlawfully and carnally knowing a child;[12] of robbery in second degree, upon an indictment for robbery in the first degree;[13] of manslaughter in any degree, upon an indictment for murder;[14] of the offence specified in § 2 of Laws 1873 ch. 9, upon an indictment for the offence specified in § 1 of the same act;[15] of assault, upon an indictment for an assault with intent to do great bodily harm;[16] upon an indictment for burglary a party cannot be convicted of the crime of larceny.[17]

[1] State v. Laliyer, 4 Minn. 368 Gil. 277.

[2] State v. Smith, 56 Minn. 78, 57 N. W. 325; State v. Miller, 45 Minn. 521, 48 N. W. 401.

[3] State v. Eno, 8 Minn. 220 Gil. 190.

[4] State v. Smith, 56 Minn. 78, 57 N. W. 325.

[5] State v. Cantieny, 34 Minn. 1, 24 N. W. 458; State v. Rheams, 34 Minn. 18, 24 N. W. 302; State v. Hanley, 34 Minn. 430, 26 N. W. 397; State v. Lenz, 45 Minn. 177, 47 N. W. 720.

[6] Bilansky v. State, 3 Minn. 427 Gil. 314; State v. Eno, 8 Minn. 220 Gil. 190.

Digitized by Google

[7] Boyd v. State, 4 Minn. 321 Gil. 237.
[8] O'Connell v. State, 6 Minn. 279 Gil. 190.
[9] State v. West, 39 Minn. 32, 40 N. W. 249.
[10] State v. Bogan, 41 Minn. 285, 43 N. W. 5; State v. Vadnais, 21 Minn. 382.
[11] State v. Wiles, 26 Minn. 381, 4 N. W. 615.
[12] State v. Masteller, 45 Minn. 128, 47 N. W. 541.
[13] State v. O'Neil, 71 Minn. 399, 73 N. W. 1091.
[14] State v. Lessing, 16 Minn. 75 Gil. 64.
[15] State v. Owens, 22 Minn. 238.
[16] State v. Gummell, 22 Minn. 51.
[17] State v. Hackett, 47 Minn. 425, 50 N. W. 472.

Verdict as to same—disagreement as to others—statute.

§ 2344. "On an indictment against several, if the jury cannot agree upon a verdict as to all, they may render a verdict as to those in regard to whom they do agree, on which a judgment shall be entered accordingly; and the case as to the rest may be tried by another jury."

[G. S. 1894 § 7340]

§ 2345. This is common law.[1] There is a limitation on the rule in cases where all must be either guilty or innocent from the very nature of the crime, as, for example, in prosecutions for conspiracy.[2] But where the offence is of such a nature that it may be committed by a single person the jury may, where several persons are jointly indicted and tried, convict some, acquit others and disagree as to still others.[3] The verdict must always be several, but it is sufficient if upon a single form it names severally the defendants found guilty.

[1] Com. v. Wood, 12 Mass. 313.
[2] People v. Richards, 1 Mich. 216, 51 Am. Dec. 84.
[3] State v. Kaiser, 124 Mo. 651; Bishop Crim. Pro. § 1036 (3rd Ed).
[4] Allen v. State, 34 Tex. 154; Medis v. State, 27 Tex. App. 194.

Polling the jury—statute.

§ 2346. "When a verdict is rendered and before it is recorded, the jury may be polled, on the requirement of either party, in which case they shall be severally asked whether it is their verdict, and if any one answer in the negative, the jury shall be sent out for further deliberation."

[G. S. 1894 § 7341]

§ 2347. The juror should be limited in his answer to "yes" or "no" and not be allowed to go into explanations.

State v. Tomlinson, 7 N. D. 294, 74 N. W. 995.

Reception of verdict—statute.

§ 2348. "When a verdict is given, such as the court may receive, the clerk shall immediately record it in full on the minutes, and read it to the jury, and inquire of them whether it is their verdict; and if any juror disagrees, the fact shall be entered upon the minutes,

Digitized by Google

and the jury again sent out; but if no disagreement is expressed, the verdict is complete, and the jury shall be discharged from the case." [G. S. 1894 § 7342]

Sentence or judgment.

§ 2349. Where a person has been convicted, upon several indictments for several similar but distinct offences the court may sentence him to the full extent allowed by law for such offences, upon each conviction, and it is not a case of cumulative sentences. A sentence to imprisonment ought to be certain as to the time when it shall commence and end; but where the court has to punish by imprisonment upon each of several convictions, to make one term commence at the expiration, by lapse of time or otherwise, of a preceding term, makes the sentence as certain as is possible under the circumstances and is sufficient.[1] If the sentence does not name the date when the term of imprisonment is to commence it is to be computed from the time of the commitment.[2] The statute requiring the term to expire between the first day of April and the first day of November is directory merely.[3] Without express statutory authority the court cannot impose a fine and commit the convict to prison until the fine is paid so as to exceed the limit of imprisonment prescribed by statute for the offence.[4] A convict cannot be committed to state prison merely to enforce the payment of a fine and not by way of punishment for the crime; for such purpose imprisonment in the county jail is alone warranted.[5] The place of imprisonment must be specified in the judgment and sentence of the court.[6] In all cases where the defendant is sentenced and adjudged to pay a fine the court may, in its discretion, as part of the judgment, order that defendant shall be committed to the common jail of the county until such fine is paid, not exceeding a reasonable time, to be graduated according to the amount of such fine.[7] In a capital case the time of execution is not an essential part of the judgment.[8] Where a person is convicted of a crime for which the punishment inflicted is or may be imprisonment in a county jail, he may be sentenced to, and the imprisonment may be inflicted by, confinement in a workhouse, if there be one in the county in which the offence is tried or committed.[9] In every case in which punishment in the state prison is awarded against any convict, the form of the sentence shall be, that he be punished by confinement at hard labor.[10] A judgment for a less [11] or greater [12] punishment than authorized is not void and cannot be attacked on habeas corpus. If the conviction is right an erroneous sentence or judgment is not a ground for a new trial; the supreme court will either correct the error by a proper judgment and sentence or order a correction by the court below.[13] Where sentence is a fine and costs the omission of costs in the judgment is not a ground for reversal.[14] On appeal from justice court the sentence of the district court is not limited to the sentence of the justice.[15] The court cannot impose costs unless expressly authorized.[16]

[1] G. S. 1894 § 6829; Mims v. State, 26 Minn. 498, 5 N. W. 374.
[2] Mims v. State, 26 Minn. 494, 5 N. W. 369.
[3] Id. [4] Id.

Digitized by Google

[8] State v. Framness, 43 Minn. 490, 45 N. W. 1098.
[9] G. S. 1894 § 6834.
[7] G. S. 1894 § 6835; State v. Peterson, 38 Minn. 143, 36 N. W. 443; State v. Framness, 43 Minn. 490, 45 N. W. 1098.
[8] State v. Gut, 13 Minn. 341 Gil. 315.
[9] G. S. 1894 § 6833.
[10] G. S. 1894 § 7402; State v. Wolfer, 68 Minn. 465, 71 N. W. 681.
[11] In re Williams, 39 Minn. 172, 39 N. W. 65. See (14).
[12] Id.; State v. Wolfer, 68 Minn. 465, 71 N. W. 681.
[13] See § 2262.
[14] Village of Elbow Lake v. Holt, 69 Minn. 349, 72 N. W. 564.
[15] Id.
[16] State v. Cantieny, 34 Minn. 1, 24 N. W. 458.

ARREST OF JUDGMENT

General statement.

§ 2350. By statute the only objections that can be raised by a motion in arrest of judgment are (1) that the court has not jurisdiction over the subject of the indictment and (2) that the facts stated in the indictment do not constitute a public offence.

G. S. 1894 §§ 7301, 7284; State v. Conway, 23 Minn. 290; State v. Lautenschlager, 23 Minn. 290; State v. Loomis, 27 Minn. 521, 8 N. W. 758; Bilansky v. State, 3 Minn. 427 Gil. 313.

NEW TRIALS

§ 2351. A new trial may be granted the defendant in all criminal cases, the common law distinction in this respect between felonies and misdemeanors not obtaining in this state.[1] The grounds upon which new trials may be granted in criminal actions are not prescribed by statute in this state, but the law of new trials is substantially the same in civil and criminal cases except that a new trial cannot be awarded the state.[2] When the indictment contains several counts and the accused is acquitted as to some and convicted as to others a new trial is restricted to the counts upon which he was found guilty. And when a person is convicted for a lesser offence, or lesser degree of the same offence, than the one charged in the indictment a new trial granted upon his application is confined to the lesser offence or lesser degree of the offence charged.[4] It is an obvious requirement of public policy that verdicts in criminal actions should not be set aside for merely formal or technical errors. Our statute of jeofails should be applied more frequently than it is. It provides that "no indictment is insufficient, nor can the trial, judgment, or other proceedings thereon be affected, by reason of a defect or imperfection in matter of form, which does not tend to the prejudice of the substantial rights of the defendant upon the merits." [5] "At a certain period of English history, when an accused person had no right to be represented by counsel, and when the punish-

Digitized by Google

ments for crimes were so severe as to shock the sense of justice of many judges who administered the criminal law, it was natural that technical objections which, perhaps, alone stood between the criminal and the enforcement of a most severe, if not cruel, penalty, should be accorded great weight, and that forms and modes of procedure, having really no connection with the merits of a particular case, should be insisted upon as a sort of bulwark of defence against prosecutions which might otherwise be successful, and which at the same time ought not to succeed. These times have passed and the reasons for the strict and slavish adherence to mere form have passed with them."[6] An informality, or error in practice merely, which cannot prejudice either party, is not a ground for reversing a judgment.[7]

[1] State v. Miller, 10 Minn. 313 Gil. 246.
[2] State v. McGrorty, 2 Minn. 225 Gil. 187. See Thayer, Ev. 175 et seq.
[3] George v. State, 59 Minn. 163, 80 N. W. 486.
[4] State v. Martin, 30 Wis. 216.
[5] G. S. 1894 § 7248; State v. Ryan, 13 Minn. 370 Gil. 343; State v. Gut, 13 Minn. 341 Gil. 315; State v. Munch, 22 Minn. 67; State v. Holong, 38 Minn. 368, 37 N. W. 587; State v. Harris, 50 Minn. 128, 52 N. W. 387; State v. McCartey, 17 Minn. 76 Gil. 54; State v. Coon, 18 Minn. 518 Gil. 464; State v. Howard, 66 Minn. 309, 68 N. W. 1096.
[6] Peckham, J., Crain v. U. S. 162 U. S. 646.
[7] State v. Brown, 12 Minn. 538 Gil. 448.

APPEALS AND WRITS OF ERROR

When—by whom—statute.

§ 2352. "Criminal cases may be removed by the defendant to the supreme court, by appeal or writ of error, at any time within six months after judgment, or after the decision of a motion denying a new trial; but if the order denying a new trial is affirmed upon hearing upon the merits, no appeal shall be allowed from the judgment." [G. S. 1894 § 7385]

§ 2353. A writ of error is now rarely resorted to in our practice. An appeal does not lie from intermediate orders; the only means by which they may be reviewed are an appeal from the final judgment, an appeal from an order denying a new trial and a report.[1] An appeal does not lie from a verdict.[2] An order overruling a demurrer is not appealable.[3] The state cannot appeal or sue out a writ of error.[4] An appeal lies only from final judgments—such as determine the measure of punishment to be inflicted and are to be enforced without further judicial action.[5] Upon an appeal from a final judgment no questions will be considered which might have been raised on a prior appeal from an order denying a new trial.[6] A party may waive his right to appeal by giving a bond to abide the judgment.[7]

Digitized by Google

[1] State v. Noonan, 24 Minn. 174; State v. Abrisch, 42 Minn. 202, 43 N. W. 1115.
[2] State v. Ehrig, 21 Minn. 462.
[3] State v. Abrisch, 42 Minn. 202, 43 N. W. 1115.
[4] State v. McGrorty, 2 Minn. 225 Gil. 187.
[5] State v. Abrisch, 42 Minn. 202, 43 N. W. 1115.
[6] Mims v. State, 26 Minn. 494, 5 N. W. 369.
[7] State v. Sawyer, 43 Minn. 202, 45 N. W. 155.

Stay on appeal—notice of appeal—statute.

§ 2354. "When an appeal is taken, it shall not stay the execution of the judgment, unless an order to that effect is made by the judge who tried the cause, or a judge of the supreme court. Notice of the appeal and the order staying proceedings, if any, shall be filed with the clerk of the court where the judgment is entered, and served on the attorney general."

[G. S. 1894 § 7386]

§ 2355. The right to a stay, even in a capital case, is not coincident with the right of appeal. It is a matter of discretion. When an appeal involves human life. A stay should be granted until the appeal can be heard and determined if the court has a reasonable doubt whether or not some of the assignments of error have merit.[1] Immaterial defects in a notice of appeal will be disregarded.[2] In a prosecution for the violation of a city ordinance the notice of appeal should be served on the city attorney rather than the attorney general.[3]

[1] State v. Hayward, 62 Minn. 114, 64 N. W. 90.
[2] State v. Jones, 55 Minn. 329, 56 N. W. 1068.
[3] State v. Sexton, 42 Minn. 154, 43 N. W. 845.

Writ of error—allowance—stay—statutes.

§ 2356. "No writ of error upon a judgment for any capital offence shall issue, unless allowed by one of the judges of the supreme court after notice given to the attorney general."[1] * * * "Writs of error upon judgment in all other criminal cases shall issue of course, but they shall not stay or delay the execution of the judgment or sentence, unless allowed by one of the judges of the supreme court with an express order thereon for a stay of proceedings on the judgment or sentence."[2]

[1] G. S. 1894 § 7387; Bilansky v. State, 3 Minn. 427 Gil. 313.
[2] G. S. 1894 § 7388. See Rule 27, Supreme Court; State v. Sawyer, 43 Minn. 202, 45 N. W. 155.

Return to supreme court—statute.

§ 2357. "Upon an appeal being perfected, or a writ of error filed with him, the clerk shall transmit to the supreme court a copy of the judgment roll, and of the bill of exceptions, if any."

[G. S. 1894 § 7389]

§ 2358. The judgment roll consists of (1) a copy of the minutes of challenge interposed by the defendant to the panel of the grand

Digitized by Google

jury, or to an individual grand juror, and the proceedings and decisions thereon; (2) the indictment, and a copy of the minutes of the plea or demurrer; (3) a copy of the minutes of any challenge interposed to the panel of the trial jury, to an individual juror, and the proceedings and decision thereon; (4) a copy of the minutes of the trial; (5) a copy of the minutes of the judgment; (6) the bill of exceptions, if there is one.[1] Minutes of the evidence are no part of the judgment roll unless incorporated in a bill of exceptions.[2]

[1] G. S. 1894 § 7398.

[2] State v. Wyman, 42 Minn. 182, 43 N. W. 1116.

Bill of exceptions—sufficiency of record on appeal—statute.

§ 2359. "Any person who is convicted of a crime before the district court or court of common pleas aforesaid, being aggrieved by any opinion, direction or judgment of the court in any matter of law, may allege exceptions to such opinion, direction or judgment; which exceptions, being reduced to writing in a summary manner, and presented to the court any time before the end of the term, or at any special term thereafter which the court may designate for such purpose, and being found conformable to the truth of the case, shall be allowed and signed by the judge, and may be used on a motion for a new trial, and, when judgment is rendered, shall be attached to and become a part of the judgment roll."

[G. S. 1894 § 7390]

§ 2360. This statute was obviously designed to regulate the allowance of bills of exception for use on writs of error rather than "cases" containing a complete record for use on appeals. It was enacted before the day of stenographers. At the present time no bill of exceptions is ever "reduced to writing in a summary manner." The statute ought to be ignored altogether so far as the settlement and allowance of a "case" for use on appeal are concerned. Strictly the defendant is not entitled, as of right, to have a bill of exceptions allowed if not presented before the end of the term. After that the matter rests in the discretion of the court; but we apprehend that it would be held an abuse of discretion for the court to deny the defendant a reasonable opportunity to prepare and present his bill. As to the time for settling and allowing a "case" the statute is silent. Undoubtedly the matter rests in the discretion of the court. Practically this whole matter is settled in each case by special arrangement between counsel and the court. The statute, in so far as it requires the bill to be presented and allowed at a regular term or at a "special term," is obsolete. By virtue of a subsequent statute the court is always open for the transaction of such business.[1] The county attorney cannot be ignored in the settlement.[2] After a bill has been settled by the judge he cannot correct mistakes in it without calling in both parties and allowing them to be heard.[3] The sufficiency of the evidence will not be considered unless the record on appeal contains all the evidence introduced on the trial.[4] When the record on appeal contains no bill of exceptions or case the only question that can be considered is the sufficiency of the indictment to support the

Digitized by Google

judgment.[5] Intermediate orders or rulings will not be considered on appeal unless incorporated in a bill of exceptions or case.[6] The burden is upon the defendant to make error appear affirmatively upon the face of the return for the presumption of regularity applies to criminal as well as civil actions.[7] And in general the rules as to the sufficiency of the record on appeal in civil proceedings apply to criminal proceedings.[8]

[1] See § 17.
[2] State v. Laliyer, 4 Minn. 379 Gil. 286.
[3] Id.
[4] State v. Conway, 23 Minn. 291; State v. Graffmuller, 26 Minn. 6, 46 N. W. 445; State v. Owens, 22 Minn. 22.
[5] State v. Miller, 23 Minn. 352; State v. Wyman, 42 Minn. 182, 43 N. W. 1116.
[6] State v. Noonan, 24 Minn. 174; State v. Sackett, 39 Minn. 69, 38 N. W. 773.
[7] State v. Brown, 12 Minn. 538 Gil. 448; State v. Ryan, 13 Minn. 370 Gil. 343; State v. Taunt, 16 Minn. 109 Gil. 99; State v. Brown, 41 Minn. 319, 43 N. W. 69; State v. Framness, 43 Minn. 490, 45 N. W. 1098; State v. Staley, 14 Minn. 105 Gil. 75; State v. Brecht, 41 Minn. 50, 42 N. W. 602; State v. Lessing, 16 Minn. 75 Gil. 16; State v. Adamson, 43 Minn. 196, 45 N. W. 152; State v. Beebe, 17 Minn. 241 Gil. 218; State v. Owens, 22 Minn. 238.
[8] State v. Anderson, 59 Minn. 484, 61 N. W. 448; State v. Durnam, 73 Minn. 150, 75 N. W. 1127; Village of Elbow Lake v. Holt, 69 Minn. 349, 72 N. W. 564.

Assignment of errors—power of court on appeal—statute.

§ 2361. "No assignment of errors or joinder in error is necessary upon any writ of error issued in a criminal case; but the court shall proceed on the return thereto, and render judgment on the record before them. If the court affirms the judgment, it shall direct the sentence pronounced to be executed, and the same shall be executed accordingly. If it reverses the judgment rendered, it shall either direct a new trial, or that the defendant be absolutely discharged, as the case may require."

[G. S. 1894 § 7391]

§ 2362. Assignments of error are necessary on an appeal.[1] Instead of absolutely reversing a judgment the supreme court may modify it. If the conviction be right and the judgment and sentence thereon wrong the supreme court may correct the error by a proper judgment and sentence or order a correction by the court below.[2] A judgment may be affirmed in part and reversed in part.[3]

[1] State v. Hulder, 78 Minn. 524, 81 N. W. 532; State v. Holden, 42 Minn. 350, 44 N. W. 123; State v. Hayes, 38 Minn. 475, 38 N. W. 365.
[2] Mims v. State, 26 Minn. 494, 5 N. W. 369; State v. Framness, 43 Minn. 490, 45 N. W. 1098; State v. Wolfer, 68 Minn. 465, 71 N. W. 681.
[3] Mims v. State, 26 Minn. 498, 5 N. W. 374.

Digitized by Google

Recognizance on appeal—statute.

§ 2363. "If upon appeal or writ of error, a party is admitted to bail, he may recognize to the state of Minnesota in such sum as the judge shall order, with sufficient sureties, for his personal appearance at the supreme court of the then next term thereof, and to enter and prosecute his exceptions with effect, and abide the sentence thereon, and in the meantime keep the peace, and be of good behavior; and the judge may, in his discretion, allow any person so to recognize, charged with an offence not punishable with death."

[G. S. 1894 § 7392]

§ 2364. The district court has power to admit to bail after verdict and before sentence; but it is a power to be exercised rarely and only when special circumstances justify it. Such common law power is not affected by this section.

State v. Levy, 24 Minn. 362.

Failure to recognize—power of court—statute.

§ 2365. "If any person, so appealing or taking a writ of error, does not so recognize he shall be committed to prison to await the decision of the supreme court; and, in that case, the clerk of the court in which the conviction was had, shall file a certified copy of the record and proceedings in the case in the supreme court, and the court shall have cognizance thereof, and consider and decide the questions of law, and shall render judgment or make such order thereon as law and justice require; and if a new trial is ordered, the cause shall be remanded to the said district court for such new trial."

[G. S. 1894 § 7393].

§ 2366. The supreme court no longer has authority to pronounce sentence.[1] This and the two preceding sections are construed together and held to authorize the supreme court to modify as well as reverse or affirm judgments.[2]

[1] State v. Bilansky, 3 Minn. 246 Gil. 169 (former statute).

[2] Mims v. State, 26 Minn. 494, 5 N. W. 369; State v. Framness, 43 Minn. 490, 45 N. W. 1098.

Dismissal of appeal—subsequent appeal—statute.

§ 2367. "If any of the provisions herein made requisite to the taking of an appeal or a writ of error are not complied with, the supreme court may dismiss the same; but no discontinuance or dismissal of an appeal or writ of error in the supreme court shall preclude the party from suing out another writ of error, or taking another appeal, in the same cause, within the time limited by law."

[G. S. 1894 § 7394]

§ 2368. An appeal will be dismissed if the return is insufficient to justify a consideration of any of the assignments of error.[1] An appeal will not be dismissed for immaterial defects in the notice of appeal.[2]

[1] State v. Anderson, 59 Minn. 484, 61 N. W. 448.

[2] State v. Jones, 55 Minn. 329, 56 N. W. 1068.

Digitized by Google

Certifying proceedings—statutes.

§ 2369. "If upon the trial of any person who shall be convicted in any district court, or in the court of common pleas of Ramsey county, or if, upon any demurrer to an indictment, as to a special plea or pleas to an indictment, or upon any motion upon or relating to an indictment, any question of law shall arise, which, in the opinion of the judge of such court, shall be so important or so doubtful as to require the decision of the supreme court, he shall, if the defendant desire it or consent thereto, report the case, so far as may be necessary to present the question or questions of law arising therein, and certify the said report to the supreme court of the state; and thereupon all proceedings in said cause shall be stayed until the decision of said supreme court shall be made."[1] * * * "Other criminal causes in said court involving or depending upon the same questions may, if the defendants desire or consent thereto, be stayed in like manner until the decision of the cause so certified."[2]

[1] G. S. 1894 § 7395.

[2] G. S. 1894 § 7396.

§ 2370. The record on appeal must show affirmatively that the question arose in one of the ways specified in the statute and that it was passed upon and determined by the lower court.[1] A question arising on a demurrer or a motion cannot be certified after a trial and verdict upon an issue of not guilty. The obvious purpose of the statute was to enable the trial court, before the trial of any issue upon the indictment under a plea of not guilty, to procure, for its guidance in the subsequent proceedings, an authoritative decision of any doubtful and important question raised by the demurrer or motion, thereby saving, perhaps, much of the labor and expense that might otherwise arise in the final disposition of the case on the merits.[2] The statute contemplates that the report and certificate of the trial judge should indicate the particular questions of law which he deems so important and doubtful as to require the decision of the supreme court.[3] No bill of exceptions is necessary.[4] An attorney appointed by the court to defend the accused is authorized to appear for him in the supreme court upon questions being certified.[5] The court will answer only those questions which are argued.[6] A great variety of questions have been carried to the supreme court by this means.[7]

[1] State v. Byrud, 23 Minn. 29; State v. Hoag, 23 Minn. 31; State v. Northern Pac. Ex. Co. 58 Minn. 403, 59 N. W. 1100.

[2] State v. Loomis, 27 Minn. 521, 8 N. W. 758.

[3] State v. Corbett, 57 Minn. 345, 59 N. W. 317; State v. Cornhauser, 74 Wis. 42—Bonfanti v. State, 2 Minn. 123 Gil. 99 is overruled on this point.

[4] Bonfanti v. State, 2 Minn. 123 Gil. 99.

[5] State v. Wenther, 76 Wis. 89.

[6] State v. Mrozinski, 59 Minn. 465, 61 N. W. 560.

[7] In addition to above cases see State v. Sweeney, 33 Minn. 23, 21 N. W. 847; State v. Larson, 40 Minn. 63, 41 N. W. 363; State v. Abrisch, 42 Minn. 202, 43 N. W. 1115; State v. Stein, 48 Minn. 466, 51 N. W. 474; State v. Musgang, 51 Minn. 556,

Digitized by Google

53 N. W. 874; State v. Campbell, 53 Minn. 354, 55 N. W. 553; State v. Bannock, 53 Minn. 419, 55 N. W. 558; State v. Kluseman, 53 Minn. 541, 55 N. W. 741; State v. Herges, 55 Minn. 464, 57 N. W. 205; State v. Hawks, 56 Minn. 129, 57 N. W. 455; Village of Wykoff v. Healey, 57 Minn. 14, 58 N. W. 685; State v. Rodman, 58 Minn. 393, 59 N. W. 1098; State v. Farrington, 59 Minn. 147, 60 N. W. 1088; State v. Mrozinski, 59 Minn. 465, 61 N. W. 560; State v. Goodrich, 67 Minn. 176, 69 N. W. 815; State v. George, 60 Minn. 503, 63 N. W. 100; State v. Erickson, 81 Minn. 134, 83 N. W. 512.

Digitized by Google

CHAPTER XXX

RULES OF THE SUPREME COURT

RULE 1

Duties of clerk.

§ 2371. (1) The clerk shall keep a general docket or register, in which he shall enter the titles of all actions and proceedings, including the names of the parties, and the attorneys or solicitors by whom they prosecute or defend, and he shall enter thereunder, from time to time, of the proper dates, brief notes of all papers filed and all proceedings had therein; the issuing of writs and other process, and the return thereof; the court or officer to whom directed; the return of any court, officer, or other person thereto; the filing of any bond or other security, and the issuing of a certificate of supersedeas, and of all orders and judgments in any action or proceeding, whether of course or on motion; also, proper references to the number and term of all papers and proceedings.

(2) He shall also keep a judgment book, in which he shall enter all judgments; the names of the parties thereto, plaintiff and defendant; the date of the judgment, its number and term, the amount thereof, if the recovery of money or damages is included therein, and the amount of costs, which record shall be properly indexed.

(3) He shall keep a court journal, in which he shall enter, from day to day, brief minutes of all proceedings in court.

(4) He shall file all papers presented to him; indorse thereon the style of the action, its number and term, the character of the paper, and date of filing; and after filing, no paper shall be taken from the office, unless by order of the court or a judge thereof.

(5) At the commencement of each term he shall furnish the court and bar with separate lists of all causes pending therein which have been noticed for argument, and of which a note of issue has been filed six days before the commencement of the term. Causes shall be placed upon the list according to the date of the notice of appeal or writ of error.

[Adopted July 24, 1867]

RULE 2

Bringing motions on for hearing.

§ 2372. Motions, except for orders of course, shall be brought on upon notice,[1] and when not made upon the records or files of the court, shall be accompanied with the papers on which the same are founded.

[Adopted July 24, 1867] See Rule 10.

[1] That is, eight days' notice. See Com. Ins. Co. v. Pierro, 6 Minn. 569 Gil. 404.

Digitized by Google

RULE 3

Clerk of district court to certify papers.

§ 2373. Upon an appeal from a judgment or order, the clerk of the district court, in addition to the copies of the notice of appeal and judgment roll or order, shall, upon the request of either party to such appeal, and at the expense of the party applying, certify and transmit to this court copies of any papers, affidavits, or documents on file, in the district court, in the action in which the appeal is taken, which such party may deem necessary to or proper for the elucidation and determination of any question expected or intended to be raised on the hearing of the appeal.

[Adopted July 24, 1867]

RULE 4

Return on appeal—notice to file—dismissal for failure.

§ 2374. The appellant or plaintiff in error shall cause the proper return to be made and filed with the clerk of this court within sixty days after the appeal is perfected or the writ of error served. If he fails to do so, the respondent or defendant in error may, by notice in writing, require such return to be filed within twenty days after the service of such notice, and, if the return is not filed in pursuance of such notice, the appellant or plaintiff in error shall be deemed to have abandoned the appeal or writ of error, and on an affidavit proving when the appeal was perfected or writ of error served, and the service of such notice, and a certificate of the clerk of this court that no return has been filed, the respondent or defendant in error may enter an order with the clerk dismissing the appeal or writ of error for want of prosecution, with costs, and the court below may thereupon proceed as though there had been no appeal or writ of error.

[Adopted July 24, 1867]

§ 2375. This rule was intended to speed the prosecution of appeals by permitting the respondent to secure a dismissal of an appeal for a failure to file a return within the time limited, whether the court is in session or not. It does not affect the right of the respondent to move for a dismissal under Rule 11.

Plymouth Clothing House v. Seymour, 74 Minn. 425, 77 N. W. 239; Guerin v. St. Paul etc. Ry. Co. 32 Minn. 409, 21 N. W. 470.

RULE 5

Defective return.

§ 2376. If the return made by the clerk of the court below is defective, or full copies of all the orders, papers, or records necessary to the understanding or decision of the case in this court are not certified or transmitted, either party may, on an affidavit specifying the defect or omission, apply to one of the judges of this court for

Digitized by Google

an order that such clerk make a further return and supply the omission or defect without delay.

[Adopted July 24, 1867] See Phoenix v. Gardner, 13 Minn. 294 Gil. 272.

RULE 6

Order for bringing up original papers.

§ 2377. Whenever it is necessary or proper, in the opinion of any judge of this court, that original papers of any kind should be inspected in this court on appeal, such judge may make such order for the transmission, safe-keeping, and return of such original papers as to him may seem proper, and the court may receive and consider such original papers in connection with the transcript of the proceedings.

[Adopted July 24, 1867]

RULE 7

Attorneys—guardians ad litem—continue on appeal.

§ 2378. The attorneys and guardians ad litem of the respective parties in the court below, shall be deemed the attorneys and guardians of the same parties respectively in this court, until others are retained or appointed, and notice thereof served on the adverse party.

[Adopted July 24, 1867]

RULE 8

Notice of argument—filing notes of issue.

§ 2379. Causes shall be noticed for the first day of the term, and may be noticed for argument by either party. Criminal cases shall have a preference, and may be moved on behalf of the state out of their order on the calendar. Cases shall be noticed for argument at least ten days before the first day of the term; and at least six days before the commencement of the term, the party giving the notice of argument shall furnish the clerk with a note of the issue, containing the title of the action, specifying which party is appellant and which respondent or plaintiff in error and defendant in error, as the case may be; the names of the attorneys of the parties respectively, and the date of the notice of appeal or writ of error.

[As amended February 10, 1868]

§ 2380. The day of service and the first day of the term must both be excluded in computing the time under this rule.[1] A cause cannot be noticed for argument before the return is filed.[2]

[1] Greve v. St. Paul etc. Ry. Co. 25 Minn. 327.

[2] Reynolds v. Steamboat Favorite, 9 Minn. 148 Gil. 138.

Digitized by Google

RULE 9

Paper book and brief—form and contents—assignments of error—filing.

§ 2381. (1) The appellant, or party removing a cause to this court, shall, at least three days (excluding Sunday) previous to the argument thereof, file eight copies—one for each of the judges, and one for the reporter, clerk and librarian, respectively—of the paper book, his assignment of errors, points and authorities; and within the same time the respondent shall file eight copies of his points and authorities. Any party failing to do so shall not be entitled to statutory costs, in case he prevails.

(2) The paper book and briefs must be printed, and the folios of the paper book distinctly numbered in the margin. The paper book shall consist of so much of the return as will clearly and fully present the questions arising on the review, with the reasons of the court below for its decision, if any were filed; also the notice of appeal, verdict or finding and judgment, if there be one.

(3) Prefixed to the brief of the appellant, but stated separately, shall be an assignment of errors intended to be urged. Each specification of error shall be separately, distinctly and concisely stated, without repetition, and they shall be numbered consecutively. When the error specified is that the finding of the court below or referee is not sustained by the evidence, it shall specify particularly the finding complained of. No error not affecting the jurisdiction over the subject matter will be considered, unless stated in the assignment of errors.[1]

(4) The points and authorities of appellant shall contain a concise statement of the case, so far as necessary to present the questions involved, and shall state separately the several points relied on for a reversal of the order or judgment of the court below, with a list of authorities to be cited in support of the same.

(5) Whenever either the settled case or the paper book contains any unnecessary, irrelevant or immaterial matter, and the appellant prevails, he shall not be allowed any disbursements for preparing, certifying or printing such unnecessary matter. The respondent's objection to the taxation of disbursements in such cases shall point out—specifying the folios—the particular portions of the record or paper book, for which he claims that the appellant is not entitled to tax disbursements.

[As amended April 2, 1901]

[1] See § 1791 et seq.

RULE 10

Call of calendar—setting causes for argument—motions.

§ 2382. On the first day of the term the court will proceed to call the calendar in order to set causes for oral argument or for submission on briefs, and will continue the call until there shall be as many causes so set as the court shall believe can be disposed of during the term. On such day motions in causes on the calendar,

Digitized by Google

to strike from the calendar, or to dismiss, affirm, or reverse, may be orally noticed in open court and will be heard during the first week of the term. On the call of the calendar, if neither party to a cause called shall have it set for oral argument or submission on briefs, or if neither party shall move a cause or submit it when it is called on the day on which it is set for oral argument, or, if it be set for submission on briefs, if neither party shall have filed his brief by the day appointed for the briefs to be filed, or, if no day be appointed, neither party shall file his brief during the term, the cause shall be continued to the next term.[1]

[As amended January 24, 1890]

[1] See Smith v. Ricker, 84 Minn. 210, 87 N. W. 615 (order reversed instead of cause continued).

RULE 11

Serving paper books and brief on adverse party.

§ 2383. At least twenty days before the term of this court at which a cause is noticed for trial by the appellant or plaintiff in error, and in all cases at least twenty days before the first term of this court commencing more than sixty days after the appeal is perfected or writ of error served, the appellant or plaintiff in error shall deliver to the adverse party a copy of the paper book, and of the assignment of errors, and of his points and authorities; and on or before the first day of the term at which the cause is noticed for trial the respondent or defendant in error shall furnish the adverse party a copy of his points and authorities.

[As amended April 7, 1896] See Rule 14.

§ 2384. When an appeal is taken and noticed so late that the appellant cannot comply with this rule the respondent is entitled to have the cause continued to the next term unless the rule is relaxed by order of the court. Brown v. Potter, 81 Minn. 4, 83 N. W. 457.

RULE 12

Continuance on notice of trial by respondent.

§ 2385. When the respondent, or defendant in error, notices a cause for trial at a term commencing within the time allowed to the appellant, or plaintiff in error, to serve his points and authorities, the appellant, or plaintiff in error, shall be entitled to a continuance on a suggestion that he cannot conveniently proceed with the trial at such term.

[Adopted July 24, 1867]

Digitized by Google

RULE 13

Statement of facts in briefs.

§ 2386. In cases where it may be necessary for the court to go into an extended examination of evidence, each party shall add to the copies of his points furnished the court the leading facts which he deems established, with reference to the portions of the evidence where he deems the proof of such facts may be found. And the court will not hear an extended discussion upon a mere question of fact.

[Adopted July 24, 1867]

RULE 14

Failure to serve brief and paper book or to appear and argue cause.

§ 2387. Either party may apply to the court for judgment of affirmance or reversal, or for a dismissal, as the case may be, if the other party shall neglect to appear and argue the cause, or shall neglect to furnish and deliver cases and points as required by these rules.

[Adopted July 24, 1867] Rule applied: Smith v. Ricker, 84 Minn. 210, 87 N. W. 615 (order reversed on court's own motion for failure to file or submit briefs and to appear); Plymouth Clothing Co. v. Seymour, 74 Minn. 425, 77 N. W. 239; L. Kimball Printing Co. v. Southern Land etc. Co. 57 Minn. 37, 58 N. W. 868; Guerin v. St. Paul etc. Ry. Co. 32 Minn. 409, 21 N. W. 470; Merrill v. Dearing, 24 Minn. 179 (motion to affirm under this rule cannot be defeated by a mere notice of dismissal served by the adverse party).

RULE 15

Limitation of oral argument—submission without oral argument.

§ 2388. (1) Either party may submit a cause on his part on a printed brief or argument.

(2) In actions for the recovery of money only, or of specific personal property, where the amount, or the value of the property, involved in the appeal, shall not exceed one hundred dollars, and in appeals from orders involving only questions of practice, or forms or rules of pleading, and in appeals from the clerk's taxation of costs, the parties may submit on briefs but no oral argument will be allowed.[1]

(3) On oral arguments the appellant or plaintiff in error, or on a motion the moving party, or party procuring the order to show cause, shall open and be entitled to reply. Each party shall be entitled to one hour in all, except that in actions for the recovery of money only, or of specific personal property, where the amount, or the value of the property, involved in the appeal, shall not exceed five hundred dollars, they shall be entitled to only thirty minutes

Digitized by Google

each, and on motions and orders to show cause to only fifteen minutes each.

(4) Leave to argue a cause orally, when not entitled to such oral argument under this rule, may be given, on application therefor, at the time of calling the calendar. And the time allowed for oral argument as prescribed by this rule may be extended, on application therefor at the commencement of the argument, notice of intention to apply therefor being given at the time of calling the cause on the call of the calendar, and on motions and orders to show cause on application when brought to a hearing.

[As amended January 24, 1890]

[1] See § 1958.

RULE 16

Duty of clerk on dismissal.

§ 2389. In all cases of the dismissal of any appeal or writ of error in this court, it shall be the duty of the clerk to issue a certified copy of the order or dismissal to the court below, so that further proceedings may be had in such court as if no writ of error or appeal had been brought.

[Adopted July 24, 1867]

RULE 17

Remittitur—mailing notice of decision—entry of judgment—transmitting remittitur.

§ 2390. A remittitur shall contain a certified copy of the judgment of this court, sealed with the seal thereof, and signed by the clerk. When a decision is filed or an order entered determining the cause, the clerk shall mail notice thereof to the attorneys of the parties, and no judgment shall be entered until the expiration of ten days thereafter. The clerk shall receive a fee of twenty-five cents for each notice aforesaid. The remittitur shall be transmitted to the clerk of the court below as soon as may be, after judgment is entered.

[As amended by Rule 33, October 31, 1872]

RULE 18

Remittitur as matter of course.

§ 2391. Upon the reversal, affirmance, or modification of any order or judgment of the district court by this court, there will be a remittitur to the district court unless otherwise ordered.

[Adopted July 24, 1867] Rule cited: Everest v. Ferris, 17 Minn. 466 Gil. 445; Jordan v. Humphrey, 33 Minn. 522, 21 N. W. 713.

Digitized by Google

RULE 19

Final judgment without remittitur upon reversal.

§ 2392. On reversal of a judgment of the district court, rendered on a judgment removed into it from an inferior court, when there is no remittitur, this court will render such judgment as ought to have been given in the court below, including the costs of that court, and also for the costs of this court; and the plaintiff in error or appellant may have execution thereupon.

[Adopted July 24, 1867]

RULE 20

Judgment for money only—affirmance—final judgment in this court.

§ 2393. In all cases where a judgment of the district court, for the recovery of money only, is affirmed, and there is no remittitur, judgment may be entered in this court for the amount thereof, with interest and costs, and damages, if any are awarded, to be added thereto by the clerk; and the party in whose favor the same was rendered may have execution thereupon from this court.

[Adopted July 24, 1867]

RULE 21

Reversal—no remittitur—costs of prevailing party.

§ 2394. In case of a reversal of a judgment, order or decree of a district court, rendered or made in a cause commenced therein, if there is no remittitur, the prevailing party shall have judgment in this court for the costs of reversal, and the costs of the court below, and execution therefor.

[Adopted July 24, 1867]

RULE 22

Costs notwithstanding remittitur.

§ 2395. In all cases in which a remittitur is ordered, the party prevailing shall have judgment in this court for his costs, and execution thereon, notwithstanding the remittitur.

[Adopted July 24, 1867]

RULE 23

Taxation of costs.

§ 2396. Costs in all cases shall be taxed in the first instance by the clerk upon two days' notice, and inserted in the judgment, subject to the review of the court, and the clerk of the court below may tax the costs of the prevailing party in this, when the same are to be inserted in the judgment.

[As amended June 10, 1875]

Digitized by Google

RULE 24

Papers constituting judgment roll.

§ 2397. In all cases, the clerk shall attach together the writ of error, if any, the transcript and papers certified and returned by the clerk of the court below, a copy of the minutes of argument and order for judgment, and annex thereto a copy of the judgment of this court signed by him; and the papers thus annexed shall constitute the judgment roll.

[Adopted July 24, 1867]

RULE 25

Issuance and satisfaction of executions.

§ 2398. Executions to enforce any judgment of this court may issue to the sheriff of any county in which a transcript of the judgment is filed and docketed.[1] Such executions shall be returnable in sixty days from the receipt thereof by the officer. On the return of an execution satisfied, or acknowledgment of satisfaction, in due form of law, by the party who recovered the same, or his representatives or assigns, the clerk shall make an entry thereof upon the record.

[Adopted July 24, 1867]

[1] See La Crosse etc. Co. v. Reynolds, 12 Minn. 213 Gil. 135.

RULE 26

Process and writs other than executions.

§ 2399. All other writs and process issuing from or out of the court shall be signed by the clerk, sealed with the seal of the court, tested of the day when the same issued, and made returnable on any day in the next term, or in the same term when issued in term time, and a judge may, by an indorsement thereon, order process to be made returnable on any day in vacation when, in his opinion, the exigency of the case requires it.

[Adopted July 24, 1867]

RULE 27

Giving notice of writ of error.

§ 2400. On the issuance from this court of a writ of error, the plaintiff in error in such writ shall give notice in writing to the attorney general and county attorney of the county in which the action is triable, within ten days after the issuing of such writ, that such writ has been sued out.

[Adopted July 24, 1867]

Digitized by Google

RULE 28

Printing of paper books and briefs.

§ 2401. Paper books, the assignment of errors, and briefs shall be neatly and legibly printed with black ink on white writing paper, properly paged at the top, with a margin on the outer edge of one inch and a half. The printed page shall be seven inches long, and three and a half inches wide, and the paper page shall not be more than nine inches long or seven inches wide. Each brief shall be signed by counsel preparing it, and each paper book and brief shall be stitched together, with its proper designation and the title of the cause printed on the outside.

[As amended December 24, 1885]

RULE 29

Costs.

§ 2402. Unless otherwise ordered, the prevailing party shall recover costs as follows: (1) upon a judgment in his favor on the merits, twenty-five dollars; (2) upon dismissal, ten dollars.

[Adopted July 24, 1867] As to who is prevailing party see Sanborn v. Webster, 2 Minn. 323 Gil. 277; Allen v. Jones, 8 Minn. 202 Gil. 172.

RULE 30

Entry of judgment by defeated party.

§ 2403. In case the prevailing party shall neglect to have judgment entered up within twenty days after notice of the filing of the opinion or order of court, the adverse party may, without notice, cause the same to be entered by the clerk without inserting therein any allowance for costs or disbursements, except the clerk's fees in this court.

[Adopted July 24, 1867] Rule cited: D. M. Osborne & Co. v. Paulson, 37 Minn. 46, 33 N. W. 12.

RULE 31

[Obsolete by reason of statute regulating examination of applicants for admission to the bar]

RULE 32

When rules to take effect.

§ 2404. These rules shall take effect at the expiration of thirty days after the publication thereof. All former rules of this court are abrogated, except so far as it may be necessary to follow them upon appeals and writs of error which shall be pending when these rules take effect.

[Adopted July 24, 1867]

Digitized by Google

RULE 33

[See Rule 17 of which this is an amendment]

RULE 34

Entering cause on calendar during term.

§ 2405. When the clerk shall be directed to enter a cause upon the calendar during term, he shall transcribe the same into the copies of the calendar furnished to the judges, for which service he shall be entitled to a fee of one dollar, to be paid by the party upon whose motion such entry is ordered.

[Adopted October 31, 1872]

RULE 35

Calling calendar—motions—setting cases for hearing.

§ 2406. On the first day of the term the calendar will be called for the purpose of entering motions, and of ascertaining what cases are for oral argument, and of setting down the same. Motions, and such cases as counsel may desire to argue, may be heard during the first week of the term. Such cases as, upon the call of the calendar, are found to be for oral argument, and as shall not be set down for the first week of the term, shall be heard in their order upon the calendar, at the rate of two per day, commencing upon the first Monday of the term, unless otherwise directed by the court for special reasons, or unless substitutions shall be made by agreement of counsel and with the consent of court.

[Adopted October 31, 1872]

RULE 36

Continuance upon failure to furnish papers.

§ 2407. In case of the failure of the appellant or plaintiff in error to furnish papers as required by Rule 9, the action will be continued by the court upon its own motion, unless an affirmance or dismissal is ordered on application of the other party under Rule 14.

[Adopted June 10, 1875] See Smith v. Ricker, 84 Minn. 210, 87 N. W. 615.

RULE 37

Rehearing.

§ 2408. Applications for rehearing shall be made ex parte, on petition setting forth the grounds on which they are made, and filed within ten days after notice of the decision.

[As amended January 24, 1890] See § 1974.

Digitized by Google

RULE 38

Modification and suspension of rules.

§ 2409. Any of these rules may be relaxed or suspended by the court in term or a judge thereof in vacation, in particular cases, as justice may require.

[As amended January 24, 1890] See Brown v. Potter, 81 Minn. 4, 83 N. W. 457.

RULES FOR THE EXAMINATION AND ADMISSION OF ATTORNEYS.

[Prescribed and adopted by the supreme court May 29, 1891, in pursuance of Laws 1891 ch. 36]

RULE 1

§ 2410. Attorneys of five years standing from any other state or territory of the United States or from the District of Columbia, may, in the discretion of the board, be admitted without examination, further than of the papers presented by them to the board.

See In re Crum, 72 Minn. 401, 75 N. W. 3; Laws 1901 ch. 282.

RULE 2

§ 2411. Any attorney of less than five years standing from any other state or territory or from said District, who has studied law, either in a law school or in the office of a practicing attorney, or both, for a period not less than three years, six months of which period shall have been spent in study in the office of a practicing attorney in this state, may be examined by said board as hereinafter prescribed.

RULE 3

§ 2412. Any person not an attorney, who shall have studied law for a period of not less than three years within the five years preceding his application for examination, either in a law school or in the office of a practicing attorney, or both, but of which at least six months shall have been in the office of some practicing attorney in this state, may be examined by said board as hereinafter prescribed; provided, that when any applicant shall have studied at least six months as aforesaid in the office of some practicing attorney of this state the board may, in its discretion, accept as a part of said three years' study, any period of study within said five years pursued elsewhere than in a law school or the office of a practicing attorney. (As amended April 6, 1893, Dec. 23, 1897).

Digitized by Google

RULE 4

§ 2413. Any person applying to said board shall present to the secretary thereof, an application in writing, stating his name, age and occupation, if any; his present residence; how long he has resided in this state, and his places of residence during the preceding three years; the course or nature of his general education, in what educational institutions it was pursued, and the time spent therein. He shall also present his affidavit stating that he is twenty-one years of age, and a citizen of the United States, or that he has declared his intention to become such.

RULE 5

§ 2414. All applicants, except attorneys of five years standing, shall also state in their affidavits where and during what time they have studied law, in what law school, if any, and for what period of time; the name and place of residence of every attorney in this state and elsewhere, in whose office they have studied, and the period of study in such office.

RULE 6

§ 2415. If the applicant be an attorney from some other state or territory, or from said District, he shall at the same time present to said secretary his certificate of admission, and the certificate of a judge of a court of record thereof, or in lieu thereof, the certificate of two practicing attorneys of such state, territory or District, that the judge or attorneys so certifying are well acquainted with such applicant and that he is a person of good moral character, and a like certificate from two practicing attorneys of this state, and, unless he be an attorney of five years standing, a certificate of the attorney in this state in whose office he shall have studied, stating how long and when he so studied. Any person not an attorney shall at the same time present a certificate of two practicing attorneys in this state, that he is well known to them and is a person of good moral character, and if part of his time of study was at a law school, his diploma, if he have one, or the certificate of the principal or of a professor of such law school, stating how long he studied at such school, and the certificate of any attorney in whose office he studied, stating how long he so studied. The certificate of character shall not be conclusive, but the board may make such further inquiry as they may deem best. If the papers so required to be presented, be satisfactory, the board may direct the applicant to attend before it at the next examination appointed to be held, not less than three weeks after said papers are so presented.

Digitized by Google

RULE 7

§ 2416. Upon such examination said board shall examine applicants in such branches of general education as it may deem expedient, and upon the following subjects:

The law of real property, including mortgages and other liens on real property, conveyances and trusts; taxation; equity jurisprudence; Minnesota statute law; code pleading and practice; constitutional law; conflict of laws; criminal law; evidence; corporation law, including both private and municipal corporations; contracts, including sales, bailments, negotiable instruments; landlord and tenant; partnership; agency; suretyship; frauds; damages; chattel mortgages and other liens on personal property; torts, including negligence; domestic relations; executors, administrators and wills. In connection with the foregoing topics a knowledge of the common law as affected by Minnesota statute law will be required. (As amended June 13, 1901).

RULE 8

§ 2417. The examinations shall be held in the cities of St. Paul, Minneapolis, Winona, Mankato, Duluth and Fergus Falls.

RULE 9

§ 2418. Persons admitted as attorneys and counselors shall take the oath as prescribed by section 8, chapter 72, Gen. Stat., 1878.

Digitized by Google

CHAPTER XXXI

RULES OF THE DISTRICT COURT

RULE 1

Bonds.

§ 2419. All bonds shall be duly proved or acknowledged in like manner as deeds of real estate, before the same shall be received or filed. No practicing attorney or counselor at law shall be received as a surety on any bond or undertaking required in an action, whether he be the attorney of record in the action or not, except where such bond or undertaking shall be executed on behalf of a non-resident party.

See Schuek v. Hagar, 24 Minn. 339.

RULE 2

Qualification of sureties.

§ 2420. The qualifications of sureties must be as follows: Each must be a resident and freeholder of this state, and worth the amount specified in the bond or undertaking above his debts and liabilities, and exclusive of his property exempt from execution, except where the statute otherwise provides. Whenever a judge or other officer approves the security to be given in any case, or reports upon its sufficiency, he must require the sureties to justify by affidavit.

Gale v. Seifert, 39 Minn. 171, 39 N. W. 69.

RULE 3

Notice of discharge of garnishment and attachment.

§ 2421. Garnishments shall not be discharged under section 198, chapter 66, General Statutes 1878 [G. S. 1894 § 5342], nor attachments under section 157 of the same chapter [G. S. 1894 § 5299], without notice of the application therefor to the adverse party.

RULE 4

Attorneys must subscribe papers.

§ 2422. On process or papers to be served, the attorney, besides subscribing or indorsing his name, shall add thereto his place of residence, and the particular location of his place of business by street, number, or otherwise; and if he shall neglect to do so, papers may be served on him through the mail, by directing them according to the best information that can conveniently be obtained concerning his residence. This rule shall apply to a party who prosecutes or defends in person, whether he be an attorney or not.

Digitized by Google

RULE 5

Copies of papers must be legible.

§ 2423. All copies of papers served shall be legible, and if not legible may be returned within twenty-four hours after service thereof, and the service of an illegible paper so returned shall be deemed of no force or effect.

RULE 6

Causes of action must be separately stated and numbered.

§ 2424. In all cases of more than one distinct cause of action, defence, counterclaim or reply, the same shall not only be separately stated, but plainly numbered; and all pleadings not in conformity with this rule may be stricken out on motion.

RULE 7

Numbering and marking folios.

§ 2425. The attorney or other officer of court who draws any pleading, affidavit, case, bill of exceptions or report, decree or judgment, exceeding two folios in length, shall distinctly number and mark each folio of one hundred words in the margin thereof, or shall number the pages and the lines upon each page, and all copies, either for the parties or court, shall be numbered and marked, so as to conform to the originals. And if not so marked and numbered, any pleading, affidavit, bill of exceptions, or case, may be returned by the party on whom the same is served.

RULE 8

[Notice of motion—accompanying papers. See § 2059.]

RULE 9

[Effect of non-appearance on motion. See §§ 2047, 2075.]

RULE 10

[Order of proof and argument on motions. See § 2067.]

RULE 11

[Orders to show cause—when granted. See § 2041.]

RULE 12

Motions for the correction of pleadings.

§ 2426. Motions to strike out or correct any pleading under section 107 of chapter 66, General Statutes 1878 [G. S. 1894 § 5248], must be heard before demurring to or answering such pleading, and

Digitized by Google

before the time for demurring to or answering such pleading expires, unless the court, for good cause shown, shall extend the time for demurring to or answering such pleading to permit such motion to strike out or correct such pleading to be heard.

RULE 13

Special term calendar.

§ 2427. The clerk in each county shall keep a special term calendar, on which he shall enter all actions or proceedings noticed for special term according to the date of issue or service of notice of motion. Notes of issue of all matters for special term shall be filed with the clerk one day before the term. And no case shall be entered on the calendar unless such note of issue shall have been filed.

RULE 14

Filing papers for special term.

§ 2428. So all affidavits, notices and other papers, designed to be used in any cause at special term, shall be filed with the clerk at or before the hearing of the cause unless otherwise directed by the court.

RULE 15

[When papers must be filed. See § 2088.]

RULE 16

Failure to file pleadings.

§ 2429. Whenever any party to an action fails to file any pleading therein as required by section 80 of chapter 66, General Statutes 1878 [G. S. 1894 § 5220], the action shall, upon the application of the adverse party, be continued to the next general term of said court, and if both parties fail to so file their pleadings, the action shall be stricken from the calendar.

RULE 17

[Application for order without notice. See § 2073.]

RULE 18

Extension of time to plead—affidavit of merits.

§ 2430. No order extending the time to answer or reply shall be granted, unless the party applying for such order shall present to the judge to whom the application shall be made an affidavit of merits, or an affidavit of his attorney or counsel that from the statement of the case made to him by such party he verily believes that he has a good and substantial defence, upon the merits, to the pleading or some part thereof.

Digitized by Google

RULE 19

Affidavit of merits.

§ 2431. In an affidavit of merits, the affiant shall state that he has fully and fairly stated the case and facts in the case to his counsel, and that he has a good and substantial defence or cause of action on the merits, as he is advised by his counsel after such statement, and verily believes true, and shall also give the name and place of residence of such counsel.

§ 2432. An affidavit of merits must ordinarily be made by a party.[1] If made by an attorney it must state why it was not made by the party and that the affiant has personal knowledge of the facts stated.[2] An officer of a corporation may make an affidavit of merits for the corporation when it is a party to an action.[3] The district court may waive defects in an affidavit of merits.[4] Whether an affidavit complies with this rule is a question for the district court and not for the supreme court.[5]

[1] People's Ice Co. v. Schlenker, 50 Minn. 1, 52 N. W. 219.

[2] Id.; Olivier v. Cunningham, 51 Minn. 232, 53 N. W. 462; Frankoviz v. Smith, 35 Minn. 278, 28 N. W. 508; Forin v. City of Duluth, 66 Minn. 54, 68 N. W. 515.

[3] Forin v. City of Duluth, 66 Minn. 54, 68 N. W. 515.

[4] Sheldon v. Risedorph, 23 Minn. 518; Nye v. Swan, 42 Minn. 243, 44 N. W. 9; McMurran v. Bourne, 81 Minn. 515, 84 N. W. 338; Fitzpatrick v. Campbell, 58 Minn. 20, 59 N. W. 629.

[5] Rhodes v. Walsh, 58 Minn. 196, 59 N. W. 1000.

RULE 20

Amendment of pleadings—opening defaults—affidavit of merits.

§ 2433. In all cases where an application is made for leave to amend a pleading or for leave to answer or reply after the time limited by statute or to open a judgment and for leave to answer and defend, such application shall be accompanied with a copy of the proposed amendment, answer or reply as the case may be, and an affidavit of merits and be served upon the opposite party.

RULE 21

[Service of orders and notices—when personal. See § 2090.]

RULE 22

[Proof of service of orders. See § 2091.]

RULE 23

Publication of summons in divorce cases.

§ 2434. Orders for publication of summons in actions for divorce will only be granted upon an affidavit of the plaintiff stating facts showing that personal service cannot well be made.

Digitized by Google

RULE 24

Divorce cases to be tried only at general term.

§ 2435. All divorce cases shall be tried at general term in all counties wherein three or more general terms of court are appointed to be held during any one year.

RULE 25

Injunction to prevent sale on execution or foreclosure.

§ 2436. In cases where a sale of real estate upon execution or foreclosure by advertisement is sought to be enjoined, the application for an injunction shall be heard and determined upon notice to the adverse party either by motion or order to show cause. The application shall be made immediately on receiving notice of the publication of the notice of sale. And no injunction in such case shall be allowed ex parte, unless the rights of the applicant would otherwise be prejudiced, nor unless a satisfactory excuse is furnished showing why the application was not made in time to allow the same to be heard and determined upon notice before the day of sale. And in all other cases, if the court or judge deem it proper that the defendant or any of several defendants be heard before granting the injunction, an order may be made requiring cause to be shown at a specified time and place why the injunction should not be granted.

RULE 26

Bond on injunction and ne exeat.

§ 2437. In every case where no special provision is made by law as to security, the court or officer allowing a writ of injunction or ne exeat, shall require an undertaking or bond on behalf of the party applying for such writ, in not less than two hundred and fifty dollars, executed by him or some person on his behalf, as principal, together with one or more sufficient sureties, to be approved by the court or officer allowing the writ, and to the effect that the party applying for the writ will pay the party enjoined or detained such damages as he may sustain by reason of the writ, if the court shall eventually decide that the party was not entitled to the same.

RULE 27

Time to answer when demurrer overruled.

§ 2438. When a demurrer is overruled with leave to answer or reply, the party demurring shall have twenty days after notice of the order, if no time is specified therein, to file and serve an answer or reply, as the case may be.

Digitized by Google

RULE 28

Change of venue.

§ 2439. A change of venue or place of trial will not be granted unless the party applying therefor use due diligence to procure the same within a reasonable time after issue joined in the action and the ground for the change shall have come to the knowledge of the applicant. Nor will a change be granted where the other party will lose the benefit of a term, unless the party asking for such change shall move therefor at the earliest reasonable opportunity after issue joined, and he shall have information of the ground of such change. In addition to what has usually been stated in affidavits concerning venue, either party may state the nature of the controversy, and show how his witnesses are material; and may also show where the cause of action or defence or both of them arose; and these facts will be taken into consideration by the court in fixing the place of trial.

RULE 29

[Framing issues for the jury. See § 540.]

RULES 30, 31, 32, 33

[Relating to depositions. See §§ 492-495.]

RULE 34

Removing papers from custody of clerk.

§ 2440. No papers on file in a cause shall be taken from the custody of the clerk, except by the judge for his own use, or a referee appointed to try the action. Before a referee shall take any files in said action, the clerk shall require a receipt therefor, signed by the referee, specifying each paper so taken.

RULE 35

[Dismissal of action on trial before referee. See § 560.]

RULE 36

[Filing report of referee. See § 562.]

RULE 37

Calendar calls.

§ 2441. There shall be two calls of the calendar. The first shall be preliminary, the second peremptory. All preliminary motions, except motions for continuance, shall be made on the first call. The cases shall be finally disposed of in their order upon the calendar on the second call. Where, upon the preliminary call, or at any time afterwards, no response is made by either party to a case,

Digitized by Google

the case shall be stricken from the calendar unless otherwise directed by the court.

RULE 38

[Motions for continuance—when made—affidavits. See §§ 387, 388.]

RULE 39

[Order of challenges in civil actions. See § 602.]

RULE 40

[Order of trial and argument. See § 820.]

RULE 41

[Requests for instructions. See § 882.]

RULE 42

[Presence of parties and counsel upon return of verdict. See § 922.]

RULE 43

Notice of stay of proceedings.

§ 2441a. Upon the rendering of a verdict of a jury or the filing of a decision by the court in any case, no stay of proceedings, after the first, will be granted without notice to the counsel or consent of counsel for the opposite party.

RULE 44

[Taxation of costs—appeal from clerk. See § 1219.]

RULE 45

[Judgments to be signed by clerk. See § 1229.]

RULE 46

[Entry of judgment by defeated party. See § 1230.]

RULE 47

[Service of bill of exceptions or case after trial by court or referee. See § 1781.]

RULE 48

[Form of case or bill of exceptions. See § 1779.]

Digitized by Google

RULE 49

Default of juror.

§ 2442. If during the progress of the term a juror does not appear and answer when called by the court the clerk shall make an entry of the default of such juror, and deduct from his time of service the day upon which such default shall have occurred, unless the court for good cause shall excuse such absence.

RULE 50

Customary practice.

§ 2443. In cases where no provision is made by statute or by these rules, the proceeding shall be according to the customary practice, as it has heretofore existed in the several district courts of the state.

§ 2444. Whenever the statute and rules of court fail to prescribe a rule of practice in a particular case, the former rule pertaining to such cases, legal or equitable, so far as practicable, is retained.

Berkey v. Judd, 14 Minn. 394 Gil. 300.

Relaxation of rules.

§ 2445. It is in the discretion of the court to waive compliance with its rules.[1] But this is a discretion which ought rarely to be exercised.[2]

[1] Sheldon v. Risedorph, 23 Minn. 518; Gale v. Seifert, 39 Minn. 171, 39 N. W. 69; Nye v. Swan, 42 Minn. 243, 44 N. W. 9; Rhodes v. Walsh, 58 Minn. 196, 59 N. W. 1000; Fitzpatrick v. Campbell, 58 Minn. 20, 59 N. W. 629; Gillette-Herzog Mfg. Co. v. Ashton, 55 Minn. 75, 56 N. W. 576; Brown v. Potter, 81 Minn. 4, 83 N. W. 457.

[2] Proctor v. Soulier, 82 Hun (N. Y.) 353.

Authority to make rules.

§ 2446. As to modes of procedure it is competent for the court to make and alter its rules as the ends of justice may require, when there are no statutory directions. But rules of court cannot override statutes.[1] The district court cannot make rules binding on the supreme court as to matters within the province of the latter.[2]

[1] State v. Parrant, 16 Minn. 178 Gil. 157.

[2] State v. Otis, 71 Minn. 511, 74 N. W. 283.

Digitized by Google

Digitized by Google

FORMS

§ 2447. Summons—ordinary form.

State of Minnesota — District Court
County of — Judicial District

John Doe,
Plaintiff,
v.
Richard Roe,
Defendant.

The state of Minnesota to the above named defendant:

You [and each of you] are hereby summoned and required to answer the complaint in the above entitled action [of which a copy is hereto annexed and herewith served upon you] [which has been filed in the office of the clerk of said court] and to serve a copy of your answer thereto upon the subscriber at his office in the city of , Minnesota, within twenty days after the service of this summons upon you, exclusive of the day of such service.

If you fail to answer the complaint within such time the plaintiff will [take judgment against you for the sum of dollars (with interest at per cent per annum from 19)] [have the amount he is entitled to recover ascertained by the court, or under its direction, and take judgment for the amount so ascertained] [apply to the court for the relief demanded therein].

.....
Attorney for Plaintiff,
[Office and post-office address]

§ 2448. Summons, notice of lis pendens, and notice of no personal claim, in actions to determine adverse claims.

SUMMONS

State of Minnesota — District Court
County of — Judicial District

John Doe,
Plaintiff,
v.
Richard Roe, also all other persons or parties unknown, claiming any right, title, estate, lien, or interest in the real estate described in the complaint herein,
Defendants.

The state of Minnesota to the above named defendants:

You and each of you are hereby summoned and required to answer the complaint in the above entitled action which has been filed in

Digitized by Google

the office of the clerk of said court and to serve a copy of your answer thereto upon the subscriber at his office in the city of , Minnesota, within twenty days after the service of this summons upon you, exclusive of the day of such service.

If you fail to answer the complaint within such time the plaintiff will apply to the court for the relief demanded therein.

.....
Attorney for Plaintiff,
[Office and post-office address]

NOTICE OF LIS PENDENS

[Title of action]

Notice is hereby given that an action has been commenced in this court by the above named plaintiff against the above named defendants the object of which is to obtain a judgment that said plaintiff is the owner in fee of the following described real property and that said defendants and each of them have no estate or interest therein or lien thereon: [Describe property as in the complaint], situate in county, Minnesota.

[Date] .....
Attorney for Plaintiff,
[Office and post-office address]

NOTICE OF NO PERSONAL CLAIM

[Title of action]

To the above named defendants:

Take notice that no personal claim is made against you or any of you in this action and that the object thereof is to obtain a judgment that the plaintiff is the owner in fee of the following described real property and that you and each of you have no estate or interest therein or lien thereon:

[Describing property as in complaint]

.....
Attorney for Plaintiff,
[Office and post-office address]

§ 2449. Garnishee summons and notice to defendant.

State of Minnesota — District Court
County of — Judicial District

.....
Plaintiff,
vs.
.....
Defendant,
.....
Garnishee.

The state of Minnesota to the above named garnishee:

You are hereby summoned and required to appear before [the

Digitized by Google

above named district court (at its chambers) (at a special term thereof to be held)] [the Honorable , judge of the above named district court, at his chambers] [, clerk of the above named district court, at his office] in the court-house, in the city of , on 19 , at 10 o'clock a. m., and answer touching your indebtedness to the above named defendant and as to any property, money or effects of said defendant in your possession or under your control.

.....
Attorney for Plaintiff,
[Office and post-office address]

To , the above named defendant:

Take notice that the foregoing summons was served by , upon , the above named garnishee, on 19 , in the city of , county, Minnesota, by handing to and leaving with him personally a copy thereof.

You are hereby required to appear and take part in the examination of said garnishee at the time and place specified in the foregoing summons.

.....
Attorney for Plaintiff,
[Office and post-office address]

§ 2450. Affidavit for publication of summons—general form.

[Title of action]
[Venue]

being duly sworn, says:

I. That he is the attorney for the plaintiff in this action.

II. That he believes that the defendant is not a resident of this state and cannot be found therein.

III. [That he has deposited in the post-office at , Minnesota, a copy of the summons herein, properly enveloped, with postage prepaid, and directed to the defendant at , [New York], his place of residence.] [That the residence of the defendant is not known to affiant.]

IV. [That the subject of this action is (real) (personal) property in this state and the defendant has or claims a lien or interest, actual or contingent, therein, and the relief demanded consists (wholly) (partly) in excluding the defendant from any interest or lien therein.] [1] [That the subject of this action is (real) (personal) property in this state and the defendant has or claims a lien or interest, actual or contingent, therein.] [That the subject of this action is (real) (personal) property in this state and the relief demanded consists (wholly) (partly) in excluding the defendant from any interest or lien therein.] [That the defendant is a foreign corporation and has property within this state.] [That the defendant is a resident of this state and has departed therefrom to avoid the service of a summons.] [That the defendant is a resident of this state and has departed therefrom with intent to defraud his creditors (and to avoid the service of a summons).] [That the defendant is a resident of this state and keeps himself concealed therein to avoid the

Digitized by Google

service of a summons.] [That the defendant is not a resident of this state but has property therein and said court has jurisdiction of the subject of this action.] [That this action is for divorce on the ground of (stating a statutory ground in the language of the statute).] [That the object of this action is to foreclose a mortgage on real estate in county, where the action is brought.] [That the object of this action is to enforce a lien for (describing the lien in general terms) on real estate in county, where the action is brought.]

[Jurat] .....

Attorney for Plaintiff,
[Office and post-office address]

[1] Customarily used in actions to determine adverse claims.

§ 2451. Publication of summons against unknown heirs—affidavit and order.

[Title of action]
[Venue]

being duly sworn, says:

I. That he is the plaintiff in this action.

II. That it is an action relating to real property situated in this state, being a statutory action to determine adverse claims to [describe property].

III. That he brings this action claiming to be the owner in fee of said property and seeking to have all adverse claims thereto determined.

IV. That he is informed and verily believes that on or about 19 , one , residing at , died [intestate], leaving heirs whose names and present residences are to affiant unknown.

V. That at the time of his death the said had or claimed, as affiant is informed and verily believes, some estate or interest in or lien upon said property adverse to affiant.

VI. That affiant has [state just what has been done to ascertain names and residences of the heirs], but has been unable to ascertain their names and present residences and brings this action against them as "the unknown heirs" of , deceased.

VII. That affiant is desirous of having the summons herein served upon said heirs by publication, as authorized by General Statutes 1894 § 5840, to the end that their claims to said property, if any they have, be determined.

[Jurat] .....

Upon the filing of the above affidavit it is ordered that summons herein be served upon the unknown heirs mentioned in said affidavit by publication in the manner prescribed by General Statutes 1894 § 5205.

[Date] .....

Judge.

Digitized by Google

§ 2452. Publication of summons in action for divorce—affidavit and order.

[Title of action]
[Venue]

being duly sworn, says:

I. That she is the plaintiff in this action.

II. That she believes that defendant is not a resident of this state and cannot be found therein.

III. That the residence of defendant is not known to affiant.

IV. That this is an action for divorce in one of the cases prescribed by law, to wit, for absolute divorce on the ground [state ground in language of statute].

V. That personal service of summons on the defendant cannot well be made [because his residence and whereabouts are unknown to affiant].

[Jurat] .....

Upon the filing of the foregoing affidavit it is ordered that summons herein be served upon the defendant by publication in the manner prescribed by General Statutes 1894 § 5205.

[Date] .....

Judge.

§ 2453. Affidavit of publication of summons.

[Title of action]
[Venue]

being duly sworn, says that he is the [publisher and] printer of the , a [weekly] [daily] newspaper, printed and published in the city of , county, Minnesota; that the summons in the above entitled action, a copy of which taken from said newspaper is hereto attached, was published in said newspaper once each week for six consecutive weeks, beginning in the issue of , 19 , and closing in the issue of , 19 .

[Jurat] .....

§ 2454. Affidavit of service of summons—general form.

[Venue]

being duly sworn, says that on 19 , in the city of , county, Minnesota, he served the foregoing summons [and complaint] on , the defendant therein named, * * * [continuing as in one of the following forms.]

* * * personally, by handing to and leaving with him [a copy] [copies] thereof.

[Jurat] .....

* * * by leaving [a copy] [copies] thereof for him at his house of usual abode, with , a person of suitable age and discretion, then resident therein.

[Jurat] .....

Digitized by Google

* * * a corporation, by handing to and leaving with , its [secretary] [president] [treasurer] [managing agent] [cashier] [one of its directors] [mayor], [a copy] [copies] thereof.

[Jurat] .....

* * * a foreign corporation doing business in this state, by handing to and leaving with , the person designated by said corporation, according to law, upon whom service of summons against it may be made, [a copy] [copies] thereof.

[Jurat] .....

* * * a minor under fourteen years of age, personally, by handing to and leaving with him [a copy] [copies] thereof, and by handing to and leaving with , his [mother] [a copy] [copies] thereof.

[Jurat] .....

* * * an insane person, by handing to and leaving with him [a copy] [copies] thereof and by handing to and leaving with , his guardian, [a copy] [copies] thereof.

[Jurat] .....

§ 2455. Affidavit of service of summons in garnishment proceedings.

[Venue]

being duly sworn, says that on 19 , in the city of , county, Minnesota, he served the foregoing summons upon , the garnishee therein named, by handing to and leaving with him personally a copy thereof; that he then and there paid to the said , one dollar and cents, his fees in advance for one day's attendance and mileage; that on 19 , in the city of , in county, Minnesota, he served upon , the defendant named in the foregoing summons, the foregoing notice of garnishee examination and a copy of the foregoing garnishee summons by [describe mode of service as in § 2454].

[Jurat] .....

§ 2456. Return of service of summons—as to one defendant.

I, , [deputy] sheriff of county, Minnesota, hereby certify and return that on 19 , in the city of , in said county and state, I served the foregoing summons [and complaint] on , the defendant therein named [one of the defendants therein named] * * * [continuing as in the forms under § 2454, omitting the jurat.]

[Date] .....

Fees:

.....

.....

.....

Digitized by Google

§ 2457. Return of service of summons—several defendants.

I, , [deputy] sheriff of county, Minnesota, hereby certify and return, that in said county and state I served the foregoing summons upon the several defendants therein named, personally, by handing to and leaving with each of them, a copy thereof, at the times and places indicated below:

On , in the city of , on 19 .

[Date] .....

Fees:

.....

.....

.....

§ 2458. Return on summons that defendant cannot be found.

I, , sheriff of county, Minnesota, hereby certify and return that I have made diligent search and inquiry but have been unable to find the defendant , named in the foregoing summons, in said county; that he cannot be found therein, is not a resident thereof and has no usual place of abode therein.

[Date] .....

Fees:

.....

.....

.....

§ 2459. Admission of service of summons.

I admit that the [foregoing] [within] summons [and complaint] [was] [were] served upon me personally by the delivery of [a copy] [copies] thereof, in the city of , Minnesota, on 19 .

Attest: .....

..... Defendant.

§ 2460. Notice of appearance.

[Title of action]

To ,

Attorney for Plaintiff.

Take notice that I am retained by and appear for the defendant in this action [and demand a copy of the complaint] [specially and for the sole purpose of].

.....

Attorney for Defendant,

[Office and post-office address]

§ 2461. Service of notices—affidavit of.

[Title of action]

[Venue]

being duly sworn, says that on 19 , in the city of , county, Minnesota, he served the [above] [within] notice of on , attorney for the [plaintiff] in this action, [* * * add one of the following].

Digitized by Google

* * * personally, by handing to and leaving with him a copy thereof.

[Jurat] .....

* * * by leaving a copy thereof, at his office, during his absence, with , his clerk.

[Jurat] .....

* * * by leaving a copy thereof, at his office, during his absence, with , who was then and there in charge of said office.

[Jurat] .....

* * * by leaving a copy thereof in a conspicuous place in his office, between the hours of and o'clock in the forenoon, there being no person in said office at the time of such service.

[Jurat] .....

* * * by leaving a copy thereof at his residence, between the hours of and o'clock in the forenoon, with , a person of suitable age and discretion; that immediately prior to such service he called at the office of said attorney to make service there and found it closed.

[Jurat] .....

* * * by depositing a copy thereof, properly enveloped, with postage prepaid and addressed to said attorney at , , his place of residence, in the post-office at , Minnesota, where affiant, who is the attorney for the [defendant] in this action, resides.

[Jurat] .....

§ 2462. Notice of motion—general form.

[Title of action]

To ,

Attorney for [Plaintiff].

Take notice that on the affidavits of which copies are herewith served upon you and [on the pleadings and all the files and proceedings herein] the [plaintiff] [defendant] will move the court [at a special term thereof to be held] [at its chambers] in the court-house in the city of , on 19 , [at o'clock a. m.,] [at the opening of court on that day], or as soon thereafter as counsel can be heard, for an order [specify relief sought] on the ground of [specify ground generally except in the case of irregularity which must be particularized], [and for such other relief as may be just], with costs. .....

Attorney for [Defendant],
[Office and post-office address]

Digitized by Google

§ 2463. General form of order.

Short form

[Title of action]

On motion of , attorney for the [plaintiff], , attorney for the [defendant], appearing in opposition [no one appearing in opposition],

It is ordered that [specify relief granted] [upon condition that], with ten dollars costs [to abide the event].

[Date] .....

Judge.

Customary form

On reading and filing [1] the [foregoing] affidavits of [name affiants] [and on the pleadings, files and proceedings herein], and on motion of , attorney for the [plaintiff], , attorney for the [defendant], appearing in opposition [no one appearing in opposition and proof of due service of notice of motion being made],

It is ordered [continuing as above].

[1] The statement to the effect that the judge files the affidavits is a fiction and ought to be omitted. The practice of specifying the papers upon which the order is made is derived from New York where it is required by rule of court, the primary object being to assure the appellate court that it has before it all the evidence upon which the order was based. We have no such rule of court and the object of the rule is attained here by a certificate of the trial judge attached to the return of the clerk. See § 2637. On orders to be served it is desirable that the New York practice should be followed, and of course it is proper in all cases.

§ 2464. Order denying motion—general form.

[Title of action]

A motion having been made herein by the [plaintiff] for an order [describing order sought], appearing for the [plaintiff] and , attorney for [the defendant], appearing in opposition,

It is ordered that said motion be denied with ten dollars costs to [defendant] [to abide the event].

[Date] .....

Judge.

§ 2465. Order to show cause as a short notice of motion with restraining order.

[Title of action]

[Affidavit to justify order]

NOTICE OF MOTION

To ,

Attorney for [Plaintiff].

Take notice that on the [pleadings, files and proceedings herein] and the affidavits of which copies are herewith served upon you, the

Digitized by Google

[defendant] will move the court, at a time and place to be fixed by an order to show cause, for an order [specifying the relief sought with particularity], on the ground , and for such other relief as may be just, with costs.

.....
Attorney for [Defendant],
[Office and post-office address]

ORDER TO SHOW CAUSE

It having been made to appear to the court by the affidavit of , that the motion indicated in the above notice of motion should be heard on shorter notice than eight days, on motion of , attorney for the [defendant],

It is ordered that the [plaintiff] show cause before the court [at a special term thereof to be held] [at its chambers] in the court-house in the city of , on 19 , [at the opening of court on that day] [at o'clock a. m.], or as soon thereafter as counsel can be heard, why an order should not be made for the relief specified in said notice.

And it is further ordered that personal service of this order and the above affidavit and notice be made on the [plaintiff] [1] by exhibiting to him the originals and leaving with him copies thereof, within [twenty-four hours]; [and that all proceedings herein on the part of the (plaintiff) be and the same are hereby stayed until the hearing and determination of said motion]; [and that the (plaintiff) be and he is hereby restrained from (state matters) until the hearing and determination of said motion].

[Date] .....
Judge.

[1] If there is no restraining order service on the attorney may properly be directed.

§ 2466. General form of order to show cause when employed as a citation.

[Title of action or proceeding]

[Affidavit to justify order]

On the above affidavit and on motion of , attorney for the [plaintiff],

It is ordered that show cause before the court [at a special term thereof to be held] [at its chambers] in the court-house in the city of , on 19 , at o'clock a. m., why an order should not be made [describing order sought], and why the said should not have such other relief as may be just and costs.

And it is further ordered that personal service of this order and the above affidavit be made on the said by exhibiting to him the originals and leaving with him copies thereof within [twenty-four

Digitized by Google

hours]; [and that all proceedings herein on the part of the said be and the same are hereby stayed until the hearing and determination hereon] [and that the said be and he is hereby restrained from (state matters) until the hearing and determination hereon].

[Date] .....

Judge.

§ 2467. Affidavit of merits by party.

[Title of action]

[Venue]

being duly sworn, says that he is the [plaintiff] [defendant] in this action; that he has fully and fairly stated the case and facts in the case to his counsel, , a resident of , Minnesota, and has a good and substantial [defence] [cause of action] on the merits, as he is advised by his counsel after such statement, and verily believes true.

[Jurat] .....

§ 2468. Affidavit of merits by attorney.

[Title of action]

[Venue]

being duly sworn, says that he is the attorney for the defendant in this action and resides in , Minnesota; that he has personal knowledge of the facts constituting defendant's defence to said action and verily believes that such facts constitute a good and substantial defence on the merits; that the reason why this affidavit of merits is not made by the defendant personally is that [state reasons].

[Jurat] .....

§ 2469. Acknowledgment, justification and approval of bond.

[Venue]

On 19 , before me, a notary public within and for said county, personally appeared and , to me known to be the persons described in and who executed the foregoing instrument and acknowledged that they executed the same as their free act and deed.

[Notarial seal] .....

Notary Public,

County, Minn.

[Venue]

being duly sworn, say, each for himself, that he is one of the sureties named in the foregoing bond; that he is a resident and freeholder of county, Minnesota, and worth the amount of dollars specified in said bond, above his debts and liabilities and exclusive of his property exempt from execution.

[Jurat] .....

.....

I hereby approve the above bond and the sureties thereon.

[Date] .....

Judge.

Digitized by Google

§ 2470. General form of verification for petition.

[Venue]

being duly sworn, says that he has read the foregoing petition subscribed by him and knows the contents thereof; and that the same is true of his own knowledge, [except as to the matters therein stated on information and belief, and as to those matters he believes it to be true].

[Jurat] .....

§ 2471. Notice to municipality of claim for personal injury.

NOTICE OF PERSONAL INJURY AND CLAIM

To the Council of the city of :

Take notice that on 19 , the undersigned was injured in the city of under the following circumstances [here state circumstances of injury with particularity as to time and place and show that it was a natural consequence of some "defect" in a bridge, street, road, sidewalk, park, public ground, ferry boat or public works of the city].

And you will further take notice that the undersigned claims that said city is legally liable to compensate him for said injury and he hereby demands of said city the sum of dollars as compensation therefor.

[Date] .....

To the Clerk of the city of :

You will please present the above notice of personal injury and claim to the council of the city of at its next meeting.

.....

§ 2472. Notice to publisher of libel.

To ,

Publisher of the ,

Take notice that the following statements published of and concerning the undersigned in the , on 19 , are false and defamatory.

[Insert statements verbatim]

[Date] .....

§ 2473. Notice to produce documents at the trial.

[Title of action]

To ,

Attorney for [Plaintiff].

You are hereby notified to produce at the trial of this cause [all the letters written by to , between 19 , and 19 , in relation to (specify subject matter)] [a certain deed executed by to , dated on or about 19 , and conveying the (describing property)].

.....

Attorney for [Defendant],

[Office and post-office address]

Digitized by Google

§ 2474. Application by infant plaintiff more than fourteen years old for guardian ad litem.

[Title of court]

To the above named Court:

Your petitioner, , respectfully represents:

I. That he is a minor years of age and a resident of county, Minnesota.

II. That he has no general or testamentary guardian.

III. That he has a good cause of action, as he is advised by , an attorney of this court, against one , a resident of county, Minnesota, which he is desirous of having prosecuted at once in this court.

IV. That his father, , is a resident of county, Minnesota, and a responsible and competent person to act as his guardian ad litem to prosecute said action.

Wherefore your petitioner, who has made no other application therefor, prays that the said be appointed as such guardian.

.....

[Verification as in § 2470]

I hereby consent to act as guardian ad litem of , for the purposes stated in the foregoing petition.

[Date] .....

[Venue]

being duly sworn, says that he is the person mentioned in the foregoing petition as the father of the petitioner; that he signed the foregoing consent to act as guardian; that he is a resident of county, Minnesota; that he has no interest in the action mentioned in said petition adverse to the petitioner; and that he is worth at least five hundred dollars above his debts and liabilities and exclusive of his property exempt from execution.

[Jurat] .....

On the foregoing petition, consent and affidavit, and on motion of , attorney for the petitioner,

It is ordered that , be and he is hereby appointed guardian ad litem of , and authorized to prosecute the action mentioned in said petition [upon filing with the clerk a bond approved by me conditioned for the faithful discharge of such trust].

[Date] .....

Judge.

§ 2475. Application by relative of infant plaintiff under fourteen years of age for guardian ad litem.

[Title of court]

To the above named Court:

Your petitioner, , respectfully represents:

I. That he is the [father] of , a minor under fourteen years of age.

Digitized by Google

II. That said minor resides [with your petitioner] in the city of , county, Minnesota.

III. That said minor has no general or testamentary guardian.

IV. That said minor has, as your petitioner verily believes and is advised by , an attorney of this court, a good cause of action against one , a resident of county, Minnesota, which ought, in the interest of said minor, to be prosecuted at once in this court.

V. That your petitioner is a resident of county, Minnesota; that he has no interest in said cause of action adverse to said minor and is worth at least five hundred dollars above his debts and liabilities and exclusive of his property exempt from execution.

VI. [That on 19 , in the city of , said was personally served with written notice of this application.]

Wherefore your petitioner, who has made no other application therefor, prays that he be appointed guardian ad litem of to prosecute such action.

.....

[Verification as in § 2470]

To .....

Take notice that on the foregoing petition, a copy of which is herewith served upon you, the undersigned will move the court [at a special term thereof to be held] [at its chambers] in the court-house, in the city of on 19 , at o'clock a. m., or as soon thereafter as counsel can be heard, for an order appointing guardian ad litem of as prayed in said petition.

.....

Attorney for Petitioner,
[Office and post-office address]

[Venue]

being duly sworn, says that on 19 , in the city of , Minnesota, he served the foregoing petition and notice upon , mentioned therein, personally, by handing to and leaving with him copies thereof.

[Jurat] .....

§ 2476. Application by plaintiff for guardian ad litem of infant defendant under fourteen years of age.

[Title of action]

To the above named Court:

Your petitioner, , respectfully represents:

I. That he is the plaintiff in this action.

II. That [the defendant] [one of the defendants] in this action is a minor under fourteen years of age and resides with his [father] , in the city of , county, Minnesota.

III. That said defendant was personally served with summons herein on 19 .

IV. That said minor has no general or testamentary guardian.

Digitized by Google

V. That on , 19 , said was personally served with written notice of this application.

Wherefore your petitioner, who has made no other application therefor, prays that some suitable person be appointed guardian ad litem of said to appear and defend for him in this action.

.....

[Verification as in § 2470]
[Notice as in § 2475]
[Proof of service of notice as in § 2475]
[Consent as in § 2474.]
[Affidavit as to qualification as in § 2478]
[Order of appointment as in § 2477]

§ 2477. Application by relative of infant defendant under fourteen years for guardian ad litem.

[Title of action]

To the above named Court:

Your petitioner, , respectfully represents:

I. That he is the [father] of , [the defendant] [one of the defendants] in this action.

II. That said defendant is a minor under fourteen years of age and resides with [your petitioner] in the city of , county, Minnesota.

III. That said defendant was served with summons herein on 19 .

IV. That said minor has no general or testamentary guardian.

V. That your petitioner is a resident of county, Minnesota; that he has no interest in this action adverse to said minor; that he has no business connection with the attorney for the plaintiff herein; and that he is worth at least five hundred dollars above his debts and liabilities and exclusive of his property exempt from execution.

VI. [That on 19 , said defendant was personally served with written notice of this application.]

Wherefore your petitioner, who has made no other application therefor, prays that he be appointed guardian ad litem of the said to appear and defend for him in this action.

.....

[Verification as in § 2470]
[Notice as in § 2475 and proof of service of notice as in § 2475 if infant does not reside with the petitioner]

On the above petition [and proof of service of notice] and on motion of , attorney for the petitioner, there being no appearance in opposition,

It is ordered that be and he is hereby appointed guardian ad litem of , and authorized and directed to appear and de-

Digitized by Google

fend for him in this action [and to serve an answer within twenty days of this order].

[Date] .....

Judge.

§ 2478. Application by plaintiff for guardian ad litem of infant defendant over fourteen years of age.

[Title of action]

To the above named Court:

Your petitioner, , respectfully represents:

I. That he is the plaintiff in this action.

II. That , [the defendant] [one of the defendants] in this action is a minor more than fourteen years of age and resides with his [father] in the city of , county, Minnesota.

III. That said defendant was personally served with summons herein on 19 .

IV. That said defendant has no general or testamentary guardian.

V. That said defendant has not applied for the appointment of a guardian ad litem in this action although more than twenty days have elapsed since the summons herein was served upon him.

VI. That on 19 , said defendant was personally served with written notice of this application.

Wherefore your petitioner, who has made no other application therefor, prays that some suitable person be appointed guardian ad litem of the said to appear and defend for him in this action.

.....

[Verification as in § 2470]

To .....

Take notice that on the foregoing petition, a copy of which is herewith served upon you, the undersigned will move the court [at a special term thereof to be held] [at its chambers] in the courthouse in the city of , on 19 , at o'clock in the forenoon, or as soon thereafter as counsel can be heard, for an order appointing some suitable person guardian ad litem of as prayed in said petition.

.....

Attorney for Petitioner,

[Office and post-office address]

[Proof of service of notice as in § 2475]

[Consent as in § 2474]

[Venue]

being duly sworn, says that he is the person who signed the foregoing consent to act as the guardian ad litem of the defendant in the above entitled action; that he is a resident of county, Minnesota; that he has no interest in such action adverse to said defendant; that he has no business connection with the attorney for the plaintiff in said action; and that he is worth

Digitized by Google

at least five hundred dollars above his debts and liabilities and exclusive of his property exempt from execution.

[Jurat] .....

[Order of appointment as in § 2479]

§ 2479. Application of infant defendant more than fourteen years of age for guardian ad litem.

[Title of action]

To the above named Court:

Your petitioner, , respectfully represents:

I. That he is [the defendant] [one of the defendants] in this action and was served with summons herein on 19 .

II. That he is a minor years of age and resides with his father , in the city of , county, Minnesota.

III. That he has no general or testamentary guardian.

IV. That his father is a resident of county, Minnesota, and a responsible and competent person to act as his guardian ad litem in this action.

Wherefore your petitioner, who has made no other application therefor, prays that the said be appointed as such guardian.

.....

[Verification as in § 2470]

[Consent as in § 2474]

[Venue]

being duly sworn, says that he is the person mentioned in the foregoing petition as the father of the petitioner; that he signed the foregoing consent to act as guardian; that he is a resident of county, Minnesota; that he has no interest in the above entitled action adverse to the defendant ; that he has no business connection with the attorney for the plaintiff in said action; and that he is worth at least five hundred dollars above his debts and liabilities and exclusive of his property exempt from execution.

[Jurat] .....

On the foregoing petition, consent and affidavit and on motion of , attorney for the petitioner,

It is ordered that be and he is hereby appointed guardian ad litem of , and authorized and directed to appear and defend for him in this action [and to serve an answer within twenty days of this order].

[Date] .....

Judge.

Digitized by Google

§ 2480. Application by plaintiff for guardian ad litem of nonresident infant defendant.

[Title of action]

To the above named Court:

Your petitioner, , respectfully represents:

I. That he is the plaintiff in this action.

II. That [the defendant] [one of the defendants] in this action is a minor [under fourteen years of age] [over fourteen years of age] and is not within this state and does not reside therein, but resides, as your petitioner is informed and verily believes, in the city of , New York.

III. That said defendant has been duly served with summons herein by publication.

IV. That said minor has no general or testamentary guardian within this state.

V. [That said minor has not applied for the appointment of a guardian ad litem in this action although more than twenty days have elapsed since the summons herein was served upon him.]

Wherefore your petitioner, who has made no other application therefor, prays that some suitable person be appointed guardian ad litem of the said to appear and defend for him in this action.

.....

[Verification as in § 2470]

To and all whom it may concern:

Take notice that on the foregoing petition the plaintiff in the above entitled action will move the court [at a special term thereof to be held] [at its chambers] in the court-house in the city of , on 19 , at o'clock a. m., or as soon thereafter as counsel can be heard, for an order appointing some suitable person as guardian ad litem of to appear and defend for him in said action.

.....

Attorney for Plaintiff,
[Office and post-office address]

[Venue]

being duly sworn, says that he is the [publisher and] printer of the , a [daily] [weekly] newspaper, printed and published in the city of , county, Minnesota; that the petition and notice of motion, of which copies taken from said newspaper are hereto attached, were published in said newspaper once each week for three successive weeks, beginning in the issue of , 19 , and closing in the issue of , 19 .

[Jurat] .....

[Consent as in § 2474]

[Affidavit as to qualification as in § 2474]

On the foregoing petition, proof of publication, consent and affidavit and on motion of , attorney for the plaintiff, there being no appearance in opposition,

Digitized by Google

It is ordered that be and he is hereby appointed guardian ad litem of and authorized to appear and defend for him in this action [and to serve an answer within twenty days of this order].

[Date] .....

Judge.

§ 2481. Bond by guardian ad litem.

Know all men by these presents that we , as principal, and , and , as sureties, are bound unto the state of Minnesota in the sum of dollars, to the payment of which to the said state we jointly and severally bind ourselves, our heirs, executors and administrators.

The condition of this obligation is such that whereas on 19 , , the principal on this bond, was duly appointed guardian ad litem of , a minor, by [Hon. , judge of] the district court for county, Minnesota, for the prosecution of a certain action in said court against one ,

Now, therefore, if the said shall faithfully discharge such trust and duly account to said minor for any money or property that may come into his possession or under his control by virtue of such guardianship then this obligation, which is given in pursuance of General Statutes 1894 § 5160, shall be void; otherwise to remain in full force.

In testimony whereof we have hereunto set our hands this day of , 19 .

Executed in presence of: .....

....

....

[Acknowledgment, justification and approval as in § 2469]

§ 2482. Notice of taking deposition.

[Title of action]

To ,

Attorney for [Plaintiff].

Take notice that the depositions of , , , [and others,] will be taken for use in this action in behalf of [defendant], before , a notary public, at his office No. , in the city of , [Minnesota] [New York], on , 19 .

The examination will begin at 10 o'clock in the forenoon, or within one hour thereafter, and if not completed on that day may be adjourned from day to day and over Sundays and holidays until completed.

.....

Attorney for [Defendant],

[Office and post-office address]

Digitized by Google

§ 2483. Notice of return of deposition.

[Title of action]

To ,

Attorney for [Plaintiff].

Take notice that the depositions of and others taken before , in the city of , on , 19 , have been returned to the clerk.

.....

Attorney for [Defendant],
[Office and post-office address]

§ 2484. Stipulation for taking deposition.

[Title of action]

It is hereby stipulated that the deposition of , residing in the city of , [Minnesota] [New York] may be taken [without the issuance of a commission], for use in this action in behalf of the [plaintiff] [defendant] by [, a notary public] [any notary public] residing in said city, upon the interrogatories and cross-interrogatories hereto attached. The parties reserve the right to object at the trial [to the conduct of the notary in taking, certifying or returning the deposition and] to the competency and credibility of the deponent or the admissibility of his testimony. The deposition shall be taken in accordance with the instructions hereto attached.

[Date]

.....
Attorney for Plaintiff.

.....
Attorney for Defendant.

INSTRUCTIONS TO NOTARY

You shall cause the said to appear before you at your earliest convenience and take his deposition in the following manner:

(1) Examine him apart from all other persons, including the parties to this action and their attorneys or agents.

(2) Require him, before testifying, to swear or affirm before you that he will testify the whole truth and nothing but the truth relative to this cause.

(3) Put the several interrogatories and cross-interrogatories to him in their order and take down his answer to each, fully and clearly, before proceeding to the next, and do not read to him, nor permit him to read, a succeeding interrogatory until the answer to the preceding has been fully taken down.

(4) Do not add to, vary or qualify the interrogatories and cross-interrogatories hereto attached, but require full and explicit answers thereto.

(5) Reduce the testimony to writing and read it to him carefully or permit him to read it, allowing him to make any additions or qualifications he may desire, and then require him to sign it at the

Digitized by Google

end thereof and also upon each piece of paper on which any portion is written.

(6) Attach the completed deposition to this stipulation, together with a certificate of your doings, which may be in the form attached, and return the same by mail, in a sealed envelope addressed to Clerk of District Court [Hennepin County, Minneapolis, Minnesota].

[Certificate to be attached to stipulation and testimony]

[Venue]

I , a notary public in and for said county, do hereby certify that the attached deposition was taken before me in accordance with the attached stipulation, at my office No. , in the city of , [New York] on , 19 ; that the testimony was taken upon the interrogatories and cross-interrogatories attached to said stipulation and herewith returned and was reduced to writing by me; that the deponent, before examination, was sworn by me to testify the whole truth and nothing but the truth relative to the cause specified in said stipulation; that the testimony of the deponent was carefully read to him by me and then subscribed by him; that the instructions attached to said stipulation were in all respects observed by me in taking such deposition.

Witness my hand and seal this day of , 19 .

.....

[Notarial Seal] Notary Public,
County, [New York]

§ 2485. Affidavit and notice of taking deposition before justice of peace.

[Title of action]

[Venue]

being duly sworn, says:

I. That he is the [plaintiff] in this civil action.

II. That summons herein was served upon [defendant] , 19 , and the action is now pending.

III. [That is a material witness for affiant in this action and resides in the city of , Minnesota, which is more than thirty miles distant from the city of , Minnesota, the place of trial.] [That , residing in the city of , Minnesota, is a material witness for affiant in this action and is about to go out of the state and not to return in time for the trial.] [That , residing in the city of , Minnesota, is a material witness for affiant in this action and is so (sick) (infirm) (aged) as to make it probable that he will not be able to attend at the trial.]

[Jurat] .....

On the above affidavit and on application of , attorney for [plaintiff],

The deposition of the witness mentioned in said affidavit will be taken before me, a justice of the peace in and for the city of , Minnesota, at my [office] [court-room] in said city, on , 19 , at 10 o'clock a. m., [or within one hour thereafter.]

Digitized by Google

You are hereby notified to be present then and there and to put such interrogatories to the deponent as you may see fit.

Attest: .....

..... Justice of the Peace,
County, Minnesota.

§ 2486. Affidavit, notice and order for commission to take deposition.

[Title of action]

[Venue]

being duly sworn, says:

I. That he is the [plaintiff] in this action.

II. That an issue of fact was joined herein on , 19 , by service of [an answer] [a reply].

III. That are material witnesses for [plaintiff] in this action and reside in the city of , [New York].

[Jurat] .....

[Title of action]

To ,

Attorney for [Defendant].

Take notice that on the foregoing affidavit, a copy of which is herewith served upon you, and on the pleadings and proceedings herein, the [plaintiff] will move the court [at a special term thereof to be held] [at its chambers] in the court-house in the city of , on 19 , at o'clock a. m., or as soon thereafter as counsel can be heard, for an order directing that a commission issue to , a notary public residing in the city of , [New York] authorizing and directing him to take the depositions of the witnesses mentioned in the foregoing affidavit for use in this action in behalf of the [plaintiff].

.....
Attorney for [Plaintiff].
[Office and post-office address]

[Proof of service of notice as in § 2461]

On the foregoing affidavit and proof of service of notice and on motion of , attorney for the [plaintiff], [there being no appearance in opposition],

It is ordered that a commission issue to , a notary public residing in the city of , [New York] authorizing and directing him to take the depositions of the witnesses mentioned in said affidavit for use in this action, upon interrogatories and cross-interrogatories, to be settled in accordance with the rules of court or stipulations of the parties and attached to the commission.

[Date] .....
Judge.

Digitized by Google

§ 2487. Commission to take depositions.

[Title of action]

To , Greeting:

You are hereby appointed and authorized by this court sole commissioner to take the depositions of the following witnesses, upon the interrogatories and cross-interrogatories hereto attached, for use in this action:

John Doe, residing in .

Richard Roe residing in .

You are directed to cause said witnesses to come before you at such time and place as you may designate and then and there examine each of them separately, under oath or affirmation that he will testify the whole truth and nothing but the truth relating to this cause, in answer to said interrogatories and cross-interrogatories; and reduce the testimony, or cause the same to be reduced, to writing in your presence; and after the deposition shall thus be reduced to writing, it shall be carefully read to or by the deponent, and shall then be signed by him at the end thereof as well as upon each piece of paper on which any portion of his testimony is written.

You are further directed not to permit either party to attend at the taking of the deposition, either personally or by agent or attorney, nor to communicate by interrogatories or suggestions with the deponent whilst giving his deposition. You shall take such deposition in a place separate and apart from all other persons, and permit no person to be present during such examination, except the deponent and yourself, and such disinterested person as you may think fit to appoint as a clerk or stenographer, to assist you in reducing the deposition to writing. You shall put the several interrogatories and cross-interrogatories to the deponent in their order, and take the answer of the deponent to each, fully and clearly, before proceeding to the next, and not read to the deponent, nor permit him to read, a succeeding interrogatory until the answer to the preceding has been fully taken down.

And the same, when completed, shall be attached to this commission together with your certificate, which may be substantially in the form hereto attached, and returned by you with all convenient speed, by mail or private conveyance, in a sealed envelope addressed to the Clerk of the District Court, Hennepin County, Minneapolis, Minnesota, [U. S. A.].

Witness the Hon. , judge of said court and the seal thereof this day of , 19 .

[Seal of court] .....

Clerk.

[Attach a blank certificate as given in § 494]

Digitized by Google

§ 2488. Deposition—motion to suppress—notice and order.

[Title of action]

To ,

Attorney for [Plaintiff].

Take notice that on the affidavit of which a copy is herewith served upon you and on the deposition of taken before , on , 19 , and returned to and filed with the clerk on 19 , the [defendant] will move the court [at a special term thereof to be held] [at its chambers] in the court-house in the city of , on , 19 , at o'clock a. m., or as soon thereafter as counsel can be heard, for an order suppressing said deposition, with costs. The motion will be made on the ground that [state grounds in general terms].

.....

Attorney for [Defendant],
[Office and post-office address]

On motion of , attorney for the defendant, , attorney for the plaintiff, appearing in opposition,

It is ordered that the deposition of , taken before , on 19 , and returned to and filed with the clerk on 19 , be suppressed with ten dollars costs to the defendant.

[Date] .....

Judge.

§ 2489. Bringing in parties—affidavit and order.

[Title of action]

[Venue]

being duly sworn, says:

I. That he is the plaintiff in this action.

II. That it was commenced by the service of summons on the defendant on 19 , and is still pending.

III. That it is a statutory action to determine adverse claims.

IV. That since the commencement of the action affiant first learned that one John Doe, residing at , Minnesota, claims an estate, interest or lien in the premises described in the complaint and for that reason ought to have been made a defendant herein in order to a full determination of this action.

[Jurat] .....

On the above affidavit and the complaint herein, and on motion of , attorney for the plaintiff,

It is ordered that , residing at , Minnesota, appear and answer the complaint named in the following summons within twenty days after the service of this order upon him exclusive of the day of such service and in default thereof that judgment be entered against him in all respects as though he had been made a defendant in this action in the first instance.

[Here insert copy of original summons in full]

[Date] .....

Judge.

Digitized by Google

§ 2490. Petition, notice and order for substitution of assignee as plaintiff.

[Title of action]

To the above named Court:

Your petitioner, , respectfully represents:

I. That on 19 , the above entitled action was commenced by , plaintiff, and is still pending and undetermined, [being on the calendar for trial at the next term of the court].

II. That said action is for [state nature of action in general terms so that it will appear that it is for a cause which is assignable].

III. That on 19 , and after the commencement of said action, the said plaintiff duly assigned and transferred [the note] mentioned in the complaint to your petitioner for a valuable consideration who is now the owner and holder thereof.

Wherefore your petitioner prays that he may be substituted as plaintiff in said action, in place of said , and that said action may be continued in his name, and that he may have such other relief as may be proper.

.....

[Verification as in § 2470]

To ,
Attorney for Plaintiff.

To ,
Attorney for Defendant.

Take notice that on the above petition, a copy of which is herewith served upon you, and upon the pleadings herein, , will move the court [at a special term thereof to be held] [at its chambers] in the court-house in the city of , on 19 , at o'clock a. m., or as soon thereafter as counsel can be heard, for an order substituting him as plaintiff in this action in the place of , and continuing the action in his name with leave to amend the complaint and for such other relief as may be just.

.....
Attorney for ,
[Office and post-office address]

On the above petition and the pleadings herein and on motion of , attorney for the petitioner, , appearing for the defendant in opposition,

It is ordered that , be substituted as plaintiff in this action in the place of , the original plaintiff, and that the action be continued in his name with leave to amend the complaint as he may be advised.

[Date] .....
Judge.

Digitized by Google

§ 2491. Petition, consent and order for substitution of executor of deceased plaintiff.

[Title of action]

To the above named Court:

Your petitioner, , respectfully represents:

I. That on 19 , the plaintiff in the above entitled action died leaving a last will and testament which on 19 , was duly admitted to probate and allowed by the probate court of county, Minnesota; and on 19 , letters testamentary thereon were duly issued and granted by said court to your petitioner as executor of said will, who thereupon duly qualified and entered upon the duties of and now is such executor.

II. That said action [describe action in general terms so that it will appear that the cause survives and allege that the plaintiff owned the claim at his death so as to make out a right of action in the executor].

Wherefore your petitioner, who has made no other application therefor, prays for an order substituting him in his representative capacity as plaintiff in said action in the place of the said , deceased, and continuing the action with leave to amend the complaint.

.....

[Verification as in § 2470]

The defendant hereby consents to the substitution prayed in the above petition.

[Date] .....

Attorney for Defendant,

[Office and post-office address]

On the foregoing petition and consent and on motion of , attorney for , executor,

It is ordered that , as executor of the last will and testament of , deceased, be substituted as plaintiff in this action in the place of the said , the original plaintiff, and that this action be continued by him as such executor with leave to amend the complaint as he may be advised.

[Date] .....

Judge.

§ 2492. Affidavit, order to show cause and order dismissing action for failure of executor to move for substitution.

[Title of action]

being duly sworn, says:

I. That he is the defendant in this action.

II. That [describe condition of action as to progress and the nature of the cause and if defendant has asked for affirmative relief describe it.]

III. That on 19 , the plaintiff in this action died leaving a last will and testament which on 19 , was duly admitted

Digitized by Google

to probate and allowed by the probate court of county, Minnesota, and on 19 , letters testamentary thereon were duly issued and granted by said court to as executor of said will, who thereupon duly qualified and entered upon the duties of and now is such executor.

IV. That said executor has failed to make any application to have this action continued by him as plaintiff.

[Jurat] .....

On the above affidavit let , executor of , deceased, show cause before this court at chambers in the court-house in the city of , on 19 , at o'clock a. m., why this action should not be continued in his name as executor of , deceased, the original plaintiff herein, or dismissed with costs of the action and motion against him.

Let this order be served upon the said in the manner of a summons within days and , attorney for , deceased, be given days written notice of the hearing.

[Date] .....

Judge.

On the above affidavit of , [and proof of the service of the above order to show cause] and on motion of , attorney for the defendant, no one appearing in opposition,

It is ordered that this action be dismissed so far as the interests of , executor of , deceased, are concerned, and that defendant have leave to enter judgment against the said , as such executor, for the costs of this action with dollars costs of this motion.

[Date] .....

Judge.

§ 2493. Change of venue—affidavit, demand and proof of service.

[Title of action]

[Venue]

being duly sworn, says:

I. That he is the defendant in this action.

II. That at the commencement thereof he was and still is an actual resident of county, Minnesota.

III. That the summons herein was served upon him on , 19 , and the time for answering has not expired.

[Jurat] .....

To ,

Attorney for Plaintiff.

On the above affidavit the defendant demands that the place of trial of this action be changed from county to county.

.....

Attorney for Defendant,

[Office and post-office address]

Digitized by Google

[Venue]

being duly sworn, says that in the city of , county, Minnesota, on , 19 , he served the foregoing affidavit and demand on , attorney for the plaintiff, by handing to and leaving with him copies thereof [or otherwise as in § 2461].

[Jurat] .....

To ,
Attorney for Plaintiff.

On the above affidavits [1] the defendants, , , being a majority of all the defendants herein, demand that the place of trial of this action be changed from county to county.

.....
Attorney for , Dft.
[Office and post-office address]

.....
Attorney for , Dft.
[Office and post-office address]

[1] Have each defendant uniting in the demand make a separate affidavit as above. If several defendants live in the same county there may be a joint affidavit.

§ 2494. Affidavit, notice of motion and order for change of venue for convenience of witnesses.

[Title of action]

[Venue]

being duly sworn, says,

I. That he is the defendant in this action.

II. That the summons and complaint herein were served upon him on 19 , and issue joined on , 19 .

III. That the action is [state generally the nature of the action and the place where the cause of action and defence arose].

IV. That each of the following persons is a material and necessary witness for affiant in this action:

John Doe, residing in the city of , county.

Richard Roe, residing in the city of , county.

V. That the said John Doe has assured affiant that if called as a witness in said action he would testify that [state the facts generally so that their materiality will appear].

VI. That the said Richard Roe has assured affiant [as in preceding paragraph].

VII. That he has fully and fairly stated to , residing in , his counsel in this action, the nature of his defence and the facts which he expects to prove by each of said witnesses; that he is advised by said counsel, and verily believes, that he cannot safely proceed to the trial of this action without the presence of each and all of them.

VIII. That he has fully and fairly stated the case and facts in the case to his said counsel and that he has a good and substantial defence on the merits, as he is advised by his counsel after such statement, and verily believes true.

[Jurat] .....

Digitized by Google

To ,
Attorney for Plaintiff.

Take notice that on the above affidavit [and the complaint and answer herein] the defendant will move the court [at a special term thereof to be held] [at its chambers] in the court-house in the city of , on 19 , at o'clock a. m., or as soon thereafter as counsel can be heard, for an order changing the place of trial of this action from county to county.

.....
Attorney for Defendant,
[Office and post-office address]

On the above affidavit and on motion of , attorney for defendant, , attorney for the plaintiff appearing in opposition,

It is ordered that the place of trial of this action be and the same is hereby changed from county to county.

[Date] .....
Judge.

§ 2495. Offer of judgment.

[Title of action]
To ,
Attorney for Plaintiff.

The defendant hereby offers to allow judgment to be taken against him by the plaintiff for [here specify the exact sum, property or relief offered], with costs.

[Date] .....
Attorney for Defendant,
[Office and post-office address]

§ 2496. Acceptance of offer of judgment.

[Title of action]
To ,
Attorney for Defendant.

Take notice that the plaintiff accepts the offer of the defendant allowing him to take judgment in this action for [here specify the exact sum, property or relief offered], with costs.

[Date] .....
Attorney for Plaintiff,
[Office and post-office address]

§ 2497. Affidavit of service of acceptance of offer of judgment.

[Title of action]
[Venue]

being duly sworn, says that he is the attorney for the plaintiff in this action; that the annexed offer of judgment by the defendant was served upon him on 19 ; and that within ten days thereafter, on 19 , [he served upon , attorney for the defendant, a notice, of which the foregoing is a copy, that plaintiff accepted such offer] [a notice that plaintiff ac-

Digitized by Google

cepted such offer was served upon , attorney for the defendant, as shown by the accompanying affidavit of].

[Jurat] .....

Attorney for Plaintiff.

§ 2498. Confession of judgment.

[Title of action]

I, John Doe, the defendant in this action, do hereby confess judgment in favor of Richard Roe, the plaintiff, for the sum of dollars and cents and authorize the entry of judgment against me herein for that amount [with interest from this day] and costs.

This confession of judgment is [for a debt (now justly) (justly to become) due from me to the plaintiff] [to secure the plaintiff against a contingent liability on my behalf] arising upon the following facts:

[Here state the facts]

[Date] .....

[Venue]

John Doe, being duly sworn, says that he is the person who signed the foregoing confession of judgment and that the facts therein stated are true.

[Jurat] .....

[Judgment to be indorsed on the foregoing]

[Title of action]

On filing the within verified confession and statement it is adjudged by the court that the plaintiff recover against the defendant the sum of dollars and cents, with five dollars costs and dollars disbursements, amounting in all to the sum of dollars and cents.

[Date] .....

Clerk.

Illustrative statements for confession of judgment.

[Money loaned]

On 19 , the plaintiff loaned to the defendant the sum of dollars to be repaid on 19 , with interest at per cent per annum. There is now due on said loan the sum of dollars and cents.

[Goods sold]

[On 19] [Between 19 , and 19] the plaintiff sold and delivered to the defendant [describing goods in general terms—itemized statement unnecessary]. The same were reasonably worth the sum of dollars and cents but no part thereof has been paid. There is now due on said sale, including interest, the sum of dollars and cents.

Digitized by Google

[On promissory note]

On 19 , I made and delivered to the plaintiff my promissory note of which the following is a copy:

[Here set out note in full]

The consideration for said note was [a loan of dollars made by the plaintiff to me on 19 , which I promised to repay on 19 , with interest at per cent. per annum; and as evidence of said promise and to secure the payment said note was given] [the price of certain groceries sold and delivered to me by the plaintiff between 19 and 19].

§ 2499. Substitution of attorney.

[Title of action]

I hereby consent that , of , be substituted in my place as attorney and counsel for the [defendant] in this action.

[Date] .....

[Office and post-office address]

[Title of action]

To ,

Attorney for [Plaintiff].

Take notice that with the consent of , which has been filed with the clerk, the undersigned has been substituted in the place of the said , as attorney and counsel for the [defendant] in this action.

[Date] .....

[Office and post-office address]

§ 2500. Continuance—affidavit for to secure attendance of witness.

[Title of action]

[Venue]

being duly sworn, says:

I. That he is the [plaintiff] in this action.

II. That he cannot safely proceed to trial because of the absence of one John Doe, a resident of , and a material witness for affiant in this action.

III. That in order to secure the attendance of the said John Doe as a witness affiant [state with particularity just what has been done to secure the attendance of the witness so that the court can see from the affidavit alone that due diligence has been exercised].

IV. That affiant expects and believes that the said John Doe, if present as a witness at a postponed trial, would testify that [state with particularity all the material facts to which he would testify].

V. That if the trial of this action is postponed until , affiant believes that he can secure the attendance of the said John Doe as a witness because [state grounds of belief so that the court can see that there is a reasonable prospect of securing the attendance].

VI. That the testimony of the said John Doe would not be cumulative and affiant knows of no other witness by whom the same facts could be proved.

Digitized by Google

VII. That affiant is applying for a continuance in good faith and not for purposes of delay.

[Jurat] .....

§ 2501. Inspection of papers—affidavit, notice and order.

[Title of action]

[Venue]

being duly sworn, says:

I. That he is the defendant in this action.

II. That issue was formed herein by the service of an answer on 19 .

III. That the agreement alleged in the complaint and made the basis of this action was entered into solely by means of correspondence between the plaintiff and affiant between 19 , and 19 .

IV. That affiant has no copies of the letters which he wrote to the plaintiff during said period concerning the subject matter of this action and is unable to recall their contents.

V. That affiant verily believes that said letters are in the possession and under the control of the plaintiff.

VI. That affiant cannot safely proceed to trial without an inspection and copies of said letters.

VII. That on 19 , affiant requested of the plaintiff permission to inspect and take copies of said letters, but was refused.

[Jurat] .....

To ,

Attorney for the Plaintiff.

Take notice that on the above affidavit, a copy of which is herewith served upon you, and on the pleadings herein, the defendant will move the court [at a special term thereof to be held] [at its chambers] in the court-house in the city of , on 19 , at o'clock a. m., or as soon thereafter as counsel can be heard, for an order directing the plaintiff to allow the defendant or his attorney to inspect and take copies of all the letters written by the defendant to the plaintiff concerning the subject matter of this action between 19 and 19 .

.....

Attorney for Defendant,

[Office and post-office address]

On the above affidavit and the pleadings and on motion of , attorney for the defendant, , attorney for the plaintiff, appearing in opposition,

It is ordered that the plaintiff, within days after service of this order upon him, have, at the office of his attorney , all the letters written by the defendant to the plaintiff concerning the subject matter of this action between 19 and 19 , which he now has in his possession or under his control and that he leave them there for days after written notice to the

Digitized by Google

defendant of their presence and that he allow the defendant or his attorney during that time to inspect said letters there and take copies thereof.

[And it is further ordered that defendant have ten dollars costs of this motion, to abide the event].

[Date] .....

Judge.

§ 2502. Bill of particulars—demand for.

[Title of action]

To ,

Attorney for Plaintiff.

The defendant hereby demands a bill of particulars of the account alleged in the complaint herein.

[Date] .....

Attorney for Defendant,

[Office and post-office address]

§ 2503. Bill of particulars—form of and notice.

[Title of action]

BILL OF PARTICULARS

[Here set out itemized account]

[Venue]

being duly sworn, says that he is the plaintiff in this action and that the above bill of particulars is a true copy of the account alleged in the complaint herein.

[Jurat] .....

To ,

Attorney for Defendant.

Take notice that the above is a copy of the account demanded by you on 19 .

.....

Attorney for Plaintiff,

[Office and post-office address]

§ 2504. Leave to sue on a domestic judgment—petition and order.

[Title of court in which it is sought to bring the action]

To the above named Court:

Your petitioner, , respectfully represents:

I. That on 19 , he recovered a personal judgment in the district court for county, Minnesota, against , who is now residing in the city of , county, Minnesota, for the sum of dollars and cents.

II. That no part of said judgment has ever been paid, and your petitioner is still the owner thereof.

III. That an action on said judgment will be barred by the statute of limitations unless brought before 19 .

Wherefore your petitioner, who has made no other application

Digitized by Google

therefor, prays for leave to bring an action in this court on said judgment against the said .

.....

[Verification as in § 2470]

On the above petition, and on motion of , attorney for the petitioner,

It is ordered that , have leave to bring an action in this court against , on the judgment mentioned in said petition.

[Date] .....

Judge.

§ 2505. Leave to sue on official bond—petition and order.

[Title of court and proceeding]

To the above named Court:

Your petitioner, , respectfully represents:

I. That at all the times hereinafter stated , was and still is the sheriff of county.

II. That on 19 , said sheriff executed to the state of Minnesota an official bond of which a copy is hereunto attached, marked "Exhibit A" and made a part hereof.

III. That on 19 , an execution was duly issued out of this court and delivered by your petitioner to said sheriff for execution against the property of , upon a judgment for dollars duly rendered by said court and docketed on 19 , in favor of your petitioner against the said .

IV. That your petitioner is informed and believes [state source of information and grounds of belief] that said sheriff collected and received upon said execution to the use of your petitioner the sum of dollars beyond his fees and mileage.

V. That said sheriff in violation of his official duty has wholly failed and refused to pay over to your petitioner the amount collected on said execution and due your petitioner although more than sixty days have elapsed since said execution was delivered to him and although your petitioner, on 19 , demanded of him the amount so collected and due.

Wherefore your petitioner, who has made no other application therefor, prays that he may have leave to bring an action on said bond in his own name to recover his damages in the premises.

.....

[Verification as in § 2470]

On the above petition and on motion of , attorney for the petitioner,

It is ordered that , have leave to bring an action in this court in his own name against [sheriff] and [sureties], on the official bond of the said [sheriff] executed to the state of Minnesota on

Digitized by Google

19 , to recover damages for the delinquency alleged in the above petition.

[Date] .....

Judge.

§ 2506. Motion to compel an election between two causes of action—affidavit and notice.

[Title of action]

[Venue]

being duly sworn, says:

I. That he is the defendant in this action.

II. That the complaint herein was served upon him on 19 ; that no demurrer or answer thereto has yet been served; and that the time for demurring or answering has not yet expired.

III. That only one transaction of the nature mentioned in either of the two alleged causes of action set forth in the complaint herein ever occurred between affiant and the plaintiff and that the transactions mentioned in the two causes of action alleged in the complaint are in reality one and the same.

[Jurat] .....

To ,

Attorney for Plaintiff.

Take notice that on the above affidavit of which a copy is herewith served upon you and the complaint herein the defendant will move the court [at a special term thereof to be held] [at its chambers] in the court-house in the city of , on 19 , at o'clock a. m., or as soon thereafter as counsel can be heard, for an order directing the plaintiff to elect between the first and second causes of action alleged in the complaint and state upon which he will rely; and that on such election the other be stricken out; or in default of such election, that the second cause of action be stricken out on the ground of duplicity; and for such other relief as may be just, with costs.

.....

Attorney for Defendant,

[Office and post-office address]

§ 2507. Leave to plead after time—affidavit and order.

[Title of action]

[Venue]

being duly sworn, says:

I. That he is the defendant in this action and was duly served with summons [and complaint] herein on 19 .

II. That the time for answering the complaint herein expired on 19 .

III. That no judgment has yet been entered herein.

IV. That affiant failed to serve an answer or demurrer within the required time because [state reason].

V. That affiant has fully and fairly stated the case and the facts of the case to his counsel , a resident of , Minnesota,

Digitized by Google

and has a good and substantial defence on the merits, to this action, as he is advised by his counsel after such statement, and verily believes true.

VI. That he desires leave of court to serve the answer hereto attached and made a part hereof.

[Jurat] .....

[Notice of motion or order to show cause]

On the above affidavit and the complaint herein and on motion of , attorney for defendant, , attorney for plaintiff, appearing in opposition,

It is ordered that entry of judgment be stayed and that defendant have leave to serve the answer attached to said affidavit within days with like effect as if it had been served in time, on condition that he pay plaintiff ten dollars costs of motion.

[Date] .....

Judge.

§ 2508. Extension of time to plead—affidavit and order.

[Title of action]

[Venue]

being duly sworn, says:

I. That he is the defendant in this action and was duly served with summons [and complaint] herein on 19 .

II. That the time for answering expires on 19 .

III. That he has not answered or demurred as yet and is unable to do so before 19 , because [state reasons for failure and the necessity of further delay].

IV. That he needs days further time in which to prepare and serve his answer or demurrer.

V. [Allegation of merits as in V. § 2507 supra.]

VI. That there has been no prior extension of time to answer herein or application therefor.

[Jurat] .....

[Notice of motion or order to show cause]

On motion of , attorney for defendant, , attorney for plaintiff appearing in opposition,

It is ordered that defendant have days additional time from 19 , in which to answer or demur herein.

[Date] .....

Judge.

§ 2509. Motion to make pleading more definite—affidavit, notice and order.

[Title of action]

being duly sworn, says:

I. That he is the defendant in this action.

II. That the complaint herein was served upon him on 19 ; that no demurrer or answer thereto has yet been served; and that the time for demurring or answering has not yet expired.

Digitized by Google

III. That the following allegations of the complaint in [paragraph II] thereof are so indefinite and uncertain that the precise nature of the charge is not apparent to affiant:

[Set out indefinite allegations verbatim]

[Jurat] .....

To ,
Attorney for Plaintiff.

Take notice that on the above affidavit and the complaint herein the defendant will move the court [at a special term thereof to be held] [at chambers] in the court-house in the city of , on 19 , at o'clock a. m., or as soon thereafter as counsel can be heard, for an order directing the plaintiff to make his complaint more definite and certain by stating [specify particulars], and for costs.

.....
Attorney for Defendant,
[Office and post-office address]

On the above affidavit and the complaint herein and on motion of , attorney for defendant, , attorney for the plaintiff appearing in opposition,

It is ordered that plaintiff amend his complaint by [state in what respect with particularity] and serve a copy of such amended complaint on the attorney for the defendant within days after service of this order and that he pay to the defendant ten dollars costs of motion. And it is further ordered that in default of such amendment, service and payment the complaint be stricken out with ten dollars costs to defendant [and meanwhile let all further proceedings by the plaintiff be stayed].

[Date] .....
Judge.

§ 2510. Motion to strike out redundant and irrelevant allegations—notice and order.

[Title of action]

To ,
Attorney for [Plaintiff].

Take notice that on the [affidavit of which a copy is herewith served upon you and the] pleadings herein the [defendant] will move the court [at a special term thereof to be held] [at its chambers] in the court-house in the city of , on 19 , at o'clock a. m., or as soon thereafter as counsel can be heard, for an order striking from the [complaint] all [specify matter to be stricken out by reference to paragraph or folio] as [irrelevant and] redundant, with costs.

.....
Attorney for [Defendant],
[Office and post-office address]

Digitized by Google

On the above affidavit and the pleadings herein and on motion of , attorney for [defendant], , attorney for [plaintiff], appearing in opposition,

It is ordered that the matter contained in the complaint herein [specify matter to be stricken out by reference to paragraph or folio] be stricken out as redundant [and irrelevant], with ten dollars costs of motion to the defendant.

[Date] .....

Judge.

§ 2511. Motion for judgment on frivolous demurrer—notice and order.

[Title of action]

To ,

Attorney for [Defendant].

Take notice that on the pleadings herein the [plaintiff] will move the court [at a special term thereof to be held] [at its chambers] in the court-house in the city of , on 19 , at o'clock a. m., or as soon thereafter as counsel can be heard, for an order overruling the demurrer to the [complaint] herein as frivolous and for judgment thereon, with costs of motion.

.....

Attorney for [Plaintiff],
[Office and post-office address]

On the pleadings herein and on motion of , attorney for the [plaintiff], attorney for the [defendant] appearing in opposition,

It is ordered that the demurrer to the [complaint] herein be overruled as frivolous with leave to the [defendant] to answer within days and in default thereof that the [plaintiff] have judgment as for want of an answer with costs of the action and ten dollars costs of motion.

[Date] .....

Judge.

§ 2512. Motion for amendment of pleadings—notice and order.

[Title of action]

To ,

Attorney for [Plaintiff].

Take notice that on the affidavits and proposed amendment of which copies are herewith served upon you and on the pleadings herein the [defendant] will move the court [at a special term thereof to be held] [at its chambers] in the court-house in the city of , on 19 , at o'clock a. m., or as soon thereafter as counsel can be heard, for an order granting him leave to amend his [answer] by inserting said proposed amendment in lieu of paragraph II of said [answer].

.....

Attorney for [Defendant],
[Office and post-office address]

Digitized by Google

[Affidavits and proposed amendment]

On the above affidavits and the pleadings herein, and on motion of , attorney for the [defendant], , attorney for the [plaintiff] appearing in opposition,

It is ordered that [defendant] have leave to serve an answer herein amended by substituting for the II paragraph of his original answer the following: "II. ", within days, on payment of ten dollars costs to the plaintiff and that the plaintiff have days thereafter to reply or demur thereto.

[Date] .....

Judge.

§ 2513. Motion to strike out pleading as sham—notice and order.

[Title of action]

To ,

Attorney for Defendant.

Take notice that on the above affidavits of which copies are herewith served upon you and the pleadings herein the plaintiff will move the court [at a special term thereof to be held] [at its chambers] in the court-house in the city of , on 19 , at o'clock a. m., or as soon thereafter as counsel can be heard, for an order striking out the answer herein as sham and directing judgment for the plaintiff as for want of an answer, with costs.

.....

Attorney for the Plaintiff,

[Office and post-office address]

On the above affidavits and the pleadings herein, and on motion of , attorney for plaintiff, , attorney for defendant, appearing in opposition,

It is ordered that the answer herein be stricken out as sham [and that plaintiff have judgment as for want of an answer] [with leave to the defendant to serve an amended answer within days], with ten dollars costs to the plaintiff.

[Date] .....

Judge.

§ 2514. Order sustaining demurrer.

[Title of action]

This action having been brought to trial on the issue of law joined herein, after hearing , attorney for the [defendant] in support of the demurrer and , attorney for the [plaintiff] in opposition,

It is ordered that said demurrer be and the same is hereby sustained and that judgment be entered for the [defendant] thereon; but with leave to the [plaintiff] to amend the [complaint] within twenty days, on payment of ten dollars costs to the defendant.

[Date] .....

Judge.

Digitized by Google

§ 2515. Order overruling demurrer.

[Title of action]

This action having been brought to trial on the issue of law joined herein, after hearing , attorney for the [defendant] in support of the demurrer, and , attorney for the [plaintiff] in opposition,

It is ordered that said demurrer be and the same is hereby overruled and that judgment be entered for the [plaintiff] thereon; but with leave to the [defendant] to withdraw his demurrer and put in an [answer] [reply] within twenty days, on payment of ten dollars costs to the [plaintiff].

[Date] .....

Judge.

§ 2516. Statutory interpleader—affidavit, notice of motion and order.

[Title of action]

[Venue]

being duly sworn, says:

I. That he is the defendant in this action.

II. That the same is now pending; that the time for answering has not expired and no answer has been served.

III. That this action is [on contract] [for money] [for specific personal property].

IV. That without his collusion, one , residing in , Minnesota, and who is not a party to this action, makes a demand against him for the same [money] [debt] [property] sought to be recovered in this action by the plaintiff.

V. That he is ignorant of the respective rights of the plaintiff herein and the said , as regards such [money] [debt] [property], and cannot determine the same without hazard to himself.

VI. That he is ready and able to deposit [such money] [the amount of said debt] in court [deliver such property or its value to such person as the court may direct].

[Jurat] .....

To .....,

.....

Attorney for Plaintiff.

Take notice that on the above affidavit of which a copy is herewith served upon you and the complaint herein, the defendant will move the court [at a special term thereof to be held] [at its chambers] in the court-house in the city of , on 19 , at o'clock a. m., or as soon thereafter as counsel can be heard, for an order substituting , in his place as defendant herein and discharging him from liability to the plaintiff herein and the said , on his depositing in court the [amount of the debt] [money] [mentioned in the complaint herein] [delivering the property mentioned in the complaint herein or its value to such person as

Digitized by Google

the court may direct], and for such other relief as to the court may seem just.

.....
Attorney for Defendant,
[Office and post-office address]

On the above affidavit and the complaint herein, and on motion of , attorney for the defendant, , attorney for the plaintiff, appearing in opposition, and , appearing for ,

It is ordered that on the defendant depositing with the clerk the sum of dollars, [the money mentioned in the complaint,] [the amount of the debt alleged in the complaint], within days from the date of this order, , residing at , Minnesota, be substituted in the place of as defendant herein, and that the said be thereupon discharged from liability to either the plaintiff or the said , as regards said [money] [debt]. And it is further ordered that within days after service of this order upon him the plaintiff serve a summons and a copy of his complaint herein, amended as he may be advised, with a copy of this order, upon the said ; and that the said serve an answer to such complaint within days thereafter, and in default thereof that the plaintiff may apply to the court ex parte for an order that the money so deposited be paid over to him.

* * * In the case of specific personal property the order may read as follows:

It is ordered that the defendant deliver the property mentioned in the complaint herein to , of , who is hereby appointed receiver thereof, and that the said hold the same subject to the further order of this court; that , residing at , Minnesota, be substituted as defendant in this action in the place of , who shall, upon delivery of said property to said receiver, be discharged from all liability therefor, either to the plaintiff or to the said ; that within days from the service of this order upon him the plaintiff serve a summons and a copy of his complaint, amended as he may be advised, with a copy of this order, upon said and that said answer such complaint within days thereafter; that, if the plaintiff neglect to serve his summons and complaint and this order, as herein directed, the defendant may apply to the court for an order dismissing the action, and that the said property be delivered by the receiver to the said defendant , and that, if the said , neglect to answer such complaint, if served as herein directed, the plaintiff may apply, on notice, for an order that said property be delivered by the said receiver to the plaintiff.[1]

[Date] .....
Judge.

[1] This form was used and approved in Hooper v. Balch, 31 Minn. 276, 17 N. W. 617. See 1 Wait, Pr. 179.

Digitized by Google

§ 2517. Bond for costs by non-resident—affidavit, notice and order.

[Title of action]

[Venue]

being duly sworn, says that he is the defendant in this action; that the summons herein was served upon him on 19 ; that the plaintiff is not a resident of this state and was not at the commencement of this action; and that no security for costs and disbursements has been filed herein.

[Jurat] .....

To ,
Attorney for Plaintiff.

Take notice that on the foregoing affidavit, a copy of which is herewith served upon you, the defendant will move the court [at a special term thereof to be held] [at its chambers] in the court-house in the city of , on , 19 , at o'clock a. m., or as soon thereafter as counsel can be heard, for an order directing the plaintiff to file security for costs and disbursements herein and staying all proceedings herein on the part of the plaintiff until compliance with such order, with costs.

.....
Attorney for Defendant,
[Office and post-office address]

On the above affidavit [and proof of service of notice] and on motion of , attorney for the defendant, [appearing for the plaintiff] [no one appearing in opposition],

It is ordered that the plaintiff, within ten days of service of this order upon his attorney, file security for costs and disbursements herein as provided by statute and pay the defendant ten dollars costs of motion. And it is further ordered that all further proceedings herein on the part of the plaintiff be and the same are hereby stayed until such security is filed and costs paid.

[Date] .....
Judge.

§ 2518. Bond for costs by non-resident.

[Title of action]

Know all men by these presents that we, , and , are bound unto , clerk of said court, his successors in office, in the sum of seventy five dollars, to the payment of which to the said , his successors in office, we jointly and severally bind ourselves, our heirs, executors and administrators.

The condition of this obligation is such that whereas, , plaintiff, is about to commence the above entitled action and is a non-resident,

Now therefore, if the said plaintiff shall pay or cause to be paid all disbursements and costs that may be adjudged against him in said action, then this obligation, which is given in pursuance of General Statutes 1894 § 5518 as amended by Laws 1899 ch. 186, shall be void; otherwise to remain in full force.

Digitized by Google

In testimony whereof we have hereunto set our hands this day of 19 .

Executed in presence of: .....

....

.....

[Acknowledgment and justification as in § 2469]

§ 2519. Notice of trial.

[Title of action]

To ,

Attorney for Defendant.

Take notice that the [issues of fact] [issue of law] in this action will be brought on for trial at the next general term of this court to be held in and for the county of at the court-house in the city of on 19 .

.....

Attorney for Plaintiff.

[Office and post-office address]

§ 2520. Note of issue.

[Title of action]

NOTE OF ISSUE

1. Issues of fact for trial by [the court] [jury].
2. [Issue of law upon demurrer.]
3. Last pleading served , 19 .
4. [Default divorce case.]

.....

Attorney for Plaintiff.

.....

Attorney for Defendant.

The clerk will please file this note of issue and enter the cause on the calendar for the next [general] [special] term of the court to be held , 19 .

.....

Attorney for Plaintiff,

[Office and post-office address]

§ 2521. Subpœna—general form.

State of Minnesota District Court

County of Judicial District

The state of Minnesota,

To , Greeting:

You are hereby commanded that, laying aside all and singular your business and excuses, you be and appear before the judge of the district court for the judicial district and county of , at the court-house in the city of , in said county, on , 19 , at o'clock in the forenoon then and there to give evidence and testify in an action now pending in said court, and then and there to be tried between , plaintiff, and , defendant, on the part of the [plaintiff] [defendant].

[And you are further commanded to bring with you and then and

Digitized by Google

there produce (describing papers specifically as in a notice to produce. See § 2473)].

Hereof fail not on pain of the penalty that will fall thereon.

Witness the Hon. , judge of said court, and the seal thereof, this day of 19 .

[Seal of court] .....

Clerk.

[Indorsed with name of attorney]

§ 2522. Affidavit of service of subpœna.

[Title of action]

[Venue]

being duly sworn, says that on 19 , in the city of , county, Minnesota, he served the [attached] [foregoing] subpœna on , [personally, by handing to and leaving with him a copy thereof] [by leaving a copy thereof for him at his house of usual abode, with , a person of suitable age and discretion, then resident therein]; and at the same time and place paid him for his expenses in traveling to and from said court and one day's attendance thereat as a witness.

[Jurat] .....

§ 2523. Return of service of subpœna.

I, , sheriff of county, Minnesota, hereby certify and return that on 19 , in the city of in said county and state I served [continuing as in preceding form].

[Date] .....

Fees:

.....

.....

.....

§ 2524. Habeas corpus ad testificandum—affidavit, order, writ.

[Title of action]

[Venue]

being duly sworn, says:

I. That he is the defendant in this action, wherein he has appeared, issue been formed and the cause noticed for trial at the next general term of this court to be held on 19 .

II. That this action is brought to [state nature of action in general terms].

III. That he has pleaded as a defence to the cause of action alleged in the complaint that [state nature of defence in general terms] and issue has been formed thereon.

IV. That he has fully and fairly stated the case and facts in the case to his counsel , a resident of , Minnesota, and has a good and substantial defence on the merits, as he is advised by his counsel after such statement, and verily believes true.

V. That one is now a prisoner in custody of and confined in under a sentence of imprisonment that does not expire until after the time at which this cause is noticed for trial.

Digitized by Google

VI. That is a material and necessary witness for affiant in this cause and affiant is assured that if the said were produced at the trial he would be able to prove by him the following facts [state facts in detail so that their materiality will appear].

VII. That there is no other witness known to him by whom he could prove said facts.

VIII. That he cannot safely proceed to trial without the attendance of the said as a witness in his behalf as he is advised by his said counsel and verily believes.

[Jurat] .....

Upon the filing of the above affidavit let a writ of habeas corpus ad testificandum issue to , commanding him to have the body of , before the judge of this court in the court-house in the city of , county, on 19 , at o'clock a. m., then and there to testify in this cause as a witness for the defendant.

[Date] .....
Judge.

State of Minnesota District Court
County of Judicial District
The state of Minnesota,
To , Greeting:

You are hereby commanded that you have the body of , now in the [state prison in the city of Stillwater, Minnesota,] under your custody, as it is said, under safe and secure conduct, before the judge of the district court for the [first] judicial district and county of , at the court-house in the city of , in said county, on 19 , at o'clock a. m., then and there to give evidence and testify in an action now pending in said court and then and there to be tried between , plaintiff, and , defendant, on the part of the [defendant]; and immediately after the said shall then and there have given his evidence and testimony that you return him to said [prison] under safe and secure conduct. And have you then and there this writ.

Witness the Hon. , judge of said court, and the seal thereof, this day of 19 .

[Seal of court] .....
Clerk.

[Indorsed with name of attorney applying for writ]

§ 2525. Attachment for witness.

State of Minnesota District Court
County of Judicial District
The state of Minnesota,
To , Greeting:

We command you to attach , residing at , Minnesota, and forthwith bring him before the district court for

Digitized by Google

county at the court-house in the city of , in said county, to answer for his contempt in not obeying our writ of subpœna to him directed and on him duly served, commanding him to appear before said court on this day, and also to testify as a witness in an action now pending in said court between , plaintiff, and , defendant. And have you then and there this writ.

Witness the Hon. , judge of said court and the seal thereof, this day of 19 .

[Seal of court] .....
Clerk.

[Indorsed with name of attorney applying for writ]

§ 2526. Subpœna to appear before grand jury.

State of Minnesota District Court
County of Judicial District

The state of Minnesota,

To , Greeting:

You are hereby commanded that, laying aside all and singular your business and excuses, you be and appear before the grand jury of the district court for the [first] judicial district and county of , at their room in the court-house in the city of , in said county [forthwith] [on 19 , at o'clock in the forenoon] then and there to answer such questions as shall be put to you by said jury.

Hereof fail not on pain of the penalty that will fall thereon.

Witness the Hon. , judge of said court, and the seal thereof, this day of 19 .

[Seal of court] .....
Clerk.

[Indorsed with name of county attorney]

§ 2527. Issues to the jury—notice and order settling.

[Title of action]

To ,
Attorney for [Plaintiff]

Take notice that on the pleadings herein and the statement of proposed questions of which a copy is herewith served upon you the [defendant] will move the court [at a special term thereof to be held] [at its chambers] in the court-house in the city of , on 19 , at o'clock a. m., or as soon thereafter as counsel can be heard, for an order settling issues of fact for trial by jury herein and directing a trial by jury thereon at the next term of court.

.....
Attorney for [Defendant],
[Office and post-office address]

Digitized by Google

To
Attorney for [Plaintiff].

The [defendant] hereby proposes that the following questions of fact involved in the issues herein be submitted to a jury.

1.
2.
3.

.....
Attorney for [Defendant].

On the pleadings herein and proposed questions submitted by the defendant, and on motion of , attorney for the defendant, , attorney for the plaintiff, [appearing in opposition] [consenting],

It is ordered that the following issues of fact be tried by a jury at the next general term of this court to be held on 19 .

1.
2.
3.

And it is further ordered that all other issues involved in this action be reserved for trial by the court and that such trial by the court be had [state date of trial and if on same day as the trial by jury state whether the evidence upon all the issues shall be introduced at the same time].

[Date] .....
Judge.

§ 2528. Findings of fact and conclusions of law.

[Title of action]

This cause having been tried by the court without a jury [all the parties appearing] [all the parties appearing except the defendants (naming them), and due proof having been presented to the court of the filing with the clerk of proof of the due service of summons herein on said defendants and that no answer or demurrer has been received from them or any of them within the time allowed by law],

The court, upon the evidence [and the pleadings] finds:

AS FACTS

I. That—
II. That—

AS CONCLUSIONS OF LAW

That [plaintiff] is entitled to judgment [1] against the defendant [all the defendants] [specify the judgment to be entered], with ten dollars costs and disbursements.

Let judgment be entered accordingly.

[Date] .....
Judge.

[1] The form of stating the "conclusions of law" here adopted may not be an exact compliance with the statute, but it is believed to be sufficient and it has obvious practical advantages.

Digitized by Google

§ 2529. Reference—stipulation and order for.

[Title of action]

It is hereby stipulated by the parties to this action that the same may be referred to , of , counsellor at law, to hear and determine all the issues thereof, whether of fact or law, and to report a judgment thereon; and that the court may make an order accordingly without notice.

[Date] .....
Attorney for Plaintiff.
.....
Attorney for Defendant.

Upon the filing of the foregoing consent it is ordered that this action be and the same is hereby referred to , of , counsellor at law, to hear and determine all the issues thereof, whether of fact or law, and to report a judgment thereon.

[Date] .....
Judge.

§ 2530. Report of referee appointed to try a cause.

[Title of action]

To the above named Court:

The undersigned, having been appointed by order of court filed 19 , a referee to hear and determine all the issues of this action, whether of fact or law, and to report a judgment thereon, after a regular trial on the merits, , appearing for the plaintiff and appearing for the defendant, reports and finds:

AS FACTS

I. That—
II. That—

AS CONCLUSIONS OF LAW

That plaintiff is entitled to judgment against defendant for the sum of dollars and cents, with ten dollars costs and disbursements.

Let judgment be entered accordingly.

[Date] .....
Referee.

I hereby certify that I have spent days in the business of this reference and that my fees therefor amounting to dollars have been paid by the [plaintiff] [defendant].

[Date] .....
Referee.

§ 2531. Verdict—general form in actions for money only.

[Title of action]

We, the jury in this action, find for the [plaintiff and assess his damages at dollars] [defendant] [defendant and assess his damages at dollars].

.....
Foreman.

Digitized by Google

§ 2532. Verdict in action in nature of replevin.

[Title of action]

We, the jury in this action, find [for the plaintiff on all the issues and assess (the value [1] of (his interest in) [2] the property on [3] 19 , at dollars and) his damages by reason of (the detention) (the taking and withholding) of the property at dollars] [for the defendant on all the issues and assess (the value of the property on [4] 19 , at dollars and) [1] his damages by reason of (the detention) (the taking and withholding) of the property].

.....

Foreman.

[1] Omit assessment of value when property is in the possession of the prevailing party. See Dunnell, Minn. Pl. § 847.

[2] To be inserted when the plaintiff has only a special interest in property. See Dunnell, Minn. Pl. § 848.

[3] Insert date of wrongful taking or of the commencement of the wrongful detention. See Dunnell, Minn. Pl. § 849.

[4] Insert date of replevy. See Dunnell, Minn. Pl. § 849.

§ 2533. Verdict in action in nature of ejectment.

[Title of action]

We, the jury in this action, find for the plaintiff on all the issues and assess his damages [1] by reason of the withholding of the property at dollars [and by reason of injuries to the property at dollars].[2] [And we assess the value of the improvements made on the land by the defendant, including seven per cent. interest, at dollars.] [And we find that the defendant claims the land in controversy under (describe official deed) regular on its face and that he purchased the same without actual notice of any defect invalidating it and paid therefor, including interest at seven per cent., dollars and cents.] [And we assess the value of the land in controversy at the commencement of this action at dollars, without the improvements made by the defendant thereon.] [And we assess the rental value of the property in controversy for the year 1901, at dollars; for the year 1902, at dollars, and for the year 1903, at dollars.] [3]

.....

Foreman.

[1] See Dunnell, Minn. Pl. §§ 887-889; Blew v. Ritz, 82 Minn. 530, 85 N. W. 548; Noyes v. French Lumbering Co. 80 Minn. 397, 83 N. W. 385; Yorks v. Mooberg, 84 Minn. 502, 87 N. W. 1115.

[2] See Dunnell, Minn. Pl. § 889.

[3] See Laws 1897 ch. 38; Dunnell, Minn. Pl. § 880.

§ 2534. Special verdict.

[Title of action]

We, the jury, having been required to find a special verdict in this action find the facts as follows:

I. That—

II. That—

If upon these facts the law is with the plaintiff, then we find for the

Digitized by Google

plaintiff and assess his damages at dollars. And if the law is with the defendant, then we find for the defendant.

.....
Foreman.

[Title of action]

We, the jury in this action, to whom the court submitted the following issues of fact, find thereon as indicated below:

I. ? Answer. Yes.
II. ? Answer. No.

.....
Foreman.

§ 2535. General verdict with answers to special interrogatories.

[Title of action]

We, the jury in this action, find for the plaintiff and assess his damages at dollars.

.....
Foreman.

And having been required, in case we should return a general verdict, to answer the following special interrogatories, do answer the same as indicated below:

I. ? Answer. Yes.
II. ? Answer. No.

.....
Foreman.

§ 2536. Bond for six months' stay of execution.

[Title of action]

Know all men by these presents that we , as principal, and and , as sureties, are bound unto , plaintiff in the above entitled action, in the sum of dollars, to the payment of which to the said , his heirs, executors, administrators or assigns, we jointly and severally bind ourselves, our heirs, executors and administrators.

The condition of this obligation is such that whereas on 19 , a judgment for the recovery of money only was duly rendered and docketed in the above entitled action in favor of the plaintiff and against the defendant for the sum of dollars and cents, including costs and interest, the defendant is about to apply for a stay of execution thereon for a period of six months as provided by statute,

Now therefore if the said , defendant, shall pay the amount of such judgment, with interest thereon at twelve per cent per annum, within the time for which such stay is granted, then this obligation, which is given in pursuance of General Statutes 1894 § 5480, shall be void; otherwise to remain in full force and execution may issue for such amount and interest against the said , and the above named sureties.

In testimony whereof we have hereunto set our hands this day of , 19 .

Executed in presence of: .....
....
.....

Digitized by Google

[Acknowledgment and justification as in § 2469]

Upon the filing of the above bond, which is hereby approved, let execution in the above entitled action be stayed for a period of six months from the date of the entry of judgment therein.

[Date] .....

Judge.

§ 2537. Entry of judgment on default—notice.

[Title of action]

To ,

Attorney for Defendant.

Take notice that the plaintiff will apply to the court [at a special term thereof to be held] [at its chambers] in the court-house in the city of , on 19 , at o'clock a. m., or as soon thereafter as counsel can be heard, [for the relief demanded in the complaint] [to determine the amount he is entitled to recover and to order judgment therefor].

.....

Attorney for Plaintiff,

[Office and post-office address]

§ 2538. Entry of judgment on default—admission of counterclaim.

[Title of action]

The plaintiff in this action hereby admits the counterclaim set forth in the answer herein and consents that the same, amounting to dollars, may be deducted from the amount demanded in the complaint.

.....

Attorney for Plaintiff.

[Office and post-office address]

§ 2539. Entry of default judgment—affidavit of no answer.

[Title of action]

[Venue]

being duly sworn, says:

I. That he is the attorney for the plaintiff in this action.

II. That the summons herein was [personally served on the defendant] [served on the defendant by publication] on [1] 19 .

III. That no answer or demurrer herein has been received by affiant from the defendant within the time allowed by law or at any time.

IV. That the defendant has not appeared herein.[2]

[Jurat] .....

[1] In case of publication insert last day of publication.

[2] This is inserted because a party who has appeared is entitled to notice of the entry of judgment although he has not answered or demurred. Davis v. Red River Lumber Co. 61 Minn. 534, 63 N. W. 1111.

Digitized by Google

§ 2540. Order for judgment by default in action, not on contract, for the recovery of money only, where there was personal service of summons.

[Title of action]

Due proof [1] having been presented to the court of the filing with the clerk of proof of the personal service of summons herein and that no answer has been received within the time allowed by law and the damages of the plaintiff having been assessed by the court at dollars, on motion of , attorney for the plaintiff, there having been no appearance in the action on the part of the defendant,

It is ordered that plaintiff have judgment against defendant for the sum of dollars, with ten dollars costs and disbursements.

[Date] .....

Judge.

[1] This consists merely in exhibiting to the court the original affidavit or return of service of summons previously filed and the affidavit of no answer as given above, with the clerk's indorsement of filing. It is not necessary to make a separate affidavit for this purpose.

§ 2541. Order for judgment by default on personal service of summons in actions not for money only.

[Title of action]

Due proof [1] having been presented to the court of the filing with the clerk of proof of the personal service of summons herein and that no answer has been received within the time allowed by law, [if damages are assessed insert here recital as in preceding form], on motion of , attorney for the plaintiff, there having been no appearance on the part of the defendant,

It is ordered that plaintiff have judgment against defendant [insert direction for judgment as prayed in the complaint and for any damages assessed by the court], with ten dollars costs and disbursements.

[Date] .....

Judge.

[1] See note to preceding form.

§ 2542. Order for judgment by default where summons is served by publication.

[Title of action]

Due proof [1] having been presented to the court of the filing with the clerk of proof of the due service of summons herein by publication and that no answer has been received within the time allowed by law, and the plaintiff having proved to the satisfaction of the court [2] [the cause of action] [demand] set forth in the complaint, on motion of , attorney for the plaintiff, there having been no appearance in the action on the part of the defendant,

It is ordered that the plaintiff [upon filing a bond for restitution as provided by statute] have judgment against the defendant [in-

Digitized by Google

sert direction as to relief awarded], with ten dollars costs and disbursements.

[Date] .....

Judge.

[1] See note to § 2540.

[2] It is not necessary that there should be any formal findings of fact on default. Findings of fact are only necessary when issues of fact are formed by an answer or reply. See G. S. 1894 §§ 5386, 5357; Newman v. Newman, 68 Minn. 1, 70 N. W. 776.

§ 2543. Order for judgment by default where summons is served by publication as to part of the defendants.

[Title of action]

Due proof [1] having been presented to the court of the filing with the clerk of proof of the due service of summons herein by publication on the defendants [naming them] and that no answer has been received from them or any of them within the time allowed by law, and the plaintiff having proved to the satisfaction of the court [the cause of action] [demand] set forth in the complaint, on motion of , attorney for the plaintiff, there having been no appearance in the action on the part of any of said defendants,

It is ordered that plaintiff [upon filing a bond for restitution as provided by statute] have judgment against said defendants [insert direction as to relief awarded], with ten dollars costs and disbursements.

[Date] .....

Judge.

[1] See note to § 2540. This order may be incorporated in the decision of the court. See § 2528.

§ 2544. Bond upon entry of default judgment.

[Title of action]

Know all men by these presents that we , as principal, and , and , as sureties, are bound unto . the defendant in the above entitled action, in the sum of dollars, to the payment of which to the said , his heirs, executors, administrators or assigns, we jointly and severally bind ourselves, our heirs, executors and administrators.

The condition of this obligation is such that whereas the summons in said action has not been personally served upon the said , and plaintiff is about to cause judgment by default to be entered against the said ,

Now therefore if the said plaintiff shall abide the order of the court touching the restitution of any money or property collected or received under or by virtue of such judgment, in case the defendant or his representatives shall hereafter apply and be admitted to defend said action and shall succeed in the defence, then this obligation, which is given in pursuance of General Statutes 1894 § 5354, shall be void; otherwise to remain in full force.

Digitized by Google

In testimony whereof we have hereunto set our hands this day of 19 .

Executed in presence of:

....

....

....

[Acknowledgment, justification and approval as in § 2469]

§ 2545. Judgment for want of a reply—affidavit, notice and order.

[Title of action]

[Venue]

being duly sworn, says:

I. That he is the attorney for the defendant in this action.

II. That an answer containing a counterclaim was duly served herein on 19 .

III. That plaintiff has failed to reply or demur thereto, although more than twenty days have elapsed since said answer was served.

[Jurat] .....

To ,

Attorney for Plaintiff.

On the above affidavit of which a copy is herewith served upon you and the pleadings herein the defendant will move the court [at a special term thereof to be held] [at its chambers] in the court-house in the city of , on 19 , at o'clock a. m., or as soon thereafter as counsel can be heard, for an order for judgment, as prayed in his answer, on the ground that plaintiff has failed to reply or demur to the answer herein within the time allowed by law, with costs of the action and ten dollars costs of motion, and for such other relief as may be just.

.....

Attorney for Defendant,

[Office and post-office address]

On the above affidavit and the pleadings herein, and on motion of , attorney for the defendant, , attorney for the plaintiff, appearing in opposition,

It is ordered that defendant have judgment against plaintiff for the sum of dollars and cents, with costs and disbursements of the action and ten dollars costs of motion.

[Date] .....

Judge.

§ 2546. Notice of motion for a new trial after verdict.

[Title of action]

To ,

Attorney for [Plaintiff].

Take notice that [on the case settled herein] [on the minutes of the judge] [on the affidavits of which copies are herewith served upon you] the [defendant] will move the court [at a special term

Digitized by Google

thereof to be held] [at its chambers] in the court-house in the city of , on 19 , at o'clock a. m., or as soon thereafter as counsel can be heard, [for an order for judgment in his behalf notwithstanding the verdict, as provided by Laws 1895 ch. 320, on the ground that the court erred in denying his motion for a directed verdict at the close of the testimony, with costs] [for an order for judgment notwithstanding the verdict on the ground that the special findings of the jury are inconsistent with the general verdict, with costs] [and if that is denied] for an order setting aside the verdict [and judgment] herein and granting a new trial, with costs, on the following grounds:

(1) Irregularity in the proceeding of the court by which the [defendant] was prevented from having a fair trial.

(2) Abuse of discretion by the court by which the [defendant] was prevented from having a fair trial.

(3) Misconduct of the [plaintiff].

(4) Misconduct of the jury.

(5) Accident and surprise which ordinary prudence could not have guarded against.

(6) Excessive damages, appearing to have been given under the influence of passion or prejudice.

(7) That the verdict is not justified by the evidence and is contrary to law.

(8) Newly discovered evidence, material to the [defendant], which he could not, with reasonable diligence, have discovered and produced at the trial.

(9) That the court erred in overruling [defendant's] objection to the following question to the witness John Doe: [Give question verbatim]. Case, folio [10].

(10) That the court erred in sustaining [plaintiff's] objection to the following question to the witness Richard Roe: [Give question verbatim]. Case, folio [11].

(11) That the court erred in denying [defendant's] motion to strike out the following testimony of the witness John Smith: [Give question, objections of counsel and the answer verbatim.]

(12) That the court erred in sustaining [plaintiff's] objection to the offer of [defendant] to prove the following facts by the witness James Brown: [Insert offer in full]. Case, folio [12].

(13) That the court erred in giving the following instructions: [Insert that portion of the charge claimed to be erroneous in full and verbatim.] Case, folio [13].

(14) That the court erred in refusing to give to the jury the following instructions requested by the [defendant]: [Insert requests in full.] Case, folio [17].

(15) That the court erred in denying the motion of the [defendant] to dismiss the action when plaintiff rested. Case, folio [14].

(16) That the court erred in denying [defendant's] motion for a directed verdict at the close of the testimony. Case, folio [15].

(17) That the court erred in failing to check counsel for the [plaintiff] in his argument to the jury concerning [refer generally to the

Digitized by Google

objectionable language], upon objection being made by counsel for the [defendant]. Case, folio [16].

(18) That the court erred in denying defendant's motion for a dismissal of the action on the ground that the complaint did not state a cause of action. Case, folio [17].

(19) That the court erred in overruling defendant's objection to the admission of any evidence on the ground that the complaint did not state a cause of action. Case, folio [18].

.....
Attorney for [Defendant],
[Office and post-office address]

§ 2547. Notice of motion for new trial or amendment of conclusions after trial by court.

[Title of action]

To ,
Attorney for [Plaintiff].

Take notice that on [the case settled herein] [on the minutes of the judge] [on the affidavits of which copies are herewith served upon you] the [defendant] will move the court [at a special term thereof to be held] [at its chambers] in the court-house in the city of , on 19 , at o'clock a. m., or as soon thereafter as counsel can be heard, for an order [1] vacating the decision of the court herein [and the judgment entered thereon] and granting a new trial, with costs, on the following grounds:

(1) That the decision is not justified by the evidence and is contrary to law.

(2) That the following findings of fact are inconsistent: [Insert inconsistent findings].

(3) That the following findings of fact are without the issues: [Insert the findings in full].

(4) [Specify further grounds as in § 2546.]

.....
Attorney for [Defendant],
[Office and post-office address]

[1] If it is desired to make an alternative motion for an amendment of the conclusions of law or for a new trial add: amending the conclusions of law and order for judgment herein, with costs, on the ground that they are not justified by the findings of fact, so that they will read as follows: [Insert desired conclusions and order in full]; and if that is denied, then for an order [continuing as above].

§ 2548. Notice of motion for an amendment of conclusions of law.

[Title of action]

To ,
Attorney for [Plaintiff].

Take notice that on the files and record herein the [defendant] will move the court [at a special term thereof to be held] [at its chambers] in the court-house, in the city of , on 19 , at o'clock a. m., or as soon thereafter as counsel can

Digitized by Google

be heard, for an order amending the conclusions of law and order for judgment herein [and the judgment entered thereon], with costs, on the ground that they are not justified by the findings of fact, so that they will read as follows: [Insert desired conclusions and order in full].

.....

Attorney for [Defendant],
[Office and post-office address]

§ 2549. Affidavit of party for new trial on ground of newly discovered evidence.

[Title of action]
[Venue]

being duly sworn, says:

I. That he is the [defendant] in this action.

II. That the trial of the issues herein began on 19 , and on 19 , resulted in a verdict for the [plaintiff] for dollars.

III. That on 19 , he discovered for the first time that he could have proved by one , residing in , Minnesota, that [state facts].

IV. That he first learned of said witness [state explicitly when, where and how the new evidence was discovered].

V. That prior to said trial be made diligent search to secure witnesses to prove said facts [here state explicitly what was done to secure the evidence, naming the persons from whom information was sought, with time and place].

VI. That said has assured affiant that if a new trial were granted herein he would attend such trial as a witness and testify [as stated in the accompanying affidavit] [if no affidavit is produced state the reasons why].

VII. That said newly discovered evidence is not merely cumulative, corroborative or impeaching, but is so new and important that it would be likely, as affiant verily believes, to change the result on a new trial.

[Jurat]

.....

§ 2550. Affidavit of witness as to newly discovered evidence.

[Title of action]
[Venue]

being duly sworn, says:

I. That he resides in , Minnesota.

II. That prior to 19 , he had no knowledge of the pendency of this action and had no communication, direct or indirect, with the defendant herein or his attorney, respecting the subject-matter thereof.

III. [That for many months past he has not spoken or written to any one concerning the subject matter of this action and verily believes that no one residing in , knew that he had knowledge of such matter.]

IV. That if a new trial were granted herein he would attend as a

Digitized by Google

witness for the [defendant] and testify that [here give in full what he would testify].

[Jurat] .....

§ 2551. Demand of new trial in ejectment.

[Title of action]

To ,

Attorney for [Plaintiff].

Take notice that the [defendant] has paid all the costs [and damages] recovered by the judgment entered and docketed herein on 19 , against him and demands a new trial herein under and by virtue of General Statutes 1894 § 5845.

.....

Attorney for [Defendant],

[Office and post-office address]

§ 2552. Notice of entry of judgment to limit time for new trial in ejectment.

[Title of action]

To ,

Attorney for [Defendant].

Take notice that on 19 , a judgment was entered and docketed herein in favor of the [plaintiff] for the recovery of the possession of [describe property] and for dollars, as damages for the withholding of the same, and dollars and cents as costs and disbursements. This notice is given to limit the time within which the [defendant] may demand a new trial under General Statutes 1894 § 5845.

.....

Attorney for [Plaintiff],

[Office and post-office address]

§ 2553. Notice of determination on appeal to limit time for new trial in ejectment.

[Title of action]

To ,

Attorney for [Defendant].

Take notice that on 19 , the supreme court affirmed the judgment entered and docketed herein on 19 , in favor [continuing as in preceding form].

.....

Attorney for [Plaintiff],

[Office and post-office address]

§ 2554. Order granting a new trial.

[Title of action]

A motion for a new trial having been made by the [plaintiff], , appearing for the [plaintiff] and appearing for the [defendant], in opposition,

It is ordered that the verdict [and judgment] herein be and the same is hereby set aside and vacated and a new trial granted,[1] [on

Digitized by Google

condition that the plaintiff pay to the defendant ten dollars costs] [with ten dollars costs to abide the event].

The motion is granted on the ground that [state ground].

[Date] .....

Judge.

[1] unless the defendant, within [ten] days from the service of this order upon his attorney, files with the clerk his consent in writing that the verdict herein may be reduced from dollars to dollars, and that judgment may be entered accordingly.

§ 2555. Order denying a new trial.

[Title of action]

A motion for a new trial having been made by the [plaintiff], , appearing for the [plaintiff] and , appearing for the [defendant], in opposition,

It is ordered that the same be and it is hereby denied, with ten dollars costs to the [defendant].

[Date] .....

Judge.

§ 2556. Order on alternative motion for judgment or new trial.

[Title of action]

A motion having been made by the [defendant] in the alternative, for judgment notwithstanding the verdict under Laws 1895 ch. 320 or for a new trial, , appearing for the [defendant] and , appearing for the [plaintiff] in opposition,

It is ordered [that judgment be entered for the (defendant) notwithstanding the verdict, with ten dollars costs of motion and the costs and disbursements of the action and that the alternative motion for a new trial be and the same is hereby denied] [that both motions be and the same are hereby denied, with ten dollars costs to the (plaintiff)] [that the motion for judgment notwithstanding the verdict be and the same is hereby denied and that the verdict (and judgment) herein be and the same is hereby set aside and vacated and a new trial granted (continuing as in § 2554)].

[Date] .....

Judge.

§ 2557. Taxation of costs—bill of costs, verification, notice and allowance.

[Title of action]

[PLAINTIFF'S] [DEFENDANT'S] BILL OF COSTS AND DISBURSEMENTS

Statutory costs	$10.00
Clerk's fees	
Sheriff's fees:	
Serving summons	
" writ of attachment	
Jury fee	

Digitized by Google

Documentary evidence:
Certified copy of [state nature of document].....
" " " " .....
Affidavits:
1 of John Doe to [state nature of affidavit].....
1 of Richard Roe to " .....
Deposition of [name deponent].....
Costs granted on motion (specifying motion).....
Witness fees:

Name.	Residence.	Days Attendance.	Miles Traveled.
John Doe,	St. Cloud, Minn.	2 (Oct. 10 & 11, 1902)	55....
Richard Roe,	Duluth, "	3 (Oct. 10, 11 & 12, 1902)	200

Total.. $

The above bill of costs and disbursements is hereby taxed and allowed [except the items of , the total amount allowed being $].

[Date] .....
Clerk.

[Venue]

being duly sworn, says that he is the attorney of the [plaintiff] [defendant] in this action; that the foregoing is a true statement of the costs and disbursements of the [plaintiff] [defendant] and that all the items thereof have been actually and necessarily paid or incurred herein by the [plaintiff] [defendant]; that each of the witnesses named therein was a material witness for the [plaintiff] [defendant], was necessarily in attendance at the trial on behalf of the [plaintiff] [defendant] the number of days and on the dates specified, and for the purpose of such attendance necessarily traveled the number of miles specified in going from his place of residence to and returning from the place of trial; that all of the witnesses named were sworn and testified at the trial on behalf of the [plaintiff] [defendant] [except (name the witnesses not sworn, give the reasons why they were not sworn, and state in substance the testimony which they were called to give)].

In case of non-resident witness add: [That the witness John Doe, in traveling from his place of residence to the place of trial by the nearest usually traveled route, namely, by the Railroad, and in returning, crossed the boundary of the state (at) (near) the city of].

In case of documentary evidence add: [That the documentary evidence specified in said statement was necessarily procured for use on the trial herein by the (plaintiff) (defendant) and was necessarily introduced in evidence].

[Jurat] .....

To ,
Attorney for [Plaintiff] [Defendant].

Take notice that the foregoing bill of [plaintiff's] [defendant's] costs and disbursements will be presented to the clerk at his office in

Digitized by Google

the city of , on 19 , at o'clock in the forenoon, for taxation and insertion in the judgment then and there to be entered.

.....

Attorney for [Plaintiff] [Defendant],
[Office and post-office address]

§ 2558. Supplementary proceedings—affidavit and order.

[Title of action]
[Venue]

being duly sworn, says:

I. That he is the attorney for plaintiff in this action.

II. That on 19 , a judgment was duly rendered and docketed and the judgment roll filed herein against defendant in favor of plaintiff for the sum of dollars and cents.

III. That on 19 , execution thereon against the property of defendant was duly issued out of this court to the sheriff of county whereof defendant then was and still is a resident.

IV. That on 19 , said execution was duly returned wholly unsatisfied.

V. That said judgment remains in full force and wholly unsatisfied.

VI. That no application has heretofore been made for an order for the examination of defendant in supplementary proceedings.

[Jurat] .....

On the above affidavit and on motion of , attorney for plaintiff,

I hereby order , defendant, to appear before me at my chambers in the court-house in the city of , on 19 , at o'clock a. m., and answer concerning his property.

And the said , is hereby forbidden to transfer, dispose of, or in any manner interfere with any property, money, things in action or equitable interests belonging to him and not exempt from execution until further order.

Let this order and the above affidavit be personally served on the said , not later than 19 , by exhibiting to him the originals and leaving with him copies thereof.

[Date] .....

Judge.

On the above affidavit and on motion of , attorney for plaintiff,

I hereby order , defendant, to appear before , whom I hereby appoint referee to take and certify the examination, at his office, No. , in the city of , county, on 19 , at o'clock a. m., and on such further days as said referee may designate, to answer concerning his property.

[Continuing as in preceding form.]

Digitized by Google

§ 2559. Supplementary proceedings—affidavit and order for examination of third party.

[Title of action]
[Venue]

being duly sworn, says:

I, II, III, IV, and V, as in § 2558.

VI. That one , who resides in the city of , county, has property of the defendant and is indebted to the defendant in an amount exceeding ten dollars.

[Jurat] .....

On the above affidavit and on motion of , attorney for plaintiff,

I hereby order to appear before [if before a referee follow form under § 2558] me at my chambers in the court-house in the city of , on 19 , at 10 o'clock a. m., and answer concerning any property that he may have belonging to , defendant herein, and concerning any debt that he may owe to the said .

And the said is hereby forbidden to transfer, dispose of or in any manner interfere with any property of the said , not exempt from execution, until further order.

Let this order and the above affidavit be personally served on the said , not later than 19 , by exhibiting to him the originals and leaving with him copies thereof; and let written notice of this proceeding, with copies of this order and the above affidavit, be served on the attorney for the defendant at least [two] days before the hearing.

[Date] .....

Judge.

§ 2560. Supplementary proceedings—order appointing receiver.

On the above affidavits, the examination of the defendant in supplementary proceedings [before me] [before , referee,] filed herein on 19 , and on motion of , attorney for plaintiff, , attorney for defendant appearing in opposition,

I hereby appoint , of , receiver of all the debts, property, equitable interests, rights and things in action, of , defendant, not exempt from execution.

Upon filing with the clerk a bond approved by me conditioned for the faithful discharge of his trust said receiver shall be invested with all the rights and powers of a receiver in supplementary proceedings as provided by law.

[The said is hereby ordered to execute to the said receiver a deed of all his non-exempt real property wherever situated.]

[Date] .....

Judge.

Digitized by Google

§ 2561. Supplementary proceedings—report of referee.

[Title of action]

SUPPLEMENTARY PROCEEDINGS

Examination of taken before , referee, in pursuance of the annexed order, in the city of , county, on 19 , [give also dates of adjourned hearings], , appearing for the plaintiff and , for the defendant:

John Doe, defendant, being first duly sworn by said referee, testified as follows:

Direct examination by Mr. .

That—

Cross-examination by Mr. .

That—

Proceedings adjourned to 19 .

The proceedings having been adjourned on 19 , to 19 , were on the latter date, resumed as follows:

Richard Roe, a witness for the plaintiff, being first duly sworn by said referee, testified as follows:

[As above]

I hereby certify and report that the above is the testimony and the whole of the testimony of given before me, as referee, in pursuance of the annexed order; that the above is a true statement of all the proceedings had before me as such referee; and that before entering upon the discharge of my duties as such referee I took and subscribed the annexed oath.

[Date] .....

Referee.

[Certificate as to fees as in § 2530.]

[Order of reference]

[Oath of referee]

§ 2562. Supplementary proceedings—affidavit for arrest of judgment debtor.

[Title of action]

[Venue]

being duly sworn, says:

I, II, III, IV, V, as in § 2558, except that it should ordinarily be made by the judgment creditor.

VI. That he believes that there is danger that the said is about to leave the state of Minnesota and that such belief is founded upon the following facts [state the facts in detail and as to matters alleged upon information and belief add affidavit of informant or excuse its absence].

VII. [That he verily believes that the said has property which he unjustly refuses to apply to said judgment.]

[Jurat] .....

Digitized by Google

§ 2563. Supplementary proceedings—bench warrant for arrest of judgment debtor.

[Title of action]

The state of Minnesota,

To the sheriff of county:

It having been made to appear to me by the affidavit of , that , judgment debtor herein, is about to leave the state of Minnesota and that the judgment heretofore rendered herein against him remains unsatisfied, you are therefore required forthwith to arrest the said and bring him before me to be dealt with as provided by General Statutes 1894 § 5487.

[Date] .....

District Judge,
Judicial District.

[Indorsed with name of attorney applying for writ]

§ 2564. Supplementary proceedings—order for bond by judgment debtor.

[Title of action]

The defendant in this action, , having been arrested and brought before me in proceedings supplementary to execution upon the judgment heretofore rendered against him herein, under the provisions of General Statutes 1894 § 5487, and having been examined on oath by me,

It is ordered that the said give a bond to the state of Minnesota in the sum of dollars, with two sureties to be approved by me, conditioned as provided by said section; and in default of his so doing, he be committed to jail by my warrant as for a contempt.

[Date] .....

Judge.

§ 2565. Supplementary proceedings—bond by judgment debtor.

[Title of action]

Know all men by these presents that we , as principal, and and , as sureties, are bound unto the state of Minnesota, in the sum of dollars, to the payment of which to the said state we jointly and severally bind ourselves, our heirs, executors and administrators.

The condition of this obligation is such that whereas the said , judgment debtor in the above entitled action, has been arrested in supplementary proceedings therein, under the provisions of General Statutes 1894 § 5487, upon a warrant issued by the Hon. , judge of the district court for county, Minnesota,

Now, therefore, if the said shall attend from time to time before said judge, as said judge shall direct, during the pendency of said supplementary proceedings and until the final determination thereof and shall not in the meantime dispose of any portion of his property not exempt from execution, then this obligation, which is given in pursuance of General Statutes 1894 § 5487, shall be void; otherwise to remain in full force.

Digitized by Google

In testimony whereof we have hereunto set our hands this day of 19 .

Executed in the presence of: .....

....

....

[Acknowledgment, justification and approval as in § 2469]

§ 2566. Acknowledgment of satisfaction of judgment.

[Title of action]

The judgment entered and docketed herein on 19 , in favor of , the plaintiff, and against , the defendant, for the sum of dollars and cents is hereby acknowledged to be paid and satisfied in full and the clerk is hereby authorized to satisfy said judgment of record.

Executed in presence of: .....

..... Plaintiff.

.....

[Acknowledgment as in § 2469]

§ 2567. Partial release of judgment lien.

In consideration of the sum of dollars, to me in hand paid by , the receipt of which is hereby acknowledged, I , of , in whose favor a judgment was entered and docketed in the district court for county, Minnesota, on 19 , against the said , for the sum of dollars and cents, as will more fully appear by the record thereof to which reference is made, do hereby release and discharge from the lien and operation of said judgment the following described real property situated in said county and state:

[Describe property according to government survey or plat]

And I do covenant with the said , that he shall hold the said released premises free, clear and forever discharged from all lien and claim under said judgment.

[Date]

Executed in presence of: .....

.....

.....

[Acknowledgment as in § 2469]

§ 2568. Assignment of judgment.

In consideration of the sum of dollars, the receipt of which is hereby acknowledged, I, , of , in whose favor a judgment was entered and docketed in the district court for county, Minnesota, on 19 , against , for the sum of dollars and cents, as will more fully appear by the record thereof to which reference is made, do hereby sell, assign, transfer and set over to , of , and his assigns, said

Digitized by Google

judgment and any and all sums of money that may be had or obtained by means thereof, or on any proceedings to be had thereupon, and any and all liens and levies securing the same. And I do covenant with the said , that there is now due on said judgment the sum of dollars and cents, with interest thereon from 19 , and that I will not collect or receive the same or any part thereof, or release or discharge said judgment but will own and allow all lawful proceedings therein, the said , saving me harmless of and from any costs and charges in the premises.

Executed in presence of: .....

.....

.....

[Acknowledgment as in § 2469]

§ 2569. Assignment of sheriff's certificate on foreclosure sale.

In consideration of the sum of dollars, the receipt of which is hereby acknowledged, I, , of , Minnesota, do hereby sell, assign, transfer and set over to , of , and his assigns, a certain sheriff's certificate of sale to me executed and delivered by the sheriff of county, Minnesota, dated 19 , and on 19 , at o'clock [a.] m., recorded in the office of the register of deeds for county, Minnesota, in Book of Deeds, on page thereof, upon the sale to me by said sheriff of the premises described in said certificate by virtue of a power of sale contained in a certain mortgage executed by , mortgagor, to , mortgagee, dated . 19 , and recorded in said register's office on 19 , at o'clock [a.] m. in Book of Mortgages, on page thereof. And for the same consideration I also hereby convey, sell, assign, transfer and set over to the said , and his assigns, all my right, title and interest in and to said mortgage and the debt secured thereby and the premises described in said certificate.

[Date] .....

Executed in presence of:

.....

.....

[Acknowledgment as in § 2469]

§ 2570. Opening default—affidavit by resident defendant.

[Title of action]

[Venue]

being duly sworn, says:

I. That he is the defendant in this action.

II. That he was [personally] served with summons herein on 19 .

III. That he failed through [mistake] [inadvertence] [surprise] [excusable neglect] to appear and answer herein, and judgment by default was in consequence entered against him on 19 .

Digitized by Google

IV. [State facts constituting the mistake, inadvertence, surprise, excusable neglect.]

V. That prior to 19 , he had no notice or knowledge whatsoever of said judgment.

VI. [If motion is not made promptly after learning of the judgment state facts excusing the delay in moving.]

VII. That he has fully and fairly stated the case and facts in the case to his counsel , a resident of , Minnesota, and has a good and substantial defence on the merits, as he is advised by his counsel after such statement, and verily believes true.

[Jurat] .....

§ 2571. Opening default—affidavit by non-resident when summons published.

[Title of action]

[Venue]

being duly sworn, says:

I. That he is [the defendant in this action] [one of the defendants in this action being designated therein as an unknown party].

II. That he is not a resident of Minnesota and was not at the time this action was commenced.

III. That he was never personally served with summons herein and has never been otherwise served with summons herein except by publication.

IV. That he never received a copy of the summons herein through the mails or otherwise.

V. That prior to 19 , he had no knowledge or notice whatsoever of this action or of the publication of the summons herein.

VI. That judgment by default was entered herein against him on 19 .

VII. [If a considerable time has elapsed since acquiring knowledge of the action excuse delay in moving by stating facts.]

VIII. That he has fully and fairly stated the case and facts in the case to his counsel, , a resident of , Minnesota, and has a good and substantial defence on the merits, as he is advised by his counsel after such statement, and verily believes true.

[Jurat] .....

§ 2572. Opening default—notice of motion for.

To ,

Attorney for Plaintiff.

Take notice that on the above affidavit and proposed answer, of which copies are herewith served upon you, and on the complaint and all the files and proceedings herein, the defendant will move the court [at a special term thereof to be held] [at its chambers] in the court-house in the city of , on 19 , at o'clock a. m., or as soon thereafter as counsel can be heard, for an order setting aside and vacating the judgment entered herein on 19 , against him and granting him leave to defend this action on the merits and to serve the said proposed answer, and for such other relief as may be just. The motion will be made on the ground of

Digitized by Google

[mistake] [inadvertence] [surprise] [excusable neglect] [or specify two or more of these statutory grounds when the motion is under § 5267].

.....

Attorney for Defendant,
[Office and post-office address]

§ 2573. Opening default—order.

On the above affidavit, the proposed answer and all the files and proceedings herein, and on motion of , attorney for the defendant, , attorney for the plaintiff, appearing in opposition,

It is ordered that the judgment by default entered herein on 19 , against the defendant be set aside and vacated and he be allowed to defend this action on the merits and to serve said proposed answer within days from the filing of this order, [on condition that he pay plaintiff ten dollars costs of motion]; [the judgment, however, and the execution issued thereon, are to stand as security for the plaintiff's claim to abide the event of the action].

[Date] .....

Judge.

§ 2574. Motion to set aside service of summons—notice and order.

[Title of action]

To , .

Attorney for Plaintiff.

Take notice that on the above affidavit of which a copy is herewith served upon you [and on all the files and proceedings herein] the defendant, appearing specially and solely for that purpose, will move the court [at a special term thereof to be held] [at its chambers] in the court-house in the city of , on 19 , at o'clock a. m., or as soon thereafter as counsel can be heard, for an order setting aside and vacating the summons herein and the service thereof [and all subsequent proceedings], with costs. The motion will be made on the ground [specify ground with particularity].

.....

Attorney for Defendant,
[Office and post-office address]

On motion of , attorney for the defendant, appearing specially and solely for that purpose, , attorney for plaintiff appearing in opposition,

It is ordered that the summons herein and the service thereof [and all subsequent proceedings] be set aside and vacated with ten dollars costs to defendant.

[Date] .....

Judge.

Digitized by Google

§ 2575. Notice of claim of property seized by sheriff.

[Title of action]

[Venue]

being duly sworn, says:

I. That on 19 , the sheriff of county seized, upon a writ of [execution] [attachment], issued in the above entitled action, the following described property:

[Describe property in general terms]

II. That at the time of such seizure affiant was and still is the owner thereof.

III. That the same is of the value of dollars.

[Jurat] .....

To ,

Sheriff of county.

Take notice that I claim the property mentioned in the above affidavit and demand the delivery thereof.

[Date] .....

§ 2576. Demand of indemnifying bond by sheriff.

[Title of action]

To ,

Take notice that claims the property seized by me at your instance on 19 , under a writ of [execution] [attachment] issued in the above entitled action and that I shall release the same unless you execute to me an indemnifying bond as provided by statute.

[Date] .....

Sheriff County.

§ 2577. Indemnifying bond to sheriff.

[Title of action]

Know all men by these presents that we, , as principal, and and , as sureties, are bound unto , sheriff of county, in the sum of dollars, to the payment of which to the said , his heirs, executors, administrators or assigns, we jointly and severally bind ourselves, our heirs, executors and administrators.

The condition of this obligation is such that whereas on 19 , the said , as sheriff, seized, under a writ of [attachment] [execution], issued in the above entitled action at the instance of , as the property of , [describe property seized]; and whereas such property has been claimed of said sheriff by ,

Now, therefore, if the said shall fully indemnify and save harmless said from all damages and costs by reason of said claim of , and shall pay all damages and costs to which said may be put by reason thereof, then this obligation, which is given in pursuance of General Statutes 1894 § 5296 as amended by Laws 1897 ch. 171, shall be void; otherwise to remain in full force.

Digitized by Google

In testimony whereof we have hereunto set our hands this day of 19 .

Executed in presence of: .....

....

.....

[Acknowledgment and justification as in § 2469]

§ 2578. Execution—general form.

State of Minnesota District Court

County of Judicial District

The state of Minnesota,

To the sheriff of county:

Whereas, in an action [in this court] [in the district court for county] between , plaintiff, and , defendant, judgment was rendered in favor of said plaintiff and against said defendant on 19 , for the sum of dollars and cents, as appears by the judgment roll in said action filed with the clerk of the district court for county, on 19 ;

And whereas, on 19 , said judgment was docketed in your county and there is now actually due thereon the sum of dollars and cents with interest on that amount from 19 ;

You are therefore required to satisfy said judgment, with interest, out of the personal property of said , within your county; and if sufficient personal property cannot be found, out of the real property in your county belonging to him on the day when said judgment was docketed in your county, or at any time thereafter not exceeding ten years after the entry of said judgment; and return this execution within sixty days after its receipt by you to the clerk of the district court for [county where judgment roll is filed].

Witness the Honorable , judge of said court and the seal thereof this day of 19 .

[Seal of court] .....,

Clerk.

§ 2579. Indorsements on execution.

Issued on my application as attorney for , judgment creditor.

.....

[Office and post-office address]

Received by me on 19 , at o'clock a. m.

.....

Sheriff,

County, Minn.

§ 2580. Certificate of sheriff to copy of execution.

I hereby certify that the [above] is a true copy of the original writ of execution now in my hands for service.

[Date] .....

Sheriff,

County, Minn.

Digitized by Google

§ 2581. Renewal of execution to be indorsed on writ.

Renewed sixty days from the date hereof at the request of the judgment creditor.

Done this day of 19 . Witness my hand and the seal of the court.

.....

[Seal of court] Clerk.

§ 2582. Execution for delivery of real property and return thereon.

State of Minnesota District Court

County of Judicial District

The state of Minnesota,

To the sheriff of county:

Whereas, in an action [in this court] [in the district court for county] between , plaintiff, and , defendant, judgment was rendered in favor of said plaintiff and against said defendant on 19 , for the possession of the following described real property: [Describe property], situated in county, and also for the sum of dollars [as damages for withholding the same] [as rents and profits] and dollars as costs and disbursements, as appears by the judgment roll in said action filed with the clerk of the district court for county on 19 ;

And whereas on 19 said judgment was docketed in your county and there is now actually due thereon the sum of dollars and cents, with interest on that amount from 19 ;

You are therefore required to deliver the possession of said property to the said , plaintiff, and to satisfy the said sum of dollars and cents out of the personal property of said within your county; and if sufficient personal property cannot be found, out of the real property in your county belonging to him on the day when said judgment was docketed in your county, or at any time thereafter not exceeding ten years after the entry of said judgment; and return this execution within sixty days after its receipt by you to the clerk of the district court for [county where judgment roll is filed].

Witness the Honorable , judge of said court and the seal thereof this day of 19 .

[Seal of court] .....

Clerk.

Issued on my application as attorney for , judgment creditor.

.....

[Office and post-office address]

Received by me on 19 , at o'clock a. m.

.....

Sheriff,

County, Minn.

Digitized by Google

I, , sheriff of county, Minnesota, hereby certify and return that on 19 , under and pursuant to the foregoing writ I placed , therein named, in quiet and peaceable possession of the premises therein described; that I have made diligent search and inquiry but have been unable to find any property belonging to , judgment debtor, not exempt from execution, in my county, out of which to satisfy the foregoing writ or any part thereof, in so far as it is against property; and I therefore return the said writ fully satisfied in so far as it is for the delivery of possession of property and wholly unsatisfied in so far as it is against the property of the judgment debtor.

[Date] .....

§ 2583. Execution for delivery of personal property.

State of Minnesota District Court
County of Judicial District
The state of Minnesota,
To the sheriff of county:

Whereas in an action [in this court] [in the district court for county] between , plaintiff, and , defendant, judgment was rendered in favor of said plaintiff and against said defendant on 19 for the possession of the following described personal property [describe property in detail], or for dollars, the value of said property in case possession thereof cannot be obtained, and also for dollars damages and costs, as appears by the judgment roll filed with the clerk of the district court for county on 19 ;

And whereas on 19 , said judgment was docketed in your county and there is now actually due thereon the sum of dollars and cents [and, in case possession of said property cannot be had, the further sum of dollars, the value thereof], with interest on such amounts from 19 .

You are therefore required to deliver the possession of said property to the said , plaintiff, and to satisfy the said sum of dollars and cents, with interest [and, also, in case possession of said property cannot be had, the further sum of (value of property as above), with interest, [continuing as in § 2578].

§ 2584. Execution against several defendants.

State of Minnesota District Court
County of Judicial District
The state of Minnesota,
To the sheriff of county:

Whereas in an action [in this court] [in the district court for county] between , plaintiff and , and , defendants, judgment was rendered in favor of said plaintiff and against said defendants on 19 , for the sum of dollars and cents, as appears [continuing as in § 2578].

You are therefore required to satisfy said judgment, with interest, out of the personal property of the said and , judg-

Digitized by Google

ment debtors,[1] within your county; and if sufficient personal property cannot be found belonging to them [continuing as in § 2578].

[1] See West Duluth Land Co. v. Bradley, 75 Minn. 275, 77 N. W. 275.

§ 2585. Execution against administrator.

State of Minnesota — District Court
County of — Judicial District
The state of Minnesota,
To the sheriff of county:

Whereas in an action [in this court] [in the district court for county] between , plaintiff, and , as administrator of the estate of , deceased, defendant, judgment was rendered in favor of said plaintiff and against said defendant as such administrator on 19 , for the sum of dollars and cents as appears by the judgment roll in said action filed with the clerk of the district court for county on 19 ;

And whereas on 19 , said judgment was docketed in your county and there is now actually due thereon the sum of dollars and cents, with interest on that amount from 19 ;

You are therefore required to satisfy said judgment, with interest, out of the personal property of the said , deceased, in the hands of said , administrator, in your county; and return this execution within sixty days [continuing as in § 2578].

§ 2586. Execution against garnishee.

State of Minnesota — District Court
County of — Judicial District
The state of Minnesota,
To the sheriff of county:

Whereas in an action [in this court] [in the district court for county] between , plaintiff and against , defendant and , garnishee, judgment was rendered in favor of said plaintiff and against said garnishee [continuing as in § 2578].

§ 2587. Execution on judgment of a justice.

State of Minnesota — District Court
County of — Judicial District
The state of Minnesota,
To the sheriff of county:

Whereas in an action before Justice , a justice of the peace in and for county, Minnesota, between , plaintiff, and defendant, judgment was rendered in favor of said plaintiff and against said defendant on 19 , for the sum of dollars and cents, as appears by the transcript of said judgment filed in the office of the clerk of this court on ;

And whereas a transcript of said judgment was docketed in your county [continuing as in § 2578].

Digitized by Google

§ 2588. Execution on judgment of municipal court.

State of Minnesota District Court
County of Judicial District

The state of Minnesota,

To the sheriff of county:

Whereas, in an action in the municipal court of the city of , Minnesota, between , plaintiff and defendant, judgment was rendered in favor of said plaintiff and against said defendant on 19 , for the sum of dollars and cents, as appears by the transcript of said judgment filed in the office of the clerk of this court on 19 ;

And whereas a transcript of said judgment was docketed in your county [continuing as in § 2578].

§ 2589. Levy on real property.

I, , sheriff of county, Minnesota, hereby certify and return that the foregoing writ of execution was delivered to me on 19 , at o'clock a. m., and at that time I levied upon and attached all right, title and interest of , therein named, in and to the following described real property situated in said county:

[Describe property according to government survey or plat]

[Date] .....

Fees:

.....

.....

.....

§ 2590. Levy on debts—notice under G. S. 1894, § 5454.

[To be attached to certified copy of writ]

To ,

Take notice that under and by virtue of the foregoing writ of execution of which a certified copy is herewith served upon you I hereby levy upon and attach all right, title and interest of , mentioned in said writ, in and to all goods, chattels, moneys, credits, bills, notes, debts, bonds, shares in the stock of corporations, evidences of indebtedness and all other forms of personal property whatsoever, in your possession or under your control belonging to or owing said , and I hereby demand that you immediately deliver to me all such personal property capable of manual delivery, including all evidences of indebtedness and shares in the stock of corporations.

And I further demand that you immediately furnish me with a certificate, as required by General Statutes 1894 § 5294, designating the number of rights or shares of the said , in the stock of the , with any dividend or incumbrance thereon, and the amount and description of any form of personal property or debts as described above, held by [said corporation] [by you] and belonging to or owing said .

[Date] .....

Sheriff,
County, Minn.

Digitized by Google

§ 2591. Return on execution—levy on debts—return of certificate.

I, , sheriff of county, Minnesota, hereby certify and return that on 19 , under and by virtue of the foregoing execution I levied upon all the goods, chattels, moneys, credits, bills, notes, debts, bonds, shares in the stock of corporations, evidences of indebtedness and all other forms of personal property whatsoever belonging to , judgment debtor, in the possession or under the control of , or owing the former by the latter, by leaving with the said , a certified copy of said execution and a notice specifying the property levied upon; and at the same time I demanded of the said , a certificate of such property, as required by General Statutes 1894 § 5294, and on 19 , in compliance with such demand, he delivered to me the certificate herewith returned.

[Date] .....

§ 2592. Levy on debts under writ of attachment—notice and demand of certificate under G. S. 1894, § 5454.

To ,

Take notice that under and by virtue of the foregoing writ of attachment of which a certified copy is herewith served upon you I hereby attach all right, title and interest of , mentioned in said writ, in and to all goods, chattels, moneys, credits, bills, notes, book accounts, debts, bonds, shares in the stock of corporations, evidences of indebtedness, and all other forms of personal property whatsoever in your possession or under your control belonging to or owing said , and I hereby demand [continuing as in § 2590].

[Date] .....

Sheriff,
County, Minn.

§ 2593. Certificate under G. S. 1894, § 5294.

Pursuant to a demand made upon me by the sheriff of county, Minnesota, under General Statutes 1894 § 5294 and a writ of [attachment] [execution] issued out of the district court for county, Minnesota, against the property of , in said county I [president of] hereby certify that [the said , is the owner of shares of stock in the (and entitled to dollars as a dividend heretofore declared thereon) (incumbered as follows)] [that the said is the owner of the following described property held by me for him] [that I owe the said the sum of dollars].

[Date] .....

§ 2594. Proceedings under G. S. 1894, § 5294, for examination of party.

[Title of action]

[Venue]

being duly sworn, says:

I. That he is the sheriff of county, Minnesota.

II. That on 19 , a writ of [execution] was issued out of this court, directed and delivered to him, against the property of , judgment debtor herein, within his county.

Digitized by Google

III. That on 19 , he served upon a certified copy of said writ with a notice specifying the property attached and a demand of a certificate, of all of which copies are hereto attached and made a part hereof.

IV. That on 19 , the said , in pursuance of said demand served upon affiant a certificate of which a copy is hereto attached and made a part hereof.

V. That there is reason to suspect [that said certificate is untrue] [that said certificate fails fully to set forth the facts required to be shown thereby].

VI. That the grounds of such suspicion are [set forth grounds with particularity, give sources of information with affidavit of informant etc.].

VII. [That said execution is still in my hands unsatisfied.] [That said attachment and the levy thereunder are still in full force.]

VIII. That no application has heretofore been made for an examination of said under General Statutes 1894 § 5294.

[Jurat] .....

On the above affidavit and on motion of , attorney for , sheriff of county,

It is ordered that , attend before this court [at a special term thereof to be held] [at its chambers] in the court-house in the city of , on 19 , at o'clock in the forenoon and submit to an examination under oath concerning [any property of , held by him or any debt owing by him to the said].

Let this order and the above affidavit be personally served on the said not later than 19 , by exhibiting to him the originals and leaving with him copies thereof.

[Date] .....

Judge.

§ 2595. Return of partial satisfaction of execution.

I, , sheriff of county, Minnesota, hereby certify and return that I have collected on the foregoing execution dollars and cents and have deducted and retained therefrom dollars and cents for my fees, as itemized below, and I return said execution satisfied in the sum of dollars and cents and unsatisfied as to the balance due thereon because, upon diligent search and inquiry, I have been unable to find in my county any property, either real or personal belonging to said , judgment debtor, out of which to satisfy such balance.

[Date] .....

Fees:

.....

.....

.....

§ 2596. Return on execution wholly unsatisfied.

I, , sheriff of county, Minnesota, hereby certify and return that I have made diligent search and inquiry but have

Digitized by Google

been unable to find in my county any property, either personal or real, belonging to , judgment debtor, out of which to satisfy the foregoing execution and I therefore return the same wholly unsatisfied.

[Date] .....

Fees:

.....

.....

.....

§ 2597. Return on execution—levy on personal property.

I, , sheriff of county, Minnesota, hereby certify and return that under and by virtue of the foregoing writ of execution I have this day of 19 , levied upon and attached all right, title and interest of , therein named, in and to the following personal property:

[Here give inventory of property]

[Date] .....

Fees:

.....

.....

.....

§ 2598. Sheriff's certificate to copy of execution and inventory.

I hereby certify that the [foregoing] are true copies of the original writ and inventory in my possession.

[Date] .....

Sheriff,
County, Minn.

§ 2599. Receipt for goods left by sheriff with person on execution.

[Title of action]

I hereby acknowledge the receipt of [describe property] levied upon by the sheriff of county, Minnesota, on 19 , under an execution issued in this action against , defendant, for dollars, and promise and undertake that I will deliver the same to said sheriff on demand, or in default thereof pay to said sheriff the amount directed to be levied by said execution and his costs and fees thereon.

[Date] .....

We, , and , do hereby, in consideration of the property mentioned in the foregoing receipt being left with the said , by the sheriff of county, Minnesota, undertake, jointly and severally, that the said , will return said property to said sheriff on demand, or pay the amount by him agreed to be paid; and in default thereof that we will pay to the said sheriff the amount directed to be levied by the execution mentioned in the foregoing receipt, and his costs and fees thereon.

[Date] .....

.....

Digitized by Google

§ 2600. Appraisal of property seized on execution.

[Levy and sheriff's inventory as in § 2597]

We, the undersigned, freeholders residing in [state precinct], county, Minnesota, having been first duly sworn by the sheriff of said county to make a true appraisement of the property mentioned in the foregoing inventory, do appraise, at their cash value, the several articles thereof, at the respective sums set opposite thereto in such inventory, aggregating the sum of dollars.

[Date] .....
.....

§ 2601. Notice to sheriff of homestead claim.

To ,
Sheriff of county, Minnesota.

Take notice that I claim as my homestead exempt from attachment, levy or sale upon execution, or any other process issuing out of any court within this state, the following described premises:

[Describe premises by metes and bounds]

[Date] .....

§ 2602. Notice of sheriff's sale on execution.

SHERIFF'S SALE

Notice is hereby given that by virtue of an execution, directed and delivered to me, issued out of the district court for county, Minnesota, on a judgment rendered and docketed therein on 19 , in favor of , plaintiff and against , defendant, for the sum of dollars and cents, I have levied upon and will sell at public auction to the highest bidder, for cash, at the [front (north) door of the court-house] in the city of county, Minnesota, on 19 , at 10 o'clock in the forenoon, all the right, title and interest of the said , in and to the following described [personal] [real] property:

[Describe property with particularity]

[Date] .....
Sheriff,
County, Minn.

.....
Attorney for Plaintiff,
[Office and post-office address]

§ 2603. Sheriff's certificate of sale on execution.

I, , sheriff of county, Minnesota, hereby certify that on 19 , by virtue of an execution, directed and delivered to me, issued out of the district court for county, Minnesota, on a judgment rendered and docketed therein on 19 , in favor of , plaintiff and against , defendant, for the sum of dollars and cents, I sold, as such sher-

Digitized by Google

iff, at public auction and upon notice as provided by law, to , [for the (total) sum of dollars and cents] the following described [tracts of] real property, [as a whole] [separately, in the order and for the respective sums indicated below]: [Describe property as in execution. If sold in separate tracts describe each tract and state the amount for which it was sold.]

Said premises are subject to redemption within the time and according to the statute in such case made and provided.

[Date] .....

Executed in presence of:

.....

.....

[Acknowledgment as in § 2469]

§ 2604. Report of sheriff on execution sale of real property.

I, , sheriff of county, Minnesota, hereby certify and return that on 19 , under and by virtue of the foregoing execution and levy and after giving due notice of the time and place of sale by posting notice [of which a copy is hereto attached and made a part hereof], in three public places in said county, one being posted at , one at , and one at , for six successive weeks previous to the day of such sale, and by causing a copy of such notice to be published once each week for the same period in , a newspaper printed and published in said county, I sold, at the time and place and in the manner specified in said notice, the premises therein described, to , for the [total] sum of dollars and cents, he being the highest cash bidder and that being the highest amount bid; [that said premises consist of one tract and were sold as a whole, there being no one claiming a portion thereof and requiring that it be sold separately]; [that said premises consist of several tracts which were sold separately and in the order and for the respective sums indicated below, all, however, being sold to the said]; [that no more of said premises were sold than was necessary to satisfy said execution]; that said sale was begun and completed between the hours of [ten] and [eleven] a. m. on said day; that sufficient personal property belonging to said , judgment debtor, could not be found in my county out of which to satisfy said execution; that from the proceeds of said sale I have deducted dollars and cents for the expenses and fees itemized below and have applied the balance, dollars, upon the foregoing execution and I hereby return the same [satisfied in full] [satisfied in the sum of dollars and cents; and unsatisfied as to the balance because, upon diligent search and inquiry, I have been unable to find in my county any property, either real or personal, belonging to said judgment debtor, out of which to satisfy such balance].

[Date] .....

Fees:

.....

.....

.....

Digitized by Google

§ 2605. Report of sheriff on execution sale of personal property.

I, , sheriff of county, Minnesota, hereby certify and return that on 19 , under and by virtue of the foregoing execution and of the levy mentioned in the foregoing return, and after giving due notice of the time and place of sale by posting notice [of which a copy is hereto attached and made a part hereof] in three public places in said county for ten successive days previous to the day of such sale, one notice being posted , one , and one , I sold, at the time and place and in the manner specified in said notice, the personal property therein described to the persons and at the prices following:

.....

To ..... for $.....

.....

To ..... for .....

Total $.....

And I further certify and return that the above purchasers were the highest cash bidders for the respective articles sold to them and that the above sums were the highest bid therefor; that no more of the property was sold than was necessary to satisfy said execution; that all of said property capable of manual delivery was within view of those who attended the sale, and was pointed out to them at the time it was offered; that all of said property was sold in such parcels as were likely to bring the highest price; that said sale was begun and completed between the hours of [ten] and [eleven] in the forenoon on said day; that from the proceeds of said sale I have deducted dollars and cents, my fees as itemized below, and have applied the balance, dollars and cents, upon the foregoing execution which I hereby return [satisfied in full] [satisfied in the sum of dollars and unsatisfied as to the balance because, upon diligent search and inquiry, I have been unable to find in my county any property, either personal or real, belonging to said , judgment debtor, out of which to satisfy such balance].

[Date] .....

Fees:

.....

.....

.....

§ 2606. Notice of intention to redeem from execution sale.

State of Minnesota District Court

County of Judicial District

Notice is hereby given that I intend to redeem the [describe premises] from the sale thereof made by the sheriff of county, Minnesota, on 19 , to , for the sum of dollars, by virtue of an execution issued out of this court on a judgment entered and docketed herein on 19 , in favor of , plaintiff, and against , defendant, the sheriff's certificate of such sale being recorded in Book of Deeds in the office of the register of deeds for county, Minnesota, at page .

Digitized by Google

I shall make such redemption as a creditor of the said , having a lien on said premises by reason of [state nature of lien giving date so that it will appear to be subsequent].

[Date] .....

Filed 19 , o'clock a. m.

.....
Clerk.

§ 2607. Sheriff's certificate of redemption on execution sale.

I, , sheriff of county, Minnesota, do hereby certify that on 19 , , residing at , Minnesota, paid to me as such sheriff the sum of dollars and cents in redemption of the following described real property:

from the sale of said property made by me as such sheriff at public auction in the city of , county, Minnesota, on 19 , to , for the sum of dollars and cents, by virtue of an execution, directed and delivered to me, issued out of the district court for county, Minnesota, on a judgment rendered and docketed therein on 19 , in favor of , plaintiff, and against , defendant, for the sum of dollars and cents.

And I further certify that such redemption was made by the said upon the claim that [describe claim as in papers presented by redemptioner]; [and that there is claimed to be due on said lien on 19 , the sum of dollars].

[Date] .....

Executed in presence of:

.....

.....

[Acknowledgment as in § 2469]

§ 2608. Sheriff's certificate to copies of attachment and return.

I hereby certify that the [foregoing] are true copies of the original writ and my return thereon, now in my hands.

[Date] .....
Sheriff,
County, Minn.

§ 2609. Return of levy on attachment.

I, , sheriff of county, Minnesota, hereby certify and return that under and by virtue of the foregoing writ of attachment I have on this day of 19 , at o'clock [a.] m. levied upon and attached all right, title and interest of , defendant therein named, in and to the following described [real] [personal] property [Describe real property according to govern-

Digitized by Google

ment survey or plat with name of county and state. Make an inventory of personal property.]

[Date] .....

Fees:

.....

.....

.....

I, , sheriff of county, Minnesota, hereby certify and return that on 19 , I filed for record a certified copy of the foregoing writ of attachment and return thereon in the office of the register of deeds for said county and paid to the register his charges for filing and recording the same.

[Date] .....

Fees:

.....

.....

.....

§ 2610. Return on writ of attachment when bond is given plaintiff.

I, , sheriff of county, Minnesota, hereby certify and return that I have made no levy under the foregoing writ of attachment because of an order made on 19 , by Hon. , judge of the district court for county, discharging such attachment upon the defendant having executed to the plaintiff a bond as provided by General Statutes 1894 § 5299; and I accordingly return the writ herewith.

[Date] .....

§ 2611. Return in claim and delivery proceedings.

I, , sheriff of county, Minnesota, do hereby certify and return that on 19 , I executed the order indorsed on the foregoing affidavit by taking possession of all the property mentioned in such affidavit [or all thereof to be found in my county, to wit:] [and at the same time I delivered to , defendant, personally,] [and at the same time I delivered to , agent of , defendant, from whom the possession of the property was taken] [and at the same time I left with , a person of suitable age and discretion, at the usual place of abode of , defendant, (, agent of defendant)] a copy of said affidavit and order and of the foregoing bond approved by me,[1] [and the defendant having failed to except to the sureties on said bond and also having omitted to require a return of said property],[2] and no other person having made claim thereto, I did, at the expiration of the time allowed by law for seeking such delivery and making such claim, to wit: on 19 , deliver the property so taken to , plaintiff, as by said order I am commanded, and the original of said bond to the defendant.

[Date] .....

Digitized by Google

Where the defendant excepts to the sureties after [1] add [and the defendant having excepted to the sureties therein, and the same having duly justified] and then from [2] to the end as above.

Where the defendant claims the redelivery of the property after [4] add: [and the defendant not having excepted to the sureties therein and claiming the redelivery of said property and giving to me a bond executed to the plaintiff as provided by General Statutes 1894 § 5278, and the sureties on said bond having duly justified, and no other person having made claim to said property, I redelivered said property to the defendant, together with the first mentioned bond; and the last mentioned bond I delivered to the plaintiff].

[Date] .....

Where another claims the property and the plaintiff indemnifies after [3] add: [and one , residing at , having made claim to said property by affidavit as provided by statute and the plaintiff having executed to me an indemnifying bond against said claim I delivered said property to the plaintiff on 19 , and the original of the first mentioned bond to the defendant.]

[Date] .....

Where plaintiff refuses to give indemnifying bond after [3] add [and one , residing at , having made claim to said property by affidavit as provided by statute and the plaintiff neglecting and refusing to execute to me an indemnifying bond against said claim I released said taking].

[Date] .....

I, , sheriff of county, Minnesota, hereby certify and return that I have made diligent search and inquiry but have been unable to find the property mentioned in the foregoing affidavit or any part thereof in my county and am therefore unable to make delivery as I am commanded in the foregoing order.

[Date] .....

§ 2612. Foreclosure of mortgage by action—notice of sale.

SHERIFF'S SALE

Notice is hereby given that by virtue of a judgment of the district court for county, Minnesota, rendered on 19 , in favor of , and against , for the sum of dollars and cents, a copy of which certified by the clerk of said court having been delivered to me, I will sell at public auction to the highest bidder, for cash, at the [front (north) door of the court-house] in the city of , county, Minnesota, on 19 ,

Digitized by Google

at 10 o'clock a. m., the following described real property, situated in county, Minnesota:

[Describe property as in judgment]

[Date] .....

Sheriff,
County, Minn.

.....
Attorney for Judgment Creditor,
[Office and post-office address]

§ 2613. Foreclosure of mortgage by action—sheriff's certificate.

I, , sheriff of county, Minnesota, hereby certify that on 19 , by virtue of a judgment of the district court for county, Minnesota, rendered on 19 , in favor of , plaintiff and against , defendant, for the sum of dollars and cents, I sold at public auction and upon notice as provided by law, to , [for the (total) sum of dollars] the following described [tracts of] real property, [as a whole] [separately, in the order and for the respective sums indicated below]:

[Describe property as in judgment], situated in county, Minnesota.

Such premises are subject to redemption within the time and according to the statute in such case made and provided.

[Date] .....

Executed in presence of:

.....

.....

[Acknowledgment as in § 2469]

§ 2614. Foreclosure of mortgage by action—order confirming sale.

[Title of action]

On motion of , attorney for the plaintiff, , attorney for the defendant appearing in opposition,

It is ordered that the report of , sheriff of county, dated 19 , and filed 19 , of the sale made by him in pursuance of the judgment entered herein on 19 , be and the same is hereby confirmed.

[Date] .....

Judge.

§ 2615. Foreclosure of mortgage by action—sheriff's report of sale.

I, , sheriff of county, Minnesota, hereby certify and return that on 19 , under and by virtue of the judgment, of which a certified transcript delivered to me on 19 , is hereto attached and returned, and after giving due notice of the time and place of sale by posting notice [of which a copy is hereto attached and made a part hereof] in three public places in said county, one being posted at , one at , and one at , for six successive weeks previous to the day of such sale, and by causing

Digitized by Google

a copy of such notice to be published once each week for the same period in , a newspaper printed and published in said county, I sold, at the time and place and in the manner specified in said notice, the premises therein described to , [who is the mortgagee in the mortgage foreclosed by said judgment], for the [total] sum of dollars and cents, he being the highest cash bidder and that being the highest amount bid; [that said premises consist of one tract and were sold as a whole, there being no one claiming a portion thereof and requiring that it be sold separately]; [that said premises consist of several tracts which were sold separately and in the order and for the respective sums indicated below, all, however, being sold to the said]; that said sale was begun and completed between the hours of [ten] and [eleven] in the forenoon on said day; that on 19 , I executed to the said my certificate of sale as provided by General Statutes 1894 § 5470; that of the proceeds of said sale I have retained dollars and cents for my fees and expenses of sale as itemized below; and I have paid to , judgment creditor, the balance, amounting to dollars and cents.

[Date] .....

Fees and expenses:

.....

.....

.....

§ 2616. Foreclosure of mortgage by action—notice of intention to redeem.

State of Minnesota District Court
County of Judicial District

Notice is hereby given that I intend to redeem the [describe premises as in judgment and certificate of sale] from the sale thereof made by the sheriff of county, Minnesota, on 19 , to , for the sum of dollars, under and by virtue of a judgment entered in this court on 19 , in favor of , plaintiff, and against , defendant, the sheriff's certificate of such sale being recorded in Book of Deeds in the office of the register of deeds for county, Minnesota, at page .

I shall make such redemption as a creditor of the said having a lien on said premises by reason of [describe lien, giving date so that it will appear to be subsequent].

[Date] .....

[Address]

Filed 19 , o'clock [a.] m.

.....

Clerk.

§ 2617. Foreclosure of mortgage by action—sheriff's certificate of redemption.

I, , sheriff of county, Minnesota, do hereby certify that on 19 , , residing at , Minnesota, paid

Digitized by Google

to me as such sheriff the sum of dollars and cents in redemption of the following described real property:

from the sale of said property made by me as such sheriff at public auction in the city of , county, Minnesota, on 19 , to , for the sum of dollars and cents, under and by virtue of a judgment of the district court for county, Minnesota, rendered on 19 , in favor of , plaintiff and against , defendant, for the sum of dollars and cents.

And I further certify that such redemption was made by the said upon the claim that [describe claim as in papers presented by redemptioner] [and that there is claimed to be due on said lien on 19 , the sum of dollars].

[Date] .....

Executed in presence of:

.....

.....

[Acknowledgment as in § 2469]

§ 2618. Foreclosure of mortgage by advertisement—power of attorney.

Know all men by these presents that I, , the owner and holder of a mortgage executed to me by , dated 19 , and recorded in the office of the register of deeds of county, Minnesota, in Book of Mortgages on page thereof, hereby authorize , an attorney at law residing in the city of , Minnesota, to foreclose said mortgage by advertisement, to take all proceedings to that end required by law, and to do all things with reference thereto which I might do personally, hereby ratifying and confirming all that he shall lawfully do or cause to be done by virtue hereof.

[Date] .....

Executed in presence of:

.....

.....

[Acknowledgment as in § 2469]

§ 2619. Foreclosure of mortgage by advertisement—notice of sale.

MORTGAGE FORECLOSURE SALE

Notice is hereby given that default has been made in the conditions of a mortgage executed by , mortgagor, to , mortgagee, dated 19 , and recorded in the office of the register of deeds of county, Minnesota, on 19 , at o'clock [a.] m., in Book of Mortgages, on page thereof; [that on 19 , said mortgage was assigned by the said , mortgagee, to , and the deed of assignment

Digitized by Google

recorded on 19 , at o'clock [a.] m. in said register's office in Book of Mortgages, on page thereof]; [that the said has paid the taxes assessed against the premises described in said mortgage for the years amounting in all to dollars and cents]; that the amount claimed to be due on said mortgage at this date, including said taxes, is dollars and cents; that the premises described in and covered by said mortgage are [describe premises as in mortgage], situated in county, Minnesota; that by virtue of the power of sale contained in said mortgage and pursuant to the statute in such case made and provided said mortgage will be foreclosed by the sale of said premises, at public vendue, to the highest bidder for cash, by the sheriff of county, Minnesota, at the [front (north) door of the court-house] in the city of , in said county and state, on 19 , at 10 o'clock a. m., to satisfy the amount then due on said mortgage, [including said taxes] together with the costs of such sale and dollars, attorney's fees, stipulated in said mortgage.

[Date] .....

[Mortgagee] [Assignee of Mortgagee]

.....

Attorney for [Mortgagee],

[Office and post-office address]

NOTICE OF POSTPONEMENT

Notice is hereby given that the sale mentioned in the above notice is postponed to 19 , at o'clock [a.] m. and that in all respects save time it will take place as stated in such notice.

[Date] .....

[Mortgagee] [Assignee of Mortgagee]

§ 2620. Foreclosure of mortgage by advertisement—certificate of sale.

I, sheriff of county, Minnesota, hereby certify that on 19 , by virtue of a power of sale contained in a mortgage executed by , mortgagor, to , mortgagee, dated 19 , and on 19 , at o'clock [a.] m. recorded in the office of the register of deeds of county, Minnesota, in Book of Mortgages, on page thereof, I sold at public vendue and upon notice as provided by law, to , [for the (total) sum of dollars] the following described [tracts of] real property, [as a whole] [separately, in the order and for the respective sums indicated below]:

[Describe property as in mortgage]

Such premises are subject to redemption within the time and according to the statute in such case made and provided.

[Date] .....

Executed in presence of:

.....

.....

[Acknowledgment as in § 2469]

Digitized by Google

§ 2621. Foreclosure of mortgage by advertisement—notice of intention to redeem.

Notice is hereby given that I intend to redeem the [describe premises as in mortgage and certificate] from the sale thereof made by the sheriff of county, Minnesota, on 19 , to , for the sum of dollars by virtue of the power of sale contained in a mortgage of said premises executed by , mortgagor, to , mortgagee, dated 19 , and on 19 , at o'clock [a.] m. recorded in the office of the register of deeds of county, Minnesota, in Book of Mortgages, on page thereof; the sheriff's certificate of such sale being recorded in said register's office in Book of Deeds on page thereof.

I shall make such redemption as a creditor of the said having a lien on said premises by reason of [describe lien, giving date so that it will appear to be subsequent].

[Date] .....

[Address]

Filed 19 , o'clock [a.] m.

.....

Register of Deeds
County, Minn.

§ 2622. Foreclosure of mortgage by advertisement—certificate of redemption.

I, , sheriff of county, Minnesota, do hereby certify that on 19 , , residing at , Minnesota, paid to me as such sheriff the sum of dollars and cents in redemption of the following described real property:

from the sale of said property made by me as such sheriff at public vendue in the city of , county, Minnesota, on 19 , to , for the sum of dollars and cents, by virtue of a power of sale contained in a mortgage of said premises executed by , mortgagor, to , , mortgagee, dated 19 , and recorded on 19 , at o'clock [a.] m. in the office of the register of deeds of county, Minnesota, in Book of Mortgages, on page thereof.

And I further certify that such redemption was made by the said upon the claim that [describe claim as in papers presented by redemptioner] [and that there is claimed to be due on said lien on 19 , the sum of dollars].

[Date] .....

Executed in presence of:

.....

.....

[Acknowledgment as in § 2469]

Digitized by Google

§ 2023. Foreclosure of mortgages by advertisement—affidavits to perpetuate evidence of sale, including affidavit of costs and disbursements.

[Attach notice of sale]

[Venue]

being duly sworn, says that at all the times hereinafter stated he was and still is the sheriff of county, Minnesota; that on 19 , by virtue of a power of sale contained in the mortgage described in the notice of foreclosure sale hereto attached and made a part hereof and pursuant to said notice, he sold, at the time and place and in the manner specified in said notice the premises therein described to , [the mortgagee in said mortgage,] for the [total] sum of dollars and cents, he being the highest cash bidder and that being the highest amount bid; [that said premises consist of one tract and were sold as a whole] [that said premises consist of several tracts which were sold separately and in the order and for the respective sums indicated below, all, however, being sold to the said]; that said sale was begun and completed between the hours of [ten] and [eleven] o'clock in the forenoon on said day; [that no more of said premises was sold than was necessary to satisfy the amount due on said mortgage at the date of notice of such sale, with interest, taxes paid and costs of sale]; [that on [1] 19 , he went to and upon said premises for the purpose of serving said notice upon the person in the possession and occupancy thereof, if any there might be, and that said premises were then wholly vacant and unoccupied]; that on 19 , in the city of ,[2] county, Minnesota, he served said notice of foreclosure sale on , who was then in the actual occupation and possession of said premises, by [state mode of service as upon service of summons. See § 2454].

[Jurat] .....

[1] Any date after the commencement of publication of notice at least four weeks prior to the sale.

[2] Of course it is not necessary to make the service upon the land.

[Venue]

being duly sworn, says that on [1] 19 , he went to and upon the premises described in the notice of foreclosure sale attached to the above affidavit of , for the purpose of serving said notice upon the person in the possession and occupancy of said premises, if any there might be, and that said premises were then wholly vacant and unoccupied.[2]

[Jurat] .....

[1] Any date after the commencement of publication of notice and at least four weeks prior to the sale.

[2] This or the following form is to be used only when the sale and service of notice are made by different persons. In other cases the affidavit of sale and the affidavit of service of notice should be combined as above.

Digitized by Google

[Venue]

being duly sworn, says that on 19 ,[1] in the city of , county, Minnesota, he served the notice of foreclosure sale of which a copy is attached to the above affidavit of , on , who was then in the actual occupation and possession of the premises described in said notice, by [state mode of service as upon service of summons. See § 2454].

[Jurat] .....

[1] See note to preceding form.

[Venue]

being duly sworn, says that he is the [publisher and] printer of the , a [weekly] [daily] newspaper, printed and published in the city of , county, Minnesota; that the notice of mortgage foreclosure sale, of which a copy taken from said newspaper, is attached and made a part of the foregoing affidavit of , was published in said newspaper once each week for six successive weeks, beginning in the issue of , 19 , and closing in the issue of 19 .

[Jurat] .....

[Venue]

being duly sworn, says that he is the attorney for , the party foreclosing the mortgage mentioned in the notice of foreclosure sale attached and made a part of the foregoing affidavit of ; that the following items of costs and disbursements have been necessarily, absolutely and unconditionally incurred and expended in the foreclosure of said mortgage:

Attorney's fees for foreclosing mortgage.....	$.....
Printer's fees for publishing notice of sale.....	.....
Register of deeds' fees for recording certificate and affidavits	.....
Sheriff's fees:	
[Itemize them]	
.....	.....
.....	.....
.....	.....
Total, $	

[Jurat] .....

§ 2624. Foreclosure of chattel mortgage—notice of sale and sheriff's report of sale.

CHATTEL MORTGAGE SALE

Notice is hereby given that default has been made in the conditions of a chattel mortgage executed by , mortgagor, to , mortgagee, dated 19 , and on 19 , at o'clock [a.] m., filed in the office of the clerk of the city of , county, Minnesota; [that on 19 , said

Digitized by Google

mortgage was assigned by the said , mortgagee, to , and the deed of assignment filed in the office of said clerk, on 19 , at o'clock (a.) m.]; that said default consists in the failure of said mortgagor to [specify nature of default]; that the amount due on said mortgage at this date is dollars and cents; that the property described in and covered by said mortgage consists of [describe property as in mortgage]; that by virtue of the power of sale contained in said mortgage and pursuant to the statute in such case made and provided, said mortgage will be foreclosed by the sale of said property, or so much thereof as may be necessary, at public auction, by the sheriff of county, Minnesota, at [describe place of sale], in said county and state, on 19 , at o'clock in the forenoon, to satisfy the amount due on said mortgage, together with the costs of such sale and ten dollars attorney's fees, stipulated in said mortgage.

[Date] .....

[Mortgagee] [Assignee of Mortgagee]

Attorney for [Mortgagee],
[Office and post-office address]

I, , sheriff of county, Minnesota, report:

I. [That on 19 , in the city of , county, Minnesota, I served the above notice on , the mortgagor therein named, by (state mode of service as upon service of summons. See § 2454).] [That I have made diligent search and inquiry but have been unable to find , the mortgagor named in the above notice, in said county; that he cannot be found therein, is not a resident thereof and has no usual place of abode therein.]

II. [That on 19 , in the city of , county, Minnesota, he served the above notice on , who was then in the possession of the property described therein, by (state mode of service as upon service of summons. See § 2454).]

III. That on 19 , I posted the above notice in three public places in said county, to wit:

One copy at
One copy at
One copy at

IV. That at the time and place and in the manner specified in the above notice and pursuant thereto and by virtue of the power of sale contained in the mortgage described in such notice I, as such sheriff, sold the following articles of personal property described in and covered by said mortgage for the total sum of dollars and cents to the persons and for the amounts specified below, such persons being the highest cash bidders and such amounts being the highest amounts bid for the several articles respectively:

.....
Sold to ..... for $.....
.....
Sold to ..... for .....

Total, $

Digitized by Google

V. That all of said property was in view at the time of the sale and was pointed out by me when offered for sale.

VI. That no more of said property was sold than was necessary to satisfy the debt secured by said mortgage and the costs and expenses of foreclosure.

VII. [That no property was returned to the mortgagor.] [That the following property not sold was returned to the mortgagor.]

VIII. That the following costs and expenses were necessarily incurred and paid in connection with such foreclosure sale:

Service of notice and posting, paid to me..... $.....
Seizure and taking property to place of sale, paid to me.. .....
Care and keeping of property, paid to..... .....
Fees for selling property, paid to me..... .....
Attorney's fees, paid to..... .....
Filing papers, paid to..... .....
Affidavits, paid to..... .....

Total $

IX. That out of the proceeds of such sale I paid the above costs and expenses, applied the sum of dollars and cents on the mortgage debt and delivered the balance, amounting to dollars and cents to , the mortgagor.

[Date] .....

I, , sheriff of county, Minnesota, hereby certify and return that the statements made in the above report are true and that such report contains a full, true and correct account of all the proceedings had in the foreclosure described therein.

[Date] .....

[Venue]

being duly sworn, says that he is a regularly admitted attorney of Minnesota; that he foreclosed the mortgage described in the above notice; and that he was paid the fee of dollars, as stated in the above report, for such services.

[Jurat] .....

§ 2625. Notice of order to limit time to appeal.

[Title of action]

To ,

Attorney for [Plaintiff].

Take notice that on 19 , an order was made and filed herein [describe order] and that this notice is served upon you for the purpose of limiting the time to appeal from such order.

.....
Attorney for [Defendant],
[Office and post-office address]

Digitized by Google

§ 2626. Notice of appeal to supreme court.

[Title of action]

To ,

Attorney for [Plaintiff].

Take notice that the [defendant] appeals to the supreme court from the [judgment and the whole thereof, entered] [order (describe order in general terms) filed] herein on 19 .

.....

Attorney for [Defendant],
[Office and post-office address]

§ 2627. Bond for costs on appeal to supreme court.

[Title of action]

Know all men by these presents that we, , as principal, and and , as sureties, are bound unto , the [plaintiff] [defendant] in the above entitled action, in the sum of dollars, to the payment of which to the said , his heirs, executors, administrators or assigns, we jointly and severally bind ourselves, our heirs, executors and administrators.

The condition of this obligation is such that whereas the [plaintiff] [defendant] in the above entitled action has appealed to the supreme court from [a judgment entered against him in said action on 19 , adjudging (describing the nature of the judgment in general terms)] [an order filed in said action on 19 , (describing the nature of the order in general terms)],

Now, therefore, if the appellant shall pay all costs and charges which may be awarded against him on such appeal, not exceeding the sum of dollars, then this obligation, which is given in pursuance of General Statutes 1894 § 6141, shall be void; otherwise to remain in full force.

In testimony whereof we have hereunto set our hands this day of , 19 .

.....

Executed in presence of: .....

.....

.....

[Acknowledgment, justification and approval as in § 2469]

§ 2628. Bond for stay on appeal to supreme court from order.

[Title of action]

Know all men by these presents that we, , as principal, and and , as sureties, are bound unto , the [plaintiff] [defendant] in the above entitled action, in the sum of dollars, to the payment of which to the said , his heirs, executors, administrators or assigns, we jointly and severally bind ourselves, our heirs, executors and administrators.

The condition of this obligation is such that whereas the [plaintiff] [defendant] in the above entitled action has appealed to the supreme court from an order filed in said action on 19 , [describing order in general terms],

Digitized by Google

Now, therefore, if the [plaintiff] [defendant] shall pay the costs of said appeal, and the damages sustained by the respondent in consequence thereof, if said order or any part thereof is affirmed, or said appeal dismissed, and abide and satisfy the judgment or order which the appellate court may give therein, then this obligation, which is given in pursuance of General Statutes 1894 § 6142 shall be void; otherwise to remain in full force.

In testimony whereof we have hereunto set our hands this day of , 19 .

.....

Executed in presence of: .....

.....

.....

[Acknowledgment, justification and approval as in § 2469]

§ 2629. Bond for costs and stay on appeal to supreme court from money judgment.

[Title of action]

Know all men by these presents that we, , as principal, and , and , as sureties, are bound unto , the [plaintiff] [defendant] in the above entitled action, in the sum of dollars, to the payment of which to the said , his heirs, executors, or administrators or assigns, we jointly and severally bind ourselves, our heirs, executors and administrators.

The condition of this obligation is such that whereas the [plaintiff] [defendant] in the above entitled action has appealed to the supreme court from a judgment and the whole thereof entered in said action on 19 ,

Now, therefore, if the appellant shall pay all costs and charges which may be awarded against him on such appeal, not exceeding the sum of dollars and shall pay the amount directed to be paid by said judgment, if it is affirmed, or the part of such amount as to which the judgment is affirmed, if it is affirmed only in part, and shall pay all damages which are awarded against the appellant upon such appeal, then this obligation, which is given in pursuance of General Statutes 1894 §§ 6141, 6143, shall be void; otherwise to remain in full force.

In testimony whereof we have hereunto set our hands this day of , 19 .

.....

Executed in presence of: .....

.....

.....

[Acknowledgment, justification and approval as in § 2469]

Digitized by Google

§ 2630. Notice of argument in supreme court.

[Title of action in supreme court]

To ,
Attorney for Respondent.

Take notice that the appeal in this cause will be brought on for argument at the next term of this court to be held at the capitol in the city of St. Paul on 19 , at the opening of court on that day.

.....
Attorney for Appellant,
[Office and post-office address]

Due service of the above notice of argument is hereby admitted.
[Date] .....
Attorney for Respondent.

§ 2631. Note of issue in supreme court.

[Title of cause in supreme court]

NOTE OF ISSUE

Notice of appeal served 19 .
.....
Attorney for Appellant.
[Office and post-office address]
.....
Attorney for Respondent.
[Office and post-office address]

The clerk will please file this note of issue and enter the cause on the calendar for the next [October] term of the court to be held 19 .

.....
Attorney for Appellant.

Filed 19 .
.....
Clerk.

§ 2632. Case for use on motion for new trial or appeal.

[Title of action]

CASE

Containing all the [material] evidence offered or introduced on the trial of this cause and also [the charge in full] and all objections, rulings, orders and all other proceedings of such trial.

The issues in this cause came on for trial before the Hon. , [judge of this court] [one of the judges of this court], [and a jury] [without a jury], on 19 , appearing for the plaintiff and appearing for the defendant, whereupon the following proceedings were had:

Digitized by Google

TESTIMONY OF , CALLED BY THE PLAINTIFF

Direct examination: [Here insert testimony in a condensed form leaving out all immaterial matter. Do not give the questions asked except when an objection is made and overruled or sustained and it is sought to question the ruling on motion for a new trial or on appeal. In such cases give the question in full, the objections made and the ruling thereon as follows]. Q: ? Objected to as [state grounds in full]. Objection [sustained] [overruled]. A.
Cross examination:
Plaintiff rested.
Defendant moved for a dismissal on the ground [state ground].
Motion denied.

TESTIMONY OF , CALLED BY THE DEFENDANT

Direct examination: [As above]
At the close of the testimony defendant moved for a directed verdict in his favor on the ground [state ground].
Motion denied.
The court charged the jury as follows: [Give charge in full]
[It is not necessary to insert in the case matters which are a part of the judgment roll by statute. See § 1743.]

§ 2633. Proposal of case.

[Title of action]
To ,
Attorney for [Plaintiff].
Take notice that the [defendant] proposes the foregoing as a case to be settled and allowed by the Hon. , the judge who tried this cause.

.....
Attorney for [Defendant],
[Office and post-office address]

§ 2634. Notice of settlement of case.

[Title of action]
To ,
Attorney for [Plaintiff].
Take notice that the case heretofore proposed by the defendant [with the amendments thereto proposed by the plaintiff] will be presented to the Hon. , the judge before whom this cause was tried, at his chambers in the court-house in the city of , on 19 , at o'clock a. m., or as soon thereafter as counsel can be heard, for settlement and allowance.

.....
Attorney for [Defendant],
[Office and post-office address]

§ 2635. Stipulation for settlement of case.

[Title of action]
It is hereby stipulated that the foregoing proposed case consisting of pages of typewritten matter and exhibits may be

Digitized by Google

taken as conformable to the truth and as containing all the [material] evidence offered or introduced on the trial of this cause, and also [the charge in full] and all objections, rulings, orders and all other proceedings of such trial, and that the same may be settled and allowed as the settled case herein by the Hon. , without notice.

[Date] .....

Attorney for Plaintiff.

.....

Attorney for Defendant.

§ 2636. Certificate of judge to case.

[Title of action]

I hereby certify that the foregoing case consisting of pages of typewritten matter and exhibits has been examined by me and found conformable to the truth and to contain all the [material] [1] evidence offered or introduced on the trial of this cause, and also [the charge in full] and all objections, rulings, orders and all other proceedings of such trial, and I hereby settle and allow the same as the settled case herein.

[Date] .....

Judge.

[1] Insert when evidence is condensed. See Reiff v. Bakken, 36 Minn. 333, 31 N. W. 348.

§ 2637. Certificate of judge to return on appeal from interlocutory order.

I hereby certify [1] that the foregoing are copies of all the affidavits, pleadings, papers and records which were offered and considered by me on the motion for [describe motion in general terms] mentioned therein; and that no other evidence was offered or considered [except certain oral evidence which is herewith returned in a statement of evidence which I have examined and found to conform to the truth and to contain all the [material] [2] oral evidence offered or considered on said motion].

[Date] .....

Judge.

[1] This certificate is to be attached to the return of the clerk.

[2] Insert when evidence is condensed. See § 2636.

§ 2638. Return of clerk on appeal to supreme court.

[Attach copies of papers returned]

To the Honorable Supreme Court:

I, , clerk of the district court for county, Minnesota, do hereby certify and return that I have compared the foregoing papers writings with the original [here enumerate the papers and records of which copies are returned] in the action therein entitled, as the same appear of record and on file in my office and find the same to be true and correct copies thereof, and of the whole thereof.

In testimony whereof I have hereunto set my hand and affixed the seal of said court this day of 19 .

[Seal of court] .....

Digitized by Google

§ 2639. Appeal from justice to district court—civil action—notice and affidavit.

[Title of action in justice court]

To ,

Attorney for [Plaintiff].

Take notice that the [defendant] appeals to the district court for county from the judgment and the whole thereof rendered herein by said justice of the peace on 19 , against the [defendant] and in favor of the [plaintiff] for the sum of dollars and cents.

The appeal is taken upon questions [of law alone] [of fact alone] [of both law and fact].

.....
Attorney for [Defendant],
[Office and post-office address]

Due service of the above notice of appeal is hereby admitted.

[Date] .....
Attorney for [Plaintiff].

Filed with me 19 .

.....
Justice of the Peace.

[Title of action in justice court]

[Venue]

being duly sworn, says that he is the [defendant] in this action; that he appeals to the district court for county from the judgment and the whole thereof rendered herein by said justice of the peace on 19 , against him in favor of the plaintiff for the sum of dollars and cents; and that said appeal is made in good faith and not for the purpose of delay.

[Jurat] .....

Filed with me 19 .

.....
Justice of the Peace.

§ 2640. Appeal from justice to district court—civil action—bond.

[Title of action in justice court]

Know all men by these presents that we, , as principal, and and , as sureties, are bound unto , the [plaintiff] [defendant] in the above entitled action, in the sum of dollars, to the payment of which to the said , his heirs, executors, administrators or assigns, we jointly and severally bind ourselves, our heirs, executors and administrators.

The condition of this obligation is such that whereas the [plaintiff] [defendant] in the above entitled action has appealed to the district court for county, from a judgment rendered in said action on 19 ,

Digitized by Google

Now, therefore, if the said , appellant, shall prosecute his appeal with effect, and abide the order of the court therein, then this obligation, which is given in pursuance of General Statutes 1894 § 5068, shall be void; otherwise to remain in full force.

In testimony whereof we have hereunto set our hands this day of 19 .

.....

Executed in presence of: .....

.....

.....

[Acknowledgment and justification as in § 2469]

I hereby approve the above bond and the sureties thereon.

[Date] .....

Justice of the Peace.

Filed with me 19 .

.....

Justice of the Peace.

§ 2641. Return of justice on appeal.

[Title of action in justice court]

[Attach the originals of all papers filed, numbering them consecutively, and add transcript of all docket entries and of the evidence if it is to be returned]

To the Honorable District Court for county:

I hereby certify and return that the foregoing papers numbered 1 to [7], inclusive, are the originals of all papers filed with me in the above entitled action; and that the foregoing is a true transcript of all the entries made in my docket in connection with such action [and of all the evidence offered or received on the trial thereof].

[Date] .....

Justice of the Peace,
County, Minn.

§ 2642. Notice of appeal from justice to district court—criminal action.

[Title of action in justice court]

To ,

County Attorney,
county, Minn.

Take notice that the defendant appeals to the district court for county from the judgment and the whole thereof rendered against him herein by said justice of the peace on 19 .

The appeal is taken upon questions [of law alone] [of fact alone] [of both law and fact].

.....

Attorney for [Defendant],
[Office and post-office address]

Digitized by Google

§ 2643. Recognizance on appeal from justice court in criminal case.

[Title of action in justice court]

We, , , acknowledge ourselves to be indebted to the state of Minnesota, in the sum of dollars, to be made and levied of our several goods and chattels, lands and tenements, if default be made in the condition following,

The condition of this recognizance is such that whereas was, on 19 , convicted before , a justice of the peace in and for county, Minnesota, of the offence of [describing it]; and whereas the said has appealed from the judgment of said justice, rendered thereon, to the district court for said county,

Now, therefore, if the said shall appear before said district court on the first day of the next general term thereof and abide the judgment of the court therein and in the meantime keep the peace and be of good behavior, then this recognizance, which is given in pursuance of General Statutes 1894 § 5112, shall be void; otherwise to remain in full force.

.....

.....

Taken, subscribed and acknowledged before me this day of 19 .

.....

Justice of the Peace,
county, Minn.

§ 2644. Notice of appeal from probate to district court.

[Title of proceeding in probate court]

To ,

Attorney for

Take notice that appeals to the district court for county from the [judgment (decree) and the whole thereof (describing it in general terms)] [order (describing it in general terms)] [entered] [filed] herein on 19 .

.....

Attorney for Appellant,
[Office and post-office address]

Due service of the [above] [within] notice of appeal is hereby admitted.

[Date] .....

Attorney for

Filed 19 .

.....

Judge.

§ 2645. Bond on appeal from probate to district court.

[Title of proceeding in probate court]

Know all men by these presents that we, , as principal, and and , as sureties are bound unto , judge of probate of county, and his successors in office, in the sum of dollars, to the payment of which to the said ,

Digitized by Google

his successors in office, we jointly and severally bind ourselves, our heirs, executors and administrators.

The condition of this obligation is such that whereas has appealed to the district court for county, from a [judgment] [decree] [order] [describe it in general terms] made and entered in the above entitled proceedings on 19 ,

Now therefore, if the said , appellant, shall prosecute his appeal with due diligence to a final determination and pay all costs and disbursements and abide the order of the court therein,[1] then this obligation, which is given in pursuance of General Statutes 1894 § 4668, shall be void; otherwise to remain in full force.

In testimony whereof we have hereunto set our hands this day of , 19 .

.....

Executed in presence of: .....

....

.....

[Acknowledgment, justification and approval as in § 2469]

[1] If the appeal is under G. S. 1894 § 4666 add: and secure the estate of the said , deceased, from all damages and costs in consequence of said appeal and secure the intervening damages and costs to , then this obligation, which is given in pursuance of General Statutes 1894 §§ 4666, 4668, shall be void; otherwise to remain in full force.

In testimony etc. [as above].

§ 2646. Return on appeal from probate to district court.

[Title of proceeding in probate court]

[Here insert copies of papers and records]

To the Honorable District Court for county:

An appeal having been perfected from an [order] [judgment] [decree], [describing order, judgment or decree in general terms], entered herein on 19 , I hereby certify that the foregoing is a true transcript of such [order] [judgment] [decree] and of all the papers and proceedings upon which it was founded and of the notice of appeal, proof of service thereof and bond, on file in this court.

.....

[Date] Judge of Probate,
County, Minn.

§ 2647. Certiorari—petition, order, writ and return.

State of Minnesota Supreme Court

PETITION FOR WRIT OF CERTIORARI

To the Honorable Supreme Court:

Your petitioner, , respectfully represents:

I. [Here give an outline history of the proceedings in the lower court so that the appellate court may see from the face of the peti-

Digitized by Google

tion that it is a case justifying the issuance of the writ. Make it appear from facts stated that the petitioner has a direct and material interest in the proceedings below and has been aggrieved thereby; that the proceedings have passed to a final determination; and that there is no other mode of review than by certiorari. At common law the petition must show error but in this state, where the review is not limited to the record and the writ is merely a mode of appeal and issues almost as a matter of course it is probably not necessary that the petition should contain a formal assignment of errors or that error should affirmatively appear.]

II. That your petitioner is advised that said [judgment] [proceedings] can be reviewed by this court by writ of certiorari and not otherwise.

Wherefore, your petitioner, who has made no other application therefor, prays that a writ of certiorari issue out of this court directed to commanding them to certify and return to this court all the records of said proceedings with all things pertaining thereto, [including all the material evidence introduced or offered at the trial, all objections, rulings, orders and all other proceedings of such trial], to the end that said [judgment] [proceedings] may be reviewed by this court; and that all proceedings on account of said [judgment] be stayed until the hearing and determination upon such writ. .....

[Verification as in § 2470]

Upon the filing of the foregoing petition let a writ of certiorari issue as prayed therein returnable within days of the service thereof. [It is further ordered that a copy of the writ be served upon , attorney for , and that all further proceedings upon the [judgment] mentioned in said petition be stayed, pending such certiorari or until the further order of this court.

[Date] .....

Chief Justice.

[Title of proceeding]

The state of Minnesota,

To , Greeting:

Whereas we have been informed by the petition of ,

That [here repeat verbatim all the allegations of the petition, omitting only the introduction and prayer].

We therefore command you to certify and return to this court, within days of the service of this writ upon you, all the records of said proceedings with all things pertaining thereto, [including all the material evidence introduced or offered at the trial, all objections, rulings, orders and all other proceedings of such trial], as the same remains before you, to the end that said [judgment] [proceedings] may be reviewed by this court; and have you then and there this writ. We further command you to desist from all further proceedings under said [judgment] until the hearing and determination upon this writ.

Digitized by Google

Witness the Honorable Charles M. Start, chief justice of said court, and the seal thereof, this day of , 19 .

[Seal of court] .....
Clerk.

[Title of proceeding]

To the Honorable Supreme Court:

In obedience to the writ of certiorari hereto attached I, , judge of , return the same with a transcript of all the records of the proceedings therein mentioned remaining before me and I hereby certify that this return contains a transcript of all the files and records of said proceedings, with all things pertaining thereto, including all the material evidence introduced or offered at the trial, all objections, rulings, orders and all other proceedings of such trial.

[Date] .....

§ 2648. Prohibition—affidavit, notice, order, writ, return and adoption—writ absolute—writ of consultation.

State of Minnesota Supreme Court
[Venue]

being duly sworn, says:

I. [Here set out the proceedings in the court below in detail and the objections made therein by the affiant to the prosecution of the action.]

II. That copies of said summons [specify any motions or orders] are hereto attached and made a part hereof.

III. [State facts showing that the lower court intends to proceed with the case.]

IV. That said court is without jurisdiction to proceed in said action [here set out facts showing want of jurisdiction if they are not fully set out above].

V. That affiant makes this affidavit for the purpose of securing a writ of prohibition to be issued out of this court and directed to the said and , commanding them to desist and refrain from further proceedings in said [action].

VI. That affiant's remedy by appeal or by any other remedy except prohibition is inadequate because [here state with particularity why prohibition is the only adequate remedy].

[Jurat] .....

[Exhibits attached]

To ,
Attorney for

Take notice that on the above affidavit and exhibits thereto attached will move the supreme court in its court-room at the capitol in the city of St. Paul on 19 , at the opening of court on that day or as soon thereafter as counsel can be heard, for an order that an alternative writ of prohibition issue out of said court directed to [name court], and to , judge thereof, and [plaintiff], commanding them to desist and refrain from any further

Digitized by Google

proceedings in [state proceeding], and for such other relief as may be just.

.....
Attorney for ,
[Office and post-office address]

On the foregoing affidavit and on motion of , attorney for , , attorney for , appearing in opposition,

It is ordered that a writ of prohibition issue directed to [name court], and to , judge thereof, and to , commanding them to desist and refrain from any further proceedings in [specify action], until the next term of this court and to show cause before this court at such term why they should not be absolutely restrained from any further proceedings in such [action].

[Date] .....
Chief Justice.

[Title of proceeding]

The state of Minnesota,

To , , , Greeting:

Whereas we have been informed by the affidavit of ,

That [here repeat substance of affidavit].

We therefore command you to desist and refrain from any further proceedings in such [action] until the next term of this court, or the further order of the court thereon; and to show cause at such term why you should not be absolutely restrained from any further proceedings in such [action]. And have you then and there this writ with the return of the court thereon.

Witness the Honorable Charles M. Start, chief justice of said court, and the seal thereof, this day of , 19 .

[Seal of court] .....
Clerk.

[Title of proceeding]

To the Honorable Supreme Court:

The district court for county, Minnesota, to whom the writ of prohibition hereto annexed is directed, in answer thereto, certifies and returns:

That [here set out all the proceedings].

In testimony whereof I have caused the seal of this court to be hereunto affixed this day of 19 .

[Seal of court]

.....
Judge.

I, , the party to whom the writ of prohibition hereto annexed is directed, do hereby adopt the return of the district court hereto annexed and rely upon the matters therein contained, as sufficient cause why such court should not be restrained, as mentioned in said writ.

[Date] .....

Digitized by Google

[Title of proceeding]
The state of Minnesota,
To , , Greeting:
Whereas we have been informed by the affidavit of ,
That [here repeat substance of affidavit].
We, therefore, having determined that the said [applicant for writ] is entitled to a writ of prohibition, as prayed, do command you, that you absolutely desist and refrain from any further proceedings in [state matters to be prohibited].
Witness etc. [as in writ above].

[Title of proceeding]
The state of Minnesota,
To , , Greeting:
Whereas, [applicant for writ], has lately prosecuted and caused to be directed to you our certain writ of prohibition, out of our court, that you should not [state what the writ prohibited], by pretense of which prohibition you have thereon hitherto delayed, and yet do delay, further to proceed in [state matters], as we have understood, to the great damage of [applicant for writ],
Wherefore, having determined that the said [applicant for writ] was not entitled to said writ and being willing that there should be no further delay in [state matters], because in our court it has in such manner proceeded that it is considered by us that a writ of consultation may issue, our said writ of prohibition to the contrary notwithstanding,
We therefore, being unwilling that the said [party opposing writ] should in any wise be injured in this behalf, do hereby authorize you to proceed in said matter, and further to do what you shall know to belong thereto, our said writ of prohibition to the contrary notwithstanding.
Witness etc. [as in writ above].

§ 2649. Habeas corpus—petition and order for.

PETITION OF FOR A WRIT OF HABEAS CORPUS

To the Honorable , judge of the district court for county, Minnesota:
Your petitioner, , respectfully represents:
I. That he is imprisoned in the county jail of county, in the city of , Minnesota, by , sheriff of said county.
II. That he is not imprisoned by virtue of the final judgment or decree of any competent tribunal nor by virtue of an execution issued upon any such judgment or decree.
III. That he is informed and believes that he is imprisoned by virtue of a [warrant], a copy of which is hereto attached.
IV. That said imprisonment is illegal [setting forth the grounds of illegality as, for example] in that chapter of General Laws 19 , of this state, approved on 19 , under and by virtue of which your petitioner is imprisoned, is unconstitutional and void.

Digitized by Google

being in contravention of section , of title , of the constitution of this state.

V. [If application is not made to officer within county where the petitioner is imprisoned here state reasons for not applying to an officer within such county as required by G. S. 1894 § 5997.]

Wherefore your petitioner, who has made no other application therefor, prays that a writ of habeas corpus may issue, as provided by law, to the end that he be released from his illegal imprisonment.

[Date]. .....

[Verification as in § 2470]

Upon the filing of the foregoing petition it is ordered that a writ of habeas corpus issue out of and under the seal of the district court for county, Minnesota, directed to the said , commanding him to have the body of the said , before me at chambers, in the court-house, in the city of , county, Minnesota, on 19 , at o'clock a. m., to do and receive what shall then and there be considered concerning the said , together with the time and cause of his imprisonment and detention; and that he have then and there the said writ.

[Date] .....

District Judge,
Judicial District, Minn.

§ 2650. Habeas corpus—writ.

State of Minnesota District Court
County of Judicial District

The state of Minnesota,

To , sheriff of county, Minnesota [or other person having custody of petitioner], Greeting:

You are hereby commanded to have the body of , by you imprisoned and detained, as it is said, together with the time and cause of such imprisonment and detention, by whatsoever name the said shall be called or charged, before the Honorable , judge of the district court for county, at his chambers in the court-house in the city of , county, Minnesota, on 19 , at o'clock a. m., to do and receive what shall then and there be considered concerning the said . And have you then and there this writ.

Witness the Honorable , judge of said court and the seal thereof this day of 19 .

[Seal of court] .....

Clerk.

[Indorsed with name of attorney applying for writ]

§ 2651. Habeas corpus—bond to sheriff.

Know all men by these presents that we, , and , are bound unto , sheriff of county, Minnesota, his successors in office, in the sum of dollars, to the payment of

Digitized by Google

which to the said , his successors in office, we jointly and severally bind ourselves, our heirs, executors and administrators.

The condition of this obligation is such that whereas is now confined as a prisoner in the custody of the said , as such sheriff and a writ of habeas corpus has on this day been issued out of the district court for county, Minnesota, to inquire into the cause of the confinement of said , directed to said sheriff,

Now, therefore, if the said and , shall pay all costs and expenses of such habeas corpus proceedings and the reasonable charges of restoring , to , if he is remanded, then this obligation, which is given in pursuance of General Statutes 1894 § 6023, shall be void; otherwise to remain in full force.

Executed in presence of: .....
....
.....

[Acknowledgment and justification as in § 2469]

§ 2652. Habeas corpus—notice of hearing.

[Title of proceeding]

To ,

[Attorney for county, Minnesota] [Party interested].

Take notice that on 19 a writ of habeas corpus was issued out of the district court for county, Minnesota, directed to , sheriff of said county, to inquire into the imprisonment or restraint of , by said sheriff, and that said writ is returnable before the Hon. , judge of said court, at his chambers in the court-house in the city of , county, Minnesota, on 19 at o'clock a. m.

[Date] .....
Attorney for , Petitioner,
[Office and post-office address]

§ 2653. Habeas corpus—return to writ.

[Title of proceeding]

To the Honorable , judge of said court:

In obedience to the foregoing writ of habeas corpus served upon me on 19 I, , sheriff of county, Minnesota, hereby certify and return that [1] before the service of said writ upon me the said was committed to my custody and is now detained by me by virtue of a writ of , a copy of which is hereto attached and returned. Nevertheless I have the body of the said , now here before you as I am within commanded.

[Date] .....

Add after [1] if not in custody: "neither at the time of the allowance of said writ, nor at any time since, was the said , named therein, by whatsoever name he may be called or charged, in my custody or control or under my restraint; wherefore I cannot have his body before you as I am commanded in said writ."

[Date] .....

Digitized by Google

§ 2654. Habeas corpus—answer of petitioner to return.

[Title of proceeding]

The petitioner, for answer to the return of , sheriff of county, herein [alleges] [denies] that

.....

§ 2655. Habeas corpus—order discharging prisoner.

[Title of proceeding]

To the sheriff of county, Minnesota:

It appearing on the return of the writ of habeas corpus allowed by me on 19 that is imprisoned and restrained by you and no legal cause being shown for such imprisonment and restraint, or for the continuation thereof, I do command you forthwith to discharge him from your custody.

[Date] .....

Judge.

§ 2656. Habeas corpus—order remanding prisoner.

[Title of proceeding]

To the sheriff of county, Minnesota:

It appearing on the return of the writ of habeas corpus allowed by me on 19 that is legally detained in the custody of by virtue [describe writ or order] it is ordered that the said be and he is hereby remanded to such custody under said [writ of]. .....

[Date] Judge.

§ 2657. Habeas corpus—order admitting prisoner to bail.

[Title of proceeding]

To the sheriff of county, Minnesota:

It appearing on the return of the writ of habeas corpus allowed by me on 19 that is detained in the custody of the sheriff of county, Minnesota, under a [describe writ or order] in which he is charged with the commission of [state criminal offence] and that he is entitled to bail, it is ordered that he be held to bail for his appearance at the next general term of the district court for county in the sum of dollars, and upon such bail being duly given it is ordered that he be discharged from such custody. .....

[Date] Judge.

§ 2658. Alimony pendente lite—affidavit, notice and order.

[Title of action]

[Venue]

being duly sworn, says:

I. That she is the plaintiff in this action and that she and the defendant are husband and wife, and were married at 19 .

II. That this action was commenced by the service of summons upon the defendant on 19 [state manner of service].

III. That the defendant resides in , and appeared herein by answering on 19 .

IV. That issue was formed herein by the service of a reply on

Digitized by Google

19 and the action is now pending and ready for trial [on the calendar for trial at the next regular term of this court].

V. That this is an action for absolute divorce on the ground of , as will appear by the complaint now on file herein.

VI. That she is wholly destitute of the means of supporting herself during the pendency of this action or of defraying the expenses thereof.

VII. That she is living apart from her husband and not receiving any support from him [state how and name children living with her and at her expense].

VIII. That dollars is a reasonable amount to meet her monthly living expenses.

IX. That dollars is a reasonable amount to meet her expenses in prosecuting this action.

X. That the defendant is the owner of the following real property from which he derives rents amounting annually, as affiant verily believes, to the sum of dollars:

[Describe property]

XI. That the defendant is the owner of stocks and bonds from which he derives an annual income, as affiant verily believes, of dollars.

XII. That the defendant is engaged in the business of from which he derives an annual income, as affiant verily believes, of dollars.

XIII. That she has fully and fairly stated the case and facts in the case to her counsel , a resident of , Minnesota, and has a good and substantial cause of action on the merits, as she is advised by her counsel after such statement, and verily believes true.

[Jurat] .....

To

Attorney for Defendant.

Take notice that on the above affidavit of which a copy is herewith served upon you, and on the pleadings and all the files and proceedings herein, the plaintiff will move the court [at a special term thereof to be held] [at its chambers] in the court-house in the city of , on 19 , at o'clock a. m., or as soon thereafter as counsel can be heard, for an order directing the defendant to pay to the plaintiff the sum of dollars monthly for her support during the pendency of this action and the sum of dollars to enable her to defray the costs and expenses of this action, and for such other relief as may be just.

.....

Attorney for Plaintiff,

[Office and post-office address]

On motion of , attorney for the plaintiff, , attorney for the defendant, appearing in opposition,

It is ordered that the defendant, within days after service

Digitized by Google

of this order upon him, pay to the plaintiff the sum of dollars as and for her expenses, including counsel fees, in prosecuting this action; and that he also pay to the plaintiff the sum of dollars, for her living expenses, on the first day of each month, after the service of this order upon him, during the pendency of this action.

.....

[Date] Judge.

§ 2659. Affidavit and return of service of orders.

[Venue]

being duly sworn, says that on 19 , in the city of , county, Minnesota, he served the foregoing order [and affidavit] on , to him well known to be the person upon whom such service was therein directed to be made, by exhibiting to him the original(s) so that he could read [it] [them] and handing to and leaving with him [a copy] [copies] thereof.

[Jurat] .....

I, , sheriff of county, Minnesota, hereby certify and return, that on 19 , in the city of , in said county and state, I served the foregoing order [and affidavit] on , to me well known to be the person upon whom such service was therein directed to be made, by exhibiting to him the original(s) so that he could read [it] [them] and handing to and leaving with him [a copy] [copies] thereof.

[Date] .....

Fees:

.....

.....

.....

§ 2660. Motion for vacation of attachment—affidavit, notice and order.

[Title of action]

[Venue]

being duly sworn, says:

I. That he is the defendant in this action:

II. That the summons herein was served upon him on 19 , and [the time for answering has not expired] [that he served an answer herein on 19].

III. That a writ of attachment issued herein on 19 , against the property of affiant, directed and delivered to the sheriff of county, and that on 19 , said sheriff, under and by virtue of said writ, levied upon [state upon what].

IV. That said writ and proceedings thereunder are illegal in that [state with particularity the grounds].

[Jurat] .....

To ,

Attorney for Plaintiff.

Take notice that on the above affidavit of which a copy is herewith served upon you and upon all the files and proceedings herein, the

Digitized by Google

defendant will move the court, [at a special term thereof to be held] [at its chambers] in the court-house in the city of , on 19 , at o'clock a. m., or as soon thereafter as counsel can be heard, for an order vacating the writ of attachment issued herein on 19 , on the ground that [state irregularity], and for such other relief as may be just, with costs.

.....
Attorney for Defendant,
[Office and post-office address]

On the above affidavit and the files herein and on motion of , attorney for defendant, , attorney for plaintiff appearing in opposition,

It is ordered that the writ of attachment issued herein against the property of , defendant, on 19 , be and the same is hereby vacated; and that any and all proceeds of sales and moneys by said sheriff collected, and all the property attached remaining in his hands, be delivered and paid by him to the defendant or his agent, and released from said attachment, with ten dollars costs of motion to the defendant.

[Date] .....
Judge.

See Dunnell, Minn. Pl. §§ 1023–1046.

§ 2661. Motion for consolidation of actions.

[Titles of all the actions]

being duly sworn, says:

I. That he is the defendant in all the above entitled actions.

II. That the same are all now pending in this court and are between the same parties.

III. That said actions are based on causes of action which might have been joined in one action, as will appear by the several complaints therein now on file.

IV. That affiant intends to put in the same defence to each of said actions, namely, that [state defence].

V. That affiant has fully and fairly stated the case and facts in the case to his counsel, , a resident of , Minnesota, and has a good and substantial defence on the merits to each and all of said actions, as he is advised by his counsel after such statement, and verily believes true.

VI. That plaintiffs' attorneys have refused to consent to such consolidation.

[Jurat] .....

To ,
Attorney for Plaintiff.

Take notice that on the above affidavit of which a copy is herewith served upon you and upon all the files and proceedings in the above entitled actions, the defendant will move the court, [at a special term thereof to be held] [at its chambers] in the court-house in

Digitized by Google

the city of , on 19 , at o'clock a. m., or as soon thereafter as counsel can be heard, for an order consolidating said actions, and for such other relief as may be just, with costs.

.....
Attorney for Defendant,
[Office and post-office address]

On the above affidavit and the pleadings herein and on motion of , attorney for the defendant, , attorney for the plaintiff appearing in opposition,

It is ordered that all the above entitled actions be and the same are hereby consolidated into one action; that the defendant have leave to interpose a single answer thereto; and that said actions, so consolidated, be tried and determined as one action, with ten dollars costs of motion to the defendant.

[Date] .....
Judge.

§ 2662. Motion to serve supplemental answer.

[Title of action]
[Venue]

being duly sworn, says:

I. That he is the defendant in this action.

II. That issue was joined herein on 19 , by the service of an answer [and the cause is on the calendar for trial at the next general term of this court].

III. That the facts alleged in the accompanying proposed supplemental answer did not occur until 19 , and first came to the knowledge of affiant on 19 , after he had served his answer as aforesaid.

IV. That he has fully and fairly stated the case and the facts in the case to his counsel , a resident of , Minnesota, and has a good and substantial [defence] on the merits, as he is advised by his counsel after such statement, and verily believes true.

[Jurat] .....

[Attach verified answer. See Dunnell, Minn. Pl. § 633]

To ,
Attorney for Plaintiff.

Take notice that on the above affidavit and proposed supplemental answer, of which copies are herewith served upon you, and on the pleadings heretofore served and filed, the defendant will move the court [at a special term thereof to be held] [at its chambers] in the court-house, in the city of , on 19 , at o'clock a. m., or as soon thereafter as counsel can be heard, for an order granting him leave to serve said proposed supplemental answer, and for such other relief as may be just, with costs.

.....
Attorney for Defendant,
[Office and post-office address]

Digitized by Google

On the above affidavit and proposed supplemental answer, and on motion of , attorney for the defendant, , attorney for the plaintiff appearing in opposition,

It is ordered that the defendant have leave to serve said supplemental answer within days of the filing of this order, upon payment to the plaintiff of ten dollars costs; and that the plaintiff have days after such service in which to serve a reply or demurrer.

[Date] .....

Judge.

§ 2663. Order to show cause why a restraining order should not be made or a temporary injunction issue.

[Title of action]

On the foregoing verified complaint and on motion of , attorney for the plaintiff,

It is ordered that , defendant, and all persons acting under him, refrain from [state matters enjoined], until the further order of the court.

And it is further ordered that the said , defendant, show cause before the court [at a special term thereof to be held] [at its chambers] in the court-house in the city of , on 19 , at o'clock a. m., [why the foregoing order, or some order to be made, of like purport and effect, should not be continued in force until the final judgment herein] [why a temporary injunction should not issue commanding him, and all persons acting under him, to refrain from [state matters], until [the final judgment herein] [the further order of the court].

Let this order and attached complaint be personally served on the said , not later than 19 , by exhibiting to him the originals and leaving with him copies thereof.

[Date] .....

Judge.

§ 2664. Restraining order and order for temporary injunction.

[Title of action]

On the return to the order to show cause made herein on 19 , and on motion of , attorney for the plaintiff, , attorney for the defendant appearing in opposition,

It is ordered that, upon the filing of a bond by the plaintiff, approved by me, as provided by General Statutes 1894 § 5347 [, defendant, and all persons acting under him, refrain from (state matters enjoined) until the final judgment herein] [a temporary injunction issue commanding , defendant, and all persons acting under him, to refrain from (state matters enjoined), until (the further order of the court) (the final judgment herein)].

Let this order be personally served upon the said , by exhibiting to him the original and leaving with him a copy thereof.

[Date] .....

Judge.

Digitized by Google

§ 2665. Temporary writ of injunction.

[Title of action]

The state of Minnesota,

To , Greeting:

Whereas it has been made to appear to the court by the verified complaint herein, filed on 19 , that [here repeat the allegations of the complaint].

You, and all persons acting under you, are therefore commanded to refrain, [until the further order of the court] [until the final judgment herein], from [state matters enjoined].

Witness the Hon. , judge of said court and the seal thereof this day of 19 .

[Seal of court] .....

Clerk.

[Indorsed with name of attorney applying for writ]

§ 2666. Recognizance on appeal to supreme court.

[Title of action]

We, , , , acknowledge ourselves to be indebted to the state of Minnesota, in the sum of dollars, to be made and levied of our several goods and chattels, lands and tenements, if default be made in the condition following,

The condition of this recognizance is such that whereas was, on 19 , convicted of the offence of , in the district court for county, Minnesota; and whereas the said , has appealed from the judgment of said court thereon to the supreme court of Minnesota,

Now, therefore, if the said shall personally appear before said supreme court at the next term thereof and enter and prosecute his exceptions with effect, and abide the sentence thereon, and in the meantime keep the peace and be of good behavior, then this recognizance, which is given in pursuance of General Statutes 1894 § 7392, shall be void; otherwise to remain in full force.

.....

.....

.....

Taken, subscribed and acknowledged before me this day of 19 .

.....

Judge.

Digitized by Google

§ 2667. Taxation of costs in supreme court.

[Title of action in supreme court]

[APPELLANT'S] [RESPONDENT'S] BILL OF COSTS AND DISBURSEMENTS.

Statutory costs	$25.00
Clerk's fees	
Return	
Case	
Paper book	
Brief	
Affidavits	
Total..	$

The above bill of costs and disbursements is hereby taxed and allowed.

[Date] .....

Clerk.

[Venue]

being duly sworn, says that he is the attorney of the [appellant] [respondent] in this action; that the foregoing is a true statement of the costs and disbursements of the [appellant] [respondent] on this appeal and that all the items thereof have been actually and necessarily paid or incurred herein by the [appellant] [respondent].

[Jurat] .....

To

Attorney for [Appellant].

Take notice that the foregoing bill of [respondent's] costs and disbursements will be presented to the clerk at his office in the capitol, in the city of St. Paul, on 19 , at o'clock a. m., for taxation and insertion in the judgment then and there to be entered.

.....

Attorney for [Respondent],
[Office and post-office address]

Due service of the foregoing bill of costs and disbursements and notice of taxation is hereby admitted.

[Date] .....

Attorney for [Appellant]

Digitized by Google

Digitized by Google

GENERAL INDEX

[The references are to sections.]

Abduction, necessity of corroboration, 2311, 2312.
Absence of judge, 862.
Accomplices,
  as witnesses, 698.
  necessity of corroboration, 2309, 2310.
Account books as evidence, 747.
Accused person as witness, 696, 744, 802.
Adjourned sessions of court, 20.
Adjourned terms of court, 20.
Ad litem, guardians, 364–381.
Admissibility of evidence for court, 825.
Admission of service of summons, 825.
Adverse party,
  when dead, surviving party as witness, 709–720.
  examination of, as upon cross-examination, 727–735.
    on motions, 2068.
    by deposition, 735.
Adverse possession, 216–268.
Affidavits,
  of merits, 2430–2434.
  for use on motions, 2069–2072, 491.
  to impeach verdict, 998–1003.
Agency, province of court and jury, 675.
Aider by answer, 1830.
Aider by reply, 1835.
Aider by verdict, 1831.
Alias writs of execution, 1435.
Alimony,
  receiver in proceedings for, 2204.
Amendment,
  general statutes, 1395, 1396.
  of pleadings, 1898.
    affidavit of merits, 2433.
  of judgments and judicial records generally,
    to be made with caution, 1341.
    discretionary with trial court, 1342.
    clerical mistakes of clerk, 1343.
                judge, 1344.
    of verdict, 1345.
    false return of sheriff, 1346.
    judgment not authorized by order, 1347, 1348.
                verdict, 1349.
                report, 1350.
                offer, 1305.

Digitized by Google

Amendment—(Cont'd),
of execution, 1351.
names of parties, 1352.
proof of service of summons, 1353.
supplying omissions, 1354.
amendment of judgment not modification, 1365.
rights of third parties protected, 1355.
notice of motion, 1356.
who may oppose motion, 1357.
may be made after term, 1358.
extrinsic evidence admissible, 1359.
lost records and papers, 1360, 1361.
how made, 1362.
order of court necessary, 1363.
appeal, 1364.
of findings of fact, 535.
conclusions of law, 534, 536.
case, 1784, 1785.
Another action pending,
dismissal to defeat plea of, 402.
Appeals from justice to district court, 30–55.
probate to district court, 56–79.
district to supreme court, 1632–1979.
Appeals to supreme court—appellate procedure,
general principles,
nature of appellate jurisdiction, 1635, 1802.
appeal, how far exclusive, 1636.
a statutory remedy, 1637.
favored, 1639.
jurisdiction cannot be given by consent, 1641.
waiver of right to appeal, 1642.
jurisdiction of lower court after appeal, 1644.
burden of proof on appeal, 1647.
judicial notice of records, 1648.
res judicata, law of case, 1649.
when court equally divided, 1653.
weight to be given determination of trial court,
questions of fact generally, 1654, 1386.
findings of fact by court, 1655.
referee, 1656.
discretionary matters generally, 1890–1897.
necessity of real controversy, 1912.
purging record of improper matters, 1790, 1918.
joint appeals, 1925a.
shifting position on appeal, 1805, 1899–1908.
from part of judgment, 57, 1722.
who is aggrieved party, 1657.
construction of pleadings in supreme court, 1833.
wrong reason for right decision, 1865.
what orders and judgments appealable,
the statute, 1719.
judgments in actions appealed to district court, 1720, 1721.
in actions commenced in district court, 1722.
in default, 1723.

Digitized by Google

Appeals to supreme court—appellate procedure—(Cont'd),
judgments in tax proceedings, 1741.
part of, 57, 1722.
in criminal cases, 2352.
orders relating to provisional and ancillary remedies, **1724.**
involving the merits, 1725–1727.
granting or denying a new trial, 1728.
sustaining or overruling a demurrer, 1729–1731.
determining action and preventing a judgment, 1732, 1733.
in special proceedings, 1734–1736.
ex parte, 1739.
vacating or refusing to vacate non-appealable orders, 1740.
pro forma or by consent, 2093.
in criminal cases, 2352.
enumeration of appealable orders, 1737.
non-appealable orders, 1738.
parties to appeal, 1657–1666, 1925a.
time within which appeal may be taken, 1667–1672.
notice of appeal, 1673–1679, 2354.
bonds on appeal, 1680–1697.
stay on appeal from judgments, 1698–1704, 2354.
orders, 1705–1718.
return to supreme court, 1742-1751, 2357.
rules of court, 2373, 2374-2377.
sufficiency of record to review question raised,
general rule, 1752–1760.
to review any question of fact, 1753.
when record must contain all the evidence, 1755.
to review rulings on evidence, 1757.
instructions, 1758.
miscellaneous cases, 1760.
certificate of judge to completeness of return, 1749, 1756.
cases and bills of exceptions, 1761–1790.
assignment of errors, 1791–1801, 1925a, 2361, 2381.
memorandum of judge, 1750.
questions that cannot be raised for first time on appeal, 1802, 1803.
necessity of objections and rulings in the trial court,
to evidence, 1805.
witnesses, 1824.
variance, 1825.
pleadings, 1826–1837.
verdict, 952–955.
amount of damages, 953.
instructions, 898, 1117.
improper remarks of counsel, 1010a.
scope of review,
on appeal from judgment,
without case or bill of exceptions, 1754.
limited to return, 1867.
judgment roll, 1868.
of verdict or findings, 1869.
of intermediate orders, 1870, 1871.
from part of a judgment, 1873.
limited to particular judgment, 1874.
questions not determined below, 1802, 1803.

Digitized by Google

Appeals to supreme court—appellate procedure—(Cont'd),
orders subsequent to judgment, 1876.
of conclusions of law, 1877.
on appeal from order denying new trial, 1878–1883.
limited to grounds stated in notice, 1878.
orders prior to trial, 1879.
subsequent to trial, 1880.
of errors on judgment roll, 1881.
conclusions of law, 1882.
rulings favorable to appellant, 1883.
on appeal from order granting new trial,
not limited to grounds assigned by trial court, 1884.
general rule, 1885.
no presumption as to ground, 1886.
estoppel of appellant, 1887.
on appeal from intermediate orders generally,
general statement, 1888.
orders subsequent to judgment, 1889.
presumptions,
general statement, 1838.
as to return, 1839.
judgment, 1840.
verdict, 1841–1843.
findings, 1844–1847.
orders, 1848.
instructions, 1849–1851.
jurisdiction, 345, 1852.
issues, 1853.
rulings on evidence, 1854.
pleadings, 1856.
prejudice, 1858.
that jury followed instructions to disregard evidence, 1855.
harmless error,
general statement, 1857.
presumption of prejudice, 1858.
error favorable to plaintiff, 1859.
error caused by appellant, 1862.
estoppel to complain, 1864.
wrong reason for right decision, 1865.
in admitting or excluding evidence, 1084–1112.
granting or refusing requests, 887.
the charge, 1113–1138.
refusing to dismiss, 1866.
the findings, 1866.
submission of questions to jury, 1866.
entry of judgment, 1866.
review of matters in discretion of trial court,
general statement, 1890.
matters before trial, 1895.
on the trial, 1896.
in special proceedings, 1897.
amendment of pleadings, 1898.
theory of case,
general statement, 1899.
on appeal from order granting new trial, 1900.

Digitized by Google

Appeals to supreme court—appellate procedure—(Cont'd),
grounds stated in notice of motion, 1901.
as to law of case, 1902.
evidence, 1903.
pleadings, 1904.
issues, 1905.
facts, 1907.
how disclosed, 1908.
dismissal of appeal,
for defective return, 1909.
want of merits, 1910.
failure to prosecute, 1911.
want of real controversy, 1912.
failure to serve paper books and brief, 1913, 2387.
appellant cannot of right, 1914.
scope of review on motion for, 1915.
does not preclude subsequent appeal, 1916, 2367.
on court's own motion, 1917.
motion to dismiss and to strike out distinguished, 1918.
costs on motion for, 1919.
reinstatement of appeal, 1920.
effect of dismissal on status of case below, 1921.
notice of motion for, 1922.
form of motion, 1923.
judge may dismiss in vacation, 1924.
duty of clerk on, 2389.
disposition of case by supreme court,
statutory powers, 1925, 2361.
as to different parties, 1925a.
modification of judgment, 1926.
directing entry of judgment below, 1927.
granting a new trial, 1928, 1935, 1938.
on appeal from order on demurrer, 1929.
remitting parties to trial court for relief, 1930.
effect of reversal,
reversal of judgment, 1931–1934.
granting new trial of part of issues, 1935, 1938.
reversal of orders, 1937.
costs on appeal,
statutory provisions, 1943–1945.
purely statutory, 1946.
none to defeated party, 1947.
rules of court, 1948, 2394–2396, 2402.
who is prevailing party, 1949.
disbursements, 1950–1953, 2381.
how recovered, 1954.
when there are several prevailing parties, 1955.
in tax cases, 1956.
setting off costs against judgment, 1957.
when costs not allowed, 1958.
payment of, condition of remittitur, 1959.
appeal for delay, 1960.
miscellaneous cases, 1961–1963a.
remittitur, 1964–1973.
proceedings of lower court after, 1968–1971.

Digitized by Google

Appeals to supreme court—appellate procedure—(Cont'd),
jurisdiction of supreme court after, 1972, 1973.
rules of court as to, 2390–2395.
re-hearings, 1974–1979.
in criminal cases, 2352–2370.
oral argument, 2388.
Appearance,
definition, 348.
effect of a general, 349.
validating void judgment by, 351.
in foreign court, 352.
by infant, 353, 369.
effect of as to notice, 354.
withdrawal of, 358.
effect of failure to appear, 368, 416.
what constitutes a general appearance, 355–357, 859.
special appearance, 359, 362.
dismissal for failure to appear, 416.
Arbitration,
statutory, 2097–2128.
common law, 2129.
Argument of counsel,
opening and close, civil cases, 820–822.
criminal cases, 2330.
scope of, 863.
court may prevent useless, 834.
Arraignment of accused persons, 2243–2251a.
Arrest of judgment,
civil cases, 934.
criminal cases, 2350.
Assessment of damages by jury, 912–915.
Assignment of judgment, 1339, 1340.
Assignments of error on appeal, 1791–1801, 1925a.
Assumption of risk, province of court and jury, 671.
Attachment, (See Dunnell, Minn. Pl. §§ 948–1046.)
writ of, 7.
notice of discharge of, 2421.
Attorneys,
as sureties, 1695, 2419.
as witnesses, 707.
continue on appeal, 2378.
examination for admission to bar, 2410.
must subscribe all papers with address, 2422.
authority of as to judgment, 1356, 1381, 1421.
lien of on costs, 1171.
may waive right to second trial in ejectment, 1151.
fees of on foreclosure, 2202.
notice of appeal on, 1677.
cannot stipulate for private sale on execution, 1517.
may initiate proceedings supplementary to execution, 1606.
service of notices on, 2035.
number to be heard on the argument, 820.
presence of at rendition of verdict, 922.
giving instructions in absence of, 899.
Award, 2097–2129.

Digitized by Google

Bias,
in witness, 769, 776.
in juror, 631.
Bills and notes, province of court and jury, 661.
Bills of discovery, none in this state, 441.
Bills of exceptions, 1791–1801.
in criminal cases, 2359.
Boats, actions against, 28.
Bona fide purchaser,
protected on amendment of judgments, 1355.
within recording act, 1834.
redemptioner from execution sale is, 1534.
Bonds,
form of, rule of court, 2419.
sureties on, qualifications, 2420.
on appeal to supreme court, 1680–1697.
Brief on appeal,
contents, 2381.
serving on adverse party, 2383, 2387.
statement of facts in, 2386.
manner of printing, 2401.
Burden of proof,
general rules as to in civil cases, 805–808.
criminal cases, 2296–2314.
on appeal, 1647.
instructions as to, 897.
Calendar,
call of in district court, 2441.
supreme court, 2382, 2406.
for special term in district court, 2427.
Cases and bills of exceptions,
necessity of for review on appeal, 1752–1761.
no substitute for, 1762.
definition of bill of exceptions, 1763.
case, 1764.
securing a stay to prepare case, 1765.
who may settle, 1766.
time within which to prepare, serve and settle, 1767–1772.
extension of time, 1773, 1774.
manner of preparing bill of exceptions, 1775.
testimony should be given in narrative form, 1776.
documentary evidence, 1777.
matters not occurring on trial, 1778.
transcripts of the stenographer's notes, 1779.
notice of settlement, 1780.
filing, 1781.
how far conclusive on trial court, 1782.
discretionary power of court, 1783.
amendment by court, 1784.
parties, 1785
hearing motion on unsettled case, 1786.
appeals from orders in connection with, 1787.
construction and conclusiveness on appeal, 1788, 1789.
striking out on appeal, 1790.
expense of preparing, how taxable, 1950.

Digitized by Google

Cause and effect, province of court and jury, 662.
Caveat emptor, 1469.
Cemeteries, vacation of, 29.
Certiorari,
out of supreme court, 1980–2009.
from district to probate court, 79. 2011.
justice court, 2012.
as ancillary to habeas corpus, 1992.
Certificate of sheriff,
of sale on execution, 1522–1525.
redemption, 1539–1540.
on foreclosure sale, 2170–2174.
redemption, 2189.
Certificate of judge,
to return on appeal, 1749, 1756.
Certifying questions to supreme court in tax proceedings, 1741.
criminal actions, 2369.
Challenges,
to the panel, 612.
to individual jurors, 618.
Chambers,
court at, 19.
orders at, 18. 19, 2086, 2087.
Change of venue,
rule of court, 2439.
civil cases generally, 280–297.
in criminal cases, 2288.
on preliminary examination, 2239, 2240.
Character, evidence of good in criminal actions, 2332.
Charge of court. (See Instructions.)
in civil cases generally, 889–901.
in criminal cases, 2331–2333.
sufficiency of record to review on appeal, 1758.
Commission to take testimony, 487–494.
Communications, privileged, 705–708.
Competency of witnesses for court, 826.
Complaint, filed or served with summons, 317.
Compulsory examination of party before trial,
on interrogatories, 442.
physical, 427.
Computation of time, 2051, 2052.
Conclusions of law, (See Findings of fact and conclusions of law.)
reviewed on appeal from judgment without case, 1877.
general rules as to, 499–535.
Confession of judgment, 1290–1306.
Conforming pleadings to proof, 1898.
Consent to try issues outside pleadings, 1832, 1840, 1853.
Construction of laws for court, 663, 1559.
Construction of writings generally for court, 664.
Contempt of court, 688, 811–816, 1628.
Continuance,
civil cases, 382–397.
criminal cases, 2319.
in supreme court, 2384, 2385, 2407.
Contracts, oral, question for jury, 673.

Digitized by Google

Conversations with deceased adverse party inadmissible, 709–720.
Conviction of crime, impeachment of witness by proof of, 772, 774.
County attorney, special, 29.
Court. (See District court and Trial by court.)
Court and jury, province of,
civil cases, 660–682.
criminal cases, 2328, 2329, 2343.
effect of submitting question for court to jury, 682.
Contradictory conduct of witness, 787.
Contradictory statements of witness, 777–786.
Corroboration,
accomplice, 2309, 2310.
abduction, 2311, 2312.
seduction under promise of marriage, 2313.
perjury, 2314.
by proof of prior similar statements, 785, 804.
Credibility of witnesses,
for the jury, 665.
proper charge as to, 894.
court should not single out particular witnesses, 895.
Costs and disbursements,
in district court,
general statutes as to,
legal actions, 1176.
equitable actions, 1178.
motions and demurrers, 1180.
disbursements, 1209.
on appeal from justice court, 1186, 1187.
definition, 1164.
purely statutory, 1165.
an incident of the judgment, 1166.
judgment may be entered without, 1230, 1265.
legislative control over, 1167.
special proceedings, 1168.
court without jurisdiction, 1169.
stipulations as to, 1170.
ownership of, 1171.
in case of nominal damages, 1172.
when there are several parties, 1173.
of prior trial, 1174.
two actions tried together, 1175.
in actions of a legal nature, 1176, 1177.
in equitable actions, 1178, 1179.
on motions and demurrers, 1180–1185.
on appeal from justice court, 1186–1190.
on appeal from probate court, 77.
in actions on a domestic judgment, 1191.
in actions for services, 1192.
in actions against executor, administrator or trustee, 1194.
relator entitled to and liable for, 1195.
when guardian liable for, 1196, 1197.
impounding money in court to pay, 1198.
security for, 1199–1201.
tender as affecting costs,
actions ex contractu, 1202, 1203.

Digitized by Google

Costs and disbursements—(Cont'd),
actions ex delicto, 1204–1207.
in actions for specific performance, 1205.
tender must be kept good, 1206.
payment into court, 1207.
special statutory provisions, miscellaneous actions and proceedings, 1208.
disbursements, 1209–1212.
taxation of costs and disbursements,
statute, 1213.
time, 1214.
notice of, 1215, 1216.
affidavit, 1217.
specification of objections, 1218.
appeal to district court from taxation by clerk, 1219–1222.
how reviewed by supreme court, 1223–1224.
on motion for new trial, 985, 986.
in supreme court,
statutory provisions, 1943–1945.
purely statutory, 1946.
none to defeated party, 1947.
rules of court, 1948, 2394–2396, 2402.
who is prevailing party, 1949.
disbursements, 1950–1953.
how recovered, 1954.
when there are several prevailing parties, 1955.
in tax cases, 1956.
setting off costs against judgment, 1957.
when costs not allowed, 1958.
payment of, condition of remittitur, 1959.
appeal for delay, 1960.
miscellaneous cases, 1961–1963a.
on motion to dismiss, 1919.
Criminal procedure,
preliminary examination,
who are committing magistrates, 2225.
a statutory proceeding, 2226.
nature and object of, 2227.
when necessary, 2228.
complaint and warrant, 2229, 2230.
the examination, 2231, 2232.
discharge of prisoner, 2233, 2234.
binding over, commitment, 2235, 2236.
waiver of examination, 2236a.
recognizance and bail, 2237.
return, 2238.
change of venue, 2239, 2240.
right of indictment by grand jury, 2241, 2242.
arraignment,
time and general object of, 2243, 2244.
presence of defendant, 2245.
bench warrant, bail, 2246.
right of counsel, 2247.
mode of, 2248.
time to answer indictment, 2250.
objections that must be urged at time of, 2251a.

Digitized by Google

Criminal procedure—(Cont'd),
setting aside (quashing) indictment, 2252, 2253.
demurrer, 2254–2265.
pleas to indictment,
kinds of, 2266.
must be oral, 2268.
form and entry of, 2270, 2271.
by whom put in, 2272.
withdrawal of plea of guilty, 2274, 2275.
not guilty, 2276.
effect of plea of not guilty, 2277, 2278.
evidence admissible under plea of not guilty, 2279, 2280.
refusal to plead, 2281, 2282.
former conviction or acquittal, 2283, 2284.
practice on plea of former conviction or acquittal, 2285.
venue, 2286–2289.
right of trial by jury, 2290–2294.
objections to indictment on trial, 2295.
burden and degree of proof, 2296–2314.
issues and mode of trial,
when issues of fact formed, 2315.
presence of accused, 2316, 2317.
presence of family and friends, 2318.
continuance, 2319.
defendant committed though bail given, 2320.
separate trials, 2321, 2322.
discharge of defendant to become a witness, 2323.
minors excluded, 2324.
juror as a witness, 2325.
view, 2326, 2327.
province of court and jury, 2328, 2329.
order of argument, 2330.
charge, 2331–2333.
taking papers to jury room, 2334, 2335.
custody of jury while deliberating, 2336.
jury may return into court, 2337, 2338.
discharge of jury without verdict, 2339.
verdict,
sufficiency of, 2340.
sealed, 2341.
for lesser degrees or offences than charged, 2342, 2343.
as to some, disagreement as to others, 2344, 2345.
polling the jury, 2346, 2347.
reception of, 2348.
sentence or judgment, 2349.
arrest of judgment, 2350.
new trials, 2351.
appeals and writs of error, 2352–2370.
certifying questions to supreme court, 2369, 2370.
Criminating questions, 757–768.
Cross-examination of adverse party under statute, 727–735.
Cross-examination of witnesses, 721-804. (See Witnesses.)
Curing error,
improper remarks of counsel, 1011.
in charge, 1138.
in the admission of evidence by instructions to disregard, 1855.

Digitized by Google

Damages,
duty of jury to assess, 912–915.
excessive as ground for new trial, 1020–1045.
remitting excess, 1027–1029.
Death by wrongful act,
damages, 1043.
limitation of actions, 200.
Death of party,
judgment after, 1251, 1330.
writ of execution after, 1445.
substitution on appeal after, 1664–1666.
Dedication of land, province of court and jury, 666.
Default,
judgment on, 1271–1287.
on motions, 2075, 2076.
Default judgments,
entry of, 1271–1287.
appealable, 1723.
opening, 1387–1431.
Degree of proof required,
civil cases, 809.
criminal cases, 2296.
Delusion, witness laboring under, 798.
De minimis non curat lex, 1857.
Demurrer.
in civil cases,
appeal from order on, 1729–1731.
judgment on, 417, 1288.
disposition of case on appeal, 1929.
may be heard at any time, 18.
costs on, 1180.
in criminal cases,
grounds of, 2254–2265.
no appeal from order on, 2353.
time to answer when demurrer overruled, 2438.
Depositions,
upon notice by party,
statute, 444.
mode of taking, certificate, return, 446.
use of as evidence, objections, 447–451.
effect of informalities, motion to suppress, waiver, 452–456.
costs on failure to appear, 457.
upon notice by justice of the peace,
general provisions, 458–460.
in what cases allowable, 461–465.
time of taking, notice by justice, 466, 467.
service of notice, 468.
examination, 469–471.
must be written, read and signed, 472, 473.
cause for taking must exist at time of trial, 476, 477.
objections, how and when taken, 478–481.
upon commission,
general provisions, 487–491.
settling interrogatories, 492.
absence of one of several commissioners, 493.
return, 494.

Digitized by Google

Depositions—(Cont'd),
use of in subsequent actions, 482, 483.
on appeal, 484.
compelling by subpœna, 485, 486.
rule of court as to objections, 495.
of party, 488, 735.
Directing verdict, 855–861.
when special issues submitted to jury, 543.
Discretion, nature of judicial, 1890.
mandamus to compel the exercise of, 1892.
Dismissal of action,
statute, 398.
not an estoppel, 404.
by plaintiff before trial, 405–411.
by court before trial, 412.
by consent before trial, 413.
for failure of proof, 841–854.
voluntary nonsuit, 414.
for failure of plaintiff to appear, 416.
on demurrer, 417.
for failure to obey order of court, 418, 810.
to defeat plea of another action pending, 402.
by court, when issues submitted to jury, 543.
a dismissal for failure of proof is a "decision," 1064.
Dismissal of appeal, 1909–1924.
District court,
one throughout state, 1.
jurisdiction of, 2, 3, 27–29.
writs and processes out of, 4–7.
qualifications of judges of, 8.
districts of, 9.
several judges in same district, 13.
when judge of one district may act for judge of another, 14.
effect of vacancy in office of judge, 15.
terms of court, 16, 20.
jurisdiction out of term, 17–20.
always open for certain business, 17, 18.
at chambers, 19.
special terms of, 20.
adjourned sessions and terms of, 20.
special venires in, 23, 24.
temporary place of holding court, 22.
time of convening petit jury, 25.
how far open on Sunday, 26.
appeals from justice to, 30–55.
appeals from probate to, 56–79.
miscellaneous powers of, 29.
may pass title to land, 27.
Divorce,
actions for to be tried at regular term, 2435.
modification of judgment for on appeal, 1926.
service of summons in actions for, 319.
venue in actions for, 279.
publication of summons, 2434.

Digitized by Google

Docketing judgments, 1263–1270.
lien acquired by, 1328–1337.
Documents,
notice to produce at trial, 429–433.
inspection of before trial, 434–443.
Domicil, 119–121.
Drunkenness, as defence in criminal actions, 2308.
of witness, 798.
of jurors, 1005.
Easements, prescriptive right to, 261.
Ejectment,
new trial of right in, 1140–1163.
Entry of judgments, 1227–1254. (See Judgments.)
in supreme court, 2403.
Errors,
assignment of, on appeal, 1791.
immaterial, disregarded, 956, 1857–1866, 2351.
Estoppel,
by objecting to evidence, 1815a.
Examination of offenders, 2225–2240.
plaintiff before trial in personal injury cases, 427.
witnesses, 721–840. (See Witnesses.)
party before trial on interrogatories, 442.
Exceptions no longer necessary, 977, 1804. (See Objections.)
Executions,
kinds of, 1434.
time within which may issue, 1436, 1437.
form and contents of writ, 7, 1438, 1439.
when returnable, 1440–1442.
renewals of, 1440–1442.
return of officer on, 1444.
issuance of writ after death of party, 1445, 1446.
to what sheriff issued, 1447–1449.
priority between writs, 1450.
effect of injunction on, 1452.
amendment of writ, 1454.
collateral attack on, 1455.
sheriff acts as officer of law, 1456.
officer bound to levy under fair writ, 1461.
sheriff protected by fair writ, 1462.
nature of sheriff's interest in property levied upon, 1459.
effect of misnomer, 1458.
authority of attorney, 1457.
care of property by sheriff, 1460.
effect of excessive levy, 1463.
summary remedy against sheriff, 1464.
levy on personalty, how far satisfaction of judgment, 1466.
real property, not a satisfaction of judgment, 1467.
presumption of regularity in acts of officer, 1468.
officer acts in ministerial capacity, 1469.
execution sales not judicial, caveat emptor, 1469.
delivery of property seized to receiptor, 1470.
on a satisfied judgment, sale void, 1471.
on void judgment, sale void, 1472.
contribution and subrogation, 1473.

Digitized by Google

Executions—(Cont'd),
waste may be restrained, 1475.
interest of purchaser at sale leviable, 1476.
eviction of purchaser, new execution, 1477.
stay for six months on bond, 1478–1483.
remedies of owner for wrongful levy, 1484.
liability of execution creditors, 1485.
action to set aside obstruction to execution sale, 1486.
payment of judgment by stranger, 1487.
property subject to levy, 1489–1495.
mode of levy, 1496–1511.
statutory interest of husband or wife cut off by sale, 1525.
sale of property, 1512–1530.
notice of sale, 1514, 1515.
place and manner of sale, 1516, 1517.
sheriff's certificate, 1522–1525.
redemption from execution sale, 1531–1542.
proceedings supplementary to, 1598–1630.
out of supreme court, 2398.
Exemption of personal property, 1542–1560.
real property, 1561–1597.
Exemption from service of summons, 315.
Ex parte orders, non-appealable, 1739.
Experiments in presence of jury, 836.
Experts,
qualifications of for court, 826.
examination of, 736–743.
impeachment of, 803.
Extension of time, 2038.
to plead, 2430.
Fellow servant,
requiring jury to name, 900.
question for jury, 671.
Filing papers and pleadings, 2428, 2429.
Findings of fact and conclusions of law by court, 499–536.
the statute, 499.
object of, 501.
definitions and distinctions, 500.
conclusions of law authority for judgment, 502.
when findings necessary, 503–505.
waiver of, 506.
nature of facts to be found, 507.
sufficiency of particular findings, 508, 509.
findings and conclusions to be stated separately, 510, 522.
effect of finding a fact as a conclusion of law, 511.
must be definite and consistent, 512.
cover all the issues, 513.
be within the issues, 515.
judgment must be justified by findings, 514.
effect of finding evidentiary facts, 516.
construction of, 517.
by whom to be made, 519.
when become part of record, 520.
time allowed judge to make and file, 521.

Digitized by Google

Findings of fact and conclusions of law by court—(Cont'd),
mode of raising objections,
failure to state findings and conclusions separately, 522.
indefinite findings, 523.
failure to find on all the issues, 525–528.
no findings before entry of judgment, 529.
not within the issues, 530.
not justified by the evidence, 531.
inconsistent, 532.
conclusions of law not justified by findings, 533, 534.
amendment of conclusions of law, 536.
findings of fact, 535.
by referee, 558.
assignment of errors as to, 1794.
Findings of fact by jury,
in court cases, 545.
in answer to special interrogatories, 864–879.
Folios must be marked and numbered, 2425.
Foreclosure of mortgages by advertisement,
what mortgages may be so foreclosed, 2130, 2131.
what law governs, impairment of contract, 2132.
strict compliance with statute necessary, 2133.
insanity or disability of mortgagor, 2134.
general nature of proceeding, 2135.
conditions requisite,
statute, 2136.
default, 2137.
no action pending, 2138.
mortgage and assignments must be recorded, 2139.
power of attorney, 2162.
who may foreclose, 2140, 2141.
effect of sale on debt, 2142.
equitable interests not recognized, 2143.
of instalments, 2144.
effect of sale in exhausting lien, 2145.
notice of sale, 2146–2155.
time and place of sale, 2162.
service of notice on occupant, 2157, 2158.
no notice to mortgagor, 2159.
postponement of sale, 2160, 2161.
the sale, 2162–2165.
mortgagee may purchase, 2166, 2167.
purchaser may rely on record, 2168.
charged with notice of title, 2169.
certificate of sale, 2170–2174.
as evidence, 2172.
when operates as a conveyance, 2174.
interest acquired by purchaser, 2174.
disposal of surplus, 2175, 2176.
affidavits to perpetuate evidence of sale, 2177, 2181.
of costs, 2182, 2183.
redemption from sale, 2184–2189.
remedies upon, 2190–2201.
attorneys fees, 2202.
Former conviction or acquittal, 2283–2285.

Digitized by Google

Framed issues, 537-545.
Fraud,
examination of defendant in actions for, 722.
limitation of actions for, 159–164.
Fraudulent intent a question for the jury, 668.
Garnishment, (See Dunnell, Minn. Pl. §§ 1248–1376.)
notice of discharge of, 2421.
Good faith, a question for the jury, 668.
Grand jurors, incompetent as witnesses, 703.
Guardians ad litem, 364–381.
liable for costs, 1196, 1197.
continue on appeal, 2378.
Habeas corpus. (See Dunnell, Minn. Pl. §§ 1384–1397.)
to secure attendance of prisoner as witness, 690.
Harmless error, 1857.
Heirs unknown as parties defendant, 324.
actions against, 192.
Hicks v. Stone, rule of, 1025, 1076, 1077.
Holidays,
what are, 318.
service of summons on, 318.
holding court on, 837.
Homestead exemption, 1561–1597.
right of surviving spouse in, 1586.
House of usual abode, 311.
Husband and wife, as witnesses, 706.
statutory interest in real property cut off by sale on execution, 1525.
Hypothetical questions to experts, 737, 742.
Imbecility of witness, 702, 708.
Impaneling the jury,
who eligible as jurors, 590.
who exempt from jury service, 591.
exemption not a cause for challenge, 592.
court may exclude juror on its own motion, 593.
general practice in civil cases,
filling jury box in first instance, 594.
plaintiff must pay jury fee, 596.
ballots how kept, 597.
challenges a matter of right, 598.
joinder in challenges, 599.
order of between parties discretionary with court, 601.
prevailing practice as to order of challenges between parties, 603.
general practice in criminal cases,
jury box filled as jurors accepted, 604.
definition and kinds of challenges, 605.
joinder in challenges, 606.
order of challenges as between parties, 608.
order of challenges as to kind, 610, 611.
challenges,
definition and kinds, 605.
same in civil and criminal cases, 599.
examination of jurors before, 652.
to the panel,
definition, 612.
grounds, 613, 614.

Digitized by Google

Impaneling the jury—(Cont'd),
when and how taken, 615.
exception to, 616.
withdrawal of exception and denial, 617.
to individual jurors,
kinds of, 618.
defendant informed of time to challenge, 619.
when taken, 621.
peremptory,
definition, 623.
number allowed in civil cases, 599.
criminal cases, 624.
waiver of right to, 626.
for cause,
defined, 628.
who may challenge for, 627.
general causes, 629, 630.
bias, implied and actual, defined, 631.
what opinions disqualify, 633.
causes of challenge for implied bias specified, 634.
disqualification from relationship, 635.
master and servant, 636.
conscientious opinions, 637.
trial and determination of challenges,
court tries challenge for implied bias, 638.
how causes of challenge must be stated, 639.
exception and denial, 641, 642.
evidence on trial, 643, 647.
effect of admission of challenge, 645.
withdrawal of challenges, 646.
appointment of triers, 648–650.
examination of juror before challenge, 652.
scope of examination on voir dire, 653.
juror challenged may be examined, 654.
rules of evidence on trial, 655.
instructions to triers, 657.
decision of triers final, 658.
decision of trial court final, 659.
error in, as ground for a new trial, 1139.
Implied contracts, province of court and jury, 667.
Incriminating questions to witness, 757-768.
Indictment,
right to, 2241, 2242.
setting aside or quashing, 2252, 2253.
demurrer to, 2254–2265.
pleas to, 2266–2285.
defects in, not fatal, 2256.
objection to on trial, 2295.
Infants,
guardians ad litem for, 364–377.
effect of appearance by, 353, 369.
service of summons upon, 310.
limitation of actions as to, 128, 130.
as witnesses, 701.

Digitized by Google

Injunction. (See Dunnell, Minn. Pl. 1398–1456.)
writ of out of district court, 4.
effect of on execution, 1451.
appeal from orders on, 1724.
to prevent sale on execution or foreclosure, 1451, 1484, 2195, 2436.
bond on, 2437.
Insane persons, guardian ad litem for, 378–381.
Insanity, defence of in criminal cases, 2302.
in witness, 702, 796.
Inspection of documents, 434–443.
of plaintiff before trial, 427.
of plaintiff by X-rays, 428.
Instructions,
requests for, 880–888.
general statement as to, 889, 2332.
in language of court preferable to following requests, 888.
defining the issues, 890.
reviewing the evidence, 891.
expressing an opinion on the issues, 892.
proper, as to credibility of witnesses, 894.
must not single out witnesses and charge as to their credibility, 895.
cautionary, 896.
court must charge in accordance with its own theory of the law, 1123.
as to burden of proof, 897.
objections and exceptions to, 898, 977, 1117, 1902.
giving additional in absence of counsel, 899.
by what judge, 901.
omission to charge, 1120.
sufficiency of record on appeal to review, 1758.
in criminal actions, 2331–2333.
cannot refer to failure of accused to take the stand, 696.
assignment of error as to, 1707.
presumptions as to on appeal, 1849.
unobjected to become law of case, 1902.
no exception to necessary, 977.
how construed on appeal, 1116.
erroneous, as ground for new trial,
general statement, 1113.
how far granting new trial discretionary, 1115.
when supreme court will grant, 1115, 1116.
indefinite and ambiguous instructions, 1117.
necessity of objecting to indefinite charge on trial, 1117, 1118.
presumption as to ambiguous charge, 1119.
omission to charge, 1120.
inconsistent and contradictory instructions, 1121.
when there are several issues, error as to one, 1122.
in accord with theory of trial, 1124–1128.
when the verdict in right, 1129–1133.
impertinent abstract instructions, 1134.
complainant must be prejudiced, 1135.
submitting case where there is no evidence or where there is only one reasonable inference, 1136.
withdrawing issues from jury improperly, 1137.
curing error by withdrawing instructions, 1138.

Digitized by Google

Insurance,
to be paid on redemption from foreclosure and execution sales, 1538.
Intent, a question for jury, 668, 2305.
Interpleader, (See Dunnell, Minn. Pl. §§ 1473–1479.)
Intervener cannot move to dismiss, 854.
Issue, note of,
rules as to, in district court, 423.
rule of supreme court as to, 2379.
Issues of law and fact may be tried at any time, 17–19.
Issues litigated by consent, 1832, 1845, 1853.
Issues to the jury in court cases, 537–545.
Interrogatories to the jury, 864–879.
in depositions, rule of court as to settling, 492.
Judge,
sickness of, 862.
Judges of district court,
qualifications of, 8.
terms of office, 9.
not to practice law, 11.
sickness or absence of, 12.
several in same district, 13.
one acting for another, 14.
vacancy in office of, 15.
Judgment book, 1231.
Judgment liens, 1328–1337.
Judgment notwithstanding verdict,
under Laws 1895, ch. 320, 935–944
at common law, 945.
because special findings inconsistent with general verdict, 875.
Judgment on appeal, 1925–1930.
Judgment roll,
contents of, 1255–1262, 1743.
review on appeal when limited to, 1868–1881.
contents of in supreme court, 2397.
Judgments,
definition, 1225.
only one in action, 1226.
interlocutory, 1225.
entry of,
by clerk, 1227.
notice of entry, when necessary, 1228.
signed by clerk, 1229.
time of entry, 1230.
in judgment book, 1231, 1232.
necessity of an order of court, 1233.
must conform to order, 1234.
remedy for erroneous entry, 1235.
effect of failure to enter, 1236.
upon report of referee, 566.
in supreme court, 2403.
construction of, 1237.
as evidence, 1238.
upon stipulation, 1239.
relief allowable plaintiff, 1240, 1241.
in actions for recovery of personal property, 1242.

Digitized by Google

Judgments—(Cont'd),
as between several parties, 1243–1245.
in actions for tort against several, 1246.
relief allowable to defendant, 1247, 1248.
as against one or more of several defendants, 1249, 1250.
after death of party, 1251.
in actions on a joint obligation, 1252.
the judgment roll, 1255-1262.
docketing, 1263–1270.
upon default, 1271–1289.
on issue of law, 1288, 1289.
confession of, 1300–1306.
offer of, 1307–1327.
as liens, 1328–1337.
satisfaction of, 1338.
assignment of, 1339, 1340.
amendment of, 1341–1365.
vacation of, 1366–1386.
opening judgment by default, 1387–1430.
payment of by stranger, 1487
proceedings supplementary to, 1631.
arrest of, 934, 2350.
what appealable, 1719–1741.
notwithstanding the verdict,
under Laws 1895, ch. 320, 935–944.
at common law, 945.
special findings inconsistent with general verdict, 875.
Judicial notice of its own records by supreme court, 1648.
Jurisdiction,
of district court, 1–3, 17, 18, 27–29.
on appeal from justice court, 30–55.
on appeal from probate court, 56–79.
out of term, 17, 18.
presumption of, on publication of summons, 345.
on appeal, 345, 1852.
extent of acquired by publication of summons, 347.
of supreme court, 1632–1634.
Jurors. (See Impaneling the jury.)
who eligible, 590.
who exempt, 591.
as witnesses, 2325.
misconduct of, as ground for new trial, 991–1010.
affidavits by to impeach verdict, 998-1003.
default of, 2442.
Jury,
right to trial by, in civil cases, 579–589.
criminal cases, 2290–2294.
impaneling, 590–659.
issues to, in court cases, 537–545.
misconduct of, as ground for new trial, 991–1010.
experiments in presence of, 836.
custody of in civil cases, 1004.
criminal cases, 1004, 2336.
keeping out and urging to agree, 903.
naming fellow servant, 900.

Digitized by Google

Jury—(Cont'd),
taking papers to jury room, 902, 2334, 2335.
court may fix time for convening, 25.
sending out to correct verdict, 927.
returning into court for further instructions, 2337.
discharge of without verdict in criminal cases, 2339.
polling, 925, 2346.
Justice courts,
appeal to district court from, 30–55.
Laches, 214, 215.
Law and fact,
civil cases, 660–682.
criminal cases, 2328, 2329, 2343.
effect of submitting question for court to jury, 682.
Law of case, 1902.
Laws, construction of for court, 663.
Leading questions on direct examination, 828.
Libel,
notice to publisher before suit, 426.
province of court and jury, 669.
justification for criminal burden of proof, 2304.
limitation of actions for, 166.
Lien by docketing judgment, 1328–1337.
Limitation of actions, 80–268.
statutory origin, 80.
general policy of statute, 81.
affects remedy alone, 82.
party in possession not affected by, 83.
legislative control over, 84, 85.
court cannot modify, 86.
a statute of repose, 87.
when party has alternative rights of action, 88.
joint obligations, 89.
not applicable to defenses, 90.
construction of statutes, 91.
applicable to both legal and equitable actions, 92.
judicial proceedings not actions, 93.
applicable to claims before probate court, 94.
parties may contract as to, 96.
conflict of laws, 97.
actions by state, 98, 99.
when action accrues, 100–102.
commences, 103–108.
death of party, effect of, 109–111.
absence from state, 112–124.
cause accruing out of state, 125–127.
period of disability excluded, 128–131.
war excluded, 132.
effect of injunction, 133, 134.
time of disabilities, 135.
tacking disabilities, 136, 137.
effect of reversal on appeal, 138.
part payment, 139–147.
acknowledgment of debt, 148–156.
new promise, 148–156.

Digitized by Google

Limitation of actions—(Cont'd),
actions on contracts and obligations, 157, 158.
for fraud, 159–164.
for tort generally, 165–168.
mutual accounts, 169–173.
running accounts not mutual, 174, 175.
accounts stated, 176, 177.
to enforce trusts, 178–182.
to foreclose or redeem mortgages, 183–190.
against sureties on bonds of county officials, 191.
against heirs, devisees and legatees, 192.
for recovery of land sold by executors, administrators or guardians, 193, 194.
upon liabilities created by statute, 195–198.
involving tax titles, 199.
for death by wrongful act, 200.
for unlawful detainer, 201.
to foreclose mechanic's lien, 202.
to determine adverse claims, 203.
on judgments, 204–208.
for a statutory forfeiture or penalty, 209.
against a sheriff or constable, 210, 211.
on standard fire policy, 212.
miscellaneous cases, 213.
laches, 214–215
adverse possession, 216–268.
Lost records and papers, 1360, 1361.
Malicious prosecution, province of court and jury, 670.
Mandamus, (See Dunnell, Minn. Pl. 1562–1593.)
writ of out of district court, 4.
to compel exercise of discretion, 1892.
Maritime jurisdiction of district court, 28.
Master and servant, province of court and jury, 671.
Memoranda to refresh memory of witness, 745–756.
Memorandum of trial judge,
part of return, 1746, 1750.
does not limit or control decision, 1750.
not a substitute for case, 1762.
Memory, want of in witness, 798.
Minors, (See Infants.)
Misnomer, 338, 1269, 1282.
Moneys paid into court, deposit in bank, 29.
Mortgages,
foreclosure of by advertisement, 2130 2202.
limitation of actions to foreclose or redeem, 183–190.
Motions, (See Orders.)
definition, 2053.
scope of remedy by, 2054.
generally oral, 2055.
necessity of notice, 2056.
notice of eight days generally necessary, 2057.
form and contents, 2058.
rule of court, 2059, 2060.
may be heard at any time, 2061.
where made, 2062–2065.

Digitized by Google

Motions—(Cont'd),
refusal of court to entertain, 2066.
practice at hearing, 2067.
oral evidence generally inadmissible, 2068.
affidavits for use on, 2069–2072.
practice on motion without notice, 2073.
relief which may be awarded on, 2075, 2076.
effect of default on, 2075, 2076.
strangers to record cannot move, 2077.
renewal of motions, 2078–2082.
bringing on in supreme court, 2372.
when heard in supreme court, 2406.
Municipal corporations,
notice to before suit for personal injury, 424.
certiorari to, 1993–1999.
prohibition to, 2027.
Ne exeat, 4, 5.
bond on, 2437.
New trials.
general principles,
definition, 946.
power to grant inherent, 948.
legal and equitable actions governed by same rules, 949.
motion for, a matter of right, 950.
legislature cannot grant, 951.
necessity of motion for to secure full review on appeal, 952–955.
after trial by court without jury, 954, 1065–1068, 1112.
after trial by referee, 575–577, 955, 1069.
granted only for material error, 956.
who may move for, 957.
waiver of right to, 958, 959.
when there are several parties, 960, 961.
when there are several causes of action, 962.
of less than all the issues, 963–965, 1935.
renewal of motion for, 966.
setting aside order granting, 967.
effect of order granting, 968.
imposing terms, 970, 971.
stating grounds for granting in order, 972.
who may hear motion, 973.
setting aside judgment, 969.
in criminal cases, 2351.
when special interrogatories are submitted to jury, 878.
time within which motion must be made, 974–976.
notice of motion, 977–981.
on what made, 982–984.
costs on motion, 985, 986.
exceptions on the trial no longer necessary, 977.
objections on the trial still necessary, 1802–1837.
statutory grounds, 987.
for irregularity and abuse of discretion, 988.
for improper remarks of judge, 989.
for misconduct of the judge, 990.
for misconduct of the jury, 991–1010.
for misconduct of counsel, 1010a–1012.

Digitized by Google

New trials—(Cont'd),
for accident or surprise,
a matter of discretion with trial court, 1013.
when supreme court will grant, 1014.
necessity of objections on the trial, 1015.
affidavits on motion, 1017.
cases in which motion granted, 1018.
denied, 1019.
for excessive or inadequate damages,
under which section of statute, 1020.
discretionary with trial court, 1021.
necessity of passion or prejudice, 1022.
when supreme court will grant, 1024.
Hicks v. Stone not applicable, 1025.
record necessary on appeal, 1026.
motion prerequisite to appeal, 1026.
remitting excess, 1027–1029.
setting aside excessive verdicts, 1030.
when granted as of course, 1031.
inadequate damages, 1032–1034.
cases, 1035–1045.
for newly discovered evidence,
granted cautiously, 1046.
discretionary with trial court, 1047.
when supreme court will grant, 1048, 1049.
motion for postponement condition precedent, 1050.
showing necessary on motion, 1051, 1052.
evidence discoverable before trial, 1053.
contradicting or impeaching evidence, 1054.
cumulative evidence, 1055–1057.
evidence must be decisive, 1058.
for insufficiency of evidence—verdict contrary to evidence,
by district court,
general rules, 1059–1063.
after a dismissal on the trial, 1064.
after trial by court without a jury, 1065–1068.
after trial by referee, 1069.
after denial of motion to dismiss, 1070.
after successive verdicts, 1071.
remitting excess, 1072.
conditionally, 1073, 1074.
by supreme court,
general statement, 1075.
when order granting new trial reversed, 1076.
rule of Hicks v. Stone, 1076, 1078.
when order denying new trial reversed, 1077.
court need not review evidence in decision, 1079.
theory of trial governs appeal, 1080.
verdict contrary to law, 1081.
for errors of law on the trial, generally, 1082, 1083.
for error in admitting or excluding evidence,
erroneous admission of evidence, general rule, 1084.
erroneous exclusion of evidence, general rule, 1085.
necessity of offer, 1086.
immaterial evidence, 1087.

Digitized by Google

New trials—(Cont'd),
of facts otherwise proved, 1087a.
order of proof, 1088.
evidence calculated to prejudice jury, 1089.
when verdict is right, 1090.
of fact admitted, undisputed or presumed, 1091.
evidence to impeach witness, 1092.
evidence to disprove fact not proved, 1093.
when there are several causes, 1094.
when there is a special verdict, 1095.
exclusion of evidence subsequently admitted, 1096, 1097.
miscellaneous rules, 1098–1111.
after trial by court without a jury, 1112.
necessity of objections on the trial, 1805–1823.
necessity of motion to strike out, 1816–1823.
presumption that jury followed instructions to disregard evidence, 1855.
for erroneous instructions,
general statement, 1113.
how far discretionary with trial court, 1115.
when supreme court will grant, 1115, 1116.
indefinite and ambiguous instructions, 1117–1119.
omission to charge, 1120.
inconsistent and contradictory instructions, 1121.
when there are several issues, 1122, 1123, 1133.
instructions in accord with theory of trial, 1124–1128.
necessity of objections on the trial, 1117, 1128.
when the verdict is right, 1129.
impertinent abstract instructions, 1134.
moving party must be prejudiced, 1135.
submitting case to jury when no evidence or only one reasonable inference, 1136.
withdrawing issues from jury improperly, 1137.
curing error in charge, 1138.
for error in impaneling the jury, 1139.
of right in action in nature of ejectment, 1140–1163.
return on appeal, 1718a.
Negligence, province of court and jury, 671, 672.
Negligence cases,
province of court and jury, 671, 672.
jury to name fellow servant, 960.
damages in, 1035–1045.
examination of plaintiff before trial, 427.
notice to municipality, 424.
Next friend, 367, 377.
Nonsuit,
voluntary, 414.
involuntary, 841–854.
Notary public, removal of, 29.
affidavits before in foreign state, 491, 2072.
notice of deposition by, 458–485.
Note of issue,
district court, 423.
supreme court, 2379.

Digitized by Google

Notice.
must be in writing, 2029–2030.
mode of service, 2028–2040.
who entitled to, 354, 2028, 2056.
to attorney rather than party, 2035.
defects in, 2038.
amendment of, 2038.
waiver of irregularity in, 2040.
must be of eight days generally, 2057.
orders to show cause as a short, 2041–2048.
of motions, form and contents, 2058.
of appeal to supreme court, 1673–1679.
district court from justice court, 35, 49.
district court from probate court, 59, 62.
of trial, 421, 422.
of argument in supreme court, 2379.
to municipality in personal injury cases, 424.
to newspaper before suit for libel, 426.
to produce documents at trial, 429–433.
of foreclosure sale, 2146–2156.
of execution sale, 1514, 1515.
of order to limit time of appeal, 1669.
of no personal claim, 314.
of decision given by clerk does not limit time to appeal, 1669.
Objections and exceptions, 1804–1837.
Objections in the trial court, necessity of,
general statement as to necessity of, 1804.
party limited on appeal to objections made below, 1805.
to evidence,
necessity of, 1805.
when there are several parties, 1806.
several causes of action on trial at once, 1807.
before referee, 1808.
objection to any evidence under complaint, 1809.
inadmissible under the pleadings, 1810.
ruling of court reserved, 1811.
necessity of repeating objections, 1812.
grounds of objection must be specified, 1813–1815.
"incompetent, irrelevant and immaterial," 1815.
effect of objection as an estoppel, 1815a.
striking out evidence, 1816–1823.
to witnesses, 1824.
to variance, 1825.
to pleadings, 1826–1835.
amendable defects generally, 1836.
waiver of objections by proceeding to trial, 362, 1837.
Offer of judgment, 1307–1327.
Opening and close,
civil cases, 820–822.
criminal cases, 2330.
Opening default judgments,
upon publication of summons,
the statute, 1387.
a matter of right, 1388.
relief allowed liberally, 1389.

Digitized by Google

Opening default judgments—(Cont'd),
a good defence a sufficient cause, 1390, 1391.
diligence in making application, 1392.
when year begins to run, 1393.
the question on appeal, 1394.
upon service of summons otherwise than by publication,
the statutes, 1395, 1396.
remedy by motion exclusive, 1397.
statute not a grant of power, 1398.
statute applicable to all actions and proceedings, 1399.
relief granted with liberality, 1400.
a matter of discretion, 1401.
excusable neglect, 1402.
surprise, 1403.
inadvertence, 1404.
mistake, 1405.
fraud, 1406.
judgment in action to quiet title, 1407.
applicant relying on tax title, 1408.
when year begins to run, 1409.
time of application, diligence, laches, 1410.
necessity of a meritorious defence, 1412, 1413.
sufficiency of proposed answer, 1414.
affidavit of merits, 1415, 2433.
counter affidavits, 1416.
bona fide purchasers, 1417.
application by municipal corporation, 1418.
on appeal from justice of peace, 1419.
notice of motion, 1420, 1421.
who may apply, 1422.
terms, 1423.
costs, 1424.
renewal of motion, 1425.
waiver, 1426.
appeal, 1427.
the question on appeal, 1428–1430.
by probate court, 1431.
Oral evidence generally inadmissible on motions, 2068.
Order of argument.
civil cases, 820–822.
criminal cases, 2330.
Order of proof in discretion of court, 823.
Order of trial in civil cases, 819–822.
Orders. (See Motions.)
definition, 2083, 2084.
distinction between chamber and court orders, 2086, 2087.
filing, 2088.
entry of, 2089.
mode of serving, 2090.
proof of service, 2091.
pro forma, 2093.
ex parte, not appealable, 1739.
imposing terms, 2094.
as an estoppel, 2095.
to show cause, 2041–2050.
what appealable, 1737, 1738.

Digitized by Google

Paper book on appeal,
rule of court, 2381.
service on adverse party, 2383.
failure to serve, 1913, 2383, 2387.
manner of printing, 2401.
disbursements for, when taxable, 1950, 2381.
Papers to the jury room, 902, 2334.
Part payment to toll statute of limitations, 139–147.
Parties, on appeal to supreme court, 1657–1666.
unknown, 323.
unknown heirs, 324.
Partnership, province of court and jury, 674.
service of summons, 319.
Perjury, corroboration necessary, 2314.
Personal injury cases,
province of court and jury, 671, 672.
jury to name fellow servant, 900.
examination of plaintiff before trial, 427.
notice to municipality before suit, 424.
damages in, 1035–1045.
Physicians, as witnesses, 708.
Place of trial,
civil cases, 269–279.
criminal cases, 2286.
change of, civil cases, 280–297.
criminal cases, 2239, 2240, 2288.
Pleadings,
amendment of, 1898.
objection to for first time on appeal, 1826–1837.
construction of on appeal, 1833.
Pleas to indictment, 2266–2285.
Points and authorities on appeal, 2381.
Polling the jury,
civil cases, 925.
criminal cases, 2346.
Postponement of trial,
civil cases, 382–397.
criminal cases, 2319.
Preliminary examination of offenders, 2225–2240.
Premeditation, burden of proof, 2306.
Presumptions,
on appeal to supreme court, 1838–1858.
district court, 45.
Principal and agent, province of court and jury, 675.
Privileged communications, 705–708.
Probate court,
appeals to district court, 56–79.
vacating orders and judgments, 1431.
Proceedings supplementary to execution, 1598–1630.
judgment, 1631.
Process, formal requisites,
district court, 6.
supreme court, 2399.
subscribed with name and residence of attorney, 2422.
Production of papers,
rules as to notice, 429–433.

Digitized by Google

Prohibition, 2013–2027.
Proof,
degree requisite in civil cases, 809.
criminal cases, 2296.
burden of in civil cases, 805–808.
criminal cases, 2296–2314.
conforming pleadings to, 1898.
order of discretionary with court, 823.
Province of court and jury,
civil cases, 660–682.
criminal cases, 2328, 2329, 2343.
effect of submitting question for court to jury, 682.
Proximate cause, question for jury, 662.
Publication of summons, 330–347.
opening default on, 1387–1394.
entry of judgment of default on, 1271.
presumption of jurisdiction, 345.
proof of filed nunc pro tunc, 344, 1353.
in actions for divorce, 2434.
Public policy a question for court, 676.
Quashing indictment, 2252–2253.
Questions of law and fact,
civil cases, 660–682.
criminal cases, 2328, 2329, 2343.
Questions to jury in connection with general verdict, 864–879.
Quo warranto, (See Dunnell, Minn. Pl. §§ 1701–1710.)
writ of, 28.
Re-argument in supreme court, 1974–1979.
Reasonable doubt, definition, 2307.
Reasonable time, question for jury, 677.
Reasonableness generally, a question for jury, 678.
Recalling witness, 832.
Receiptor, 1470.
Receivers,
general statute as to appointment of, 2203.
in what actions and proceedings granted, 2204.
in actions for dissolution of partnerships, 2205.
to foreclose mortgages, 2206.
under state insolvency law, 2207.
of solvent corporations, 2208.
nature of office, 2209.
powers of, 2210.
appointment discretionary, 2211.
order of appointment, 2213.
collateral attack upon appointment, 2214.
foreign, may sue here, 2215.
duties administrative, 2216.
successive, 2217
liability, 2218.
compensation, 2219.
sales by, 2220.
actions by, 2221.
against, 2222.
notice to, 2224.
in supplementary proceedings, 1620–1622.
Recognizance on appeal in criminal cases, 2363.

Digitized by Google

Record on appeal, sufficiency of, 1752-1760.
Records, amendment of, 1341-1365.
Redemption,
from execution sales, 1531-1541.
foreclosure sales, 2184-2189.
Re-direct examination, 724.
Referee, (See Reference.)
generally, 546-578.
in supplementary proceedings, 1612.
Reference,
statutes, 546-550.
nature of office of referee, 551.
consent to a, 552.
waiver of objections to a, 553.
order of, 555.
service of order of, 556.
oath of referee, 557.
practice on trial by referee, 558-561.
filing report, 562.
fees of referee, 563.
costs and disbursements, 564.
how far findings binding on court, 565.
entry of judgment on findings of referee, 566.
compulsory reference, 567-570.
on motions, 571.
remedy for formal defects in findings, 572.
report not justified by evidence, 573.
conclusions not justified by findings, 574.
new trials after trial by referee, 575-577.
appeals, 578.
in supplementary proceedings, 1612.
Refreshing memory by memoranda, 745-756.
using professional treatise to, 741.
Re-hearing in supreme court, 1974-1979.
Relief,
allowable plaintiff, 1240.
defendant, 1247.
as between several parties, 1243.
defendants, 1249.
in actions on joint obligations, 1252.
Remitting excess in verdicts, 1027-1029, 1072.
Remittitur, 1964-1971.
Renewal of motions, 2078-2082.
Re-opening case, 824.
Replevin, judgment in, 1242.
Requests for instructions, 880-888.
Res judicata, doctrine on appeal, 1649.
as to orders, 2095.
Return,
on appeal to supreme court, 1742-1751.
district court from justice court, 37, 38, 51.
district court from probate court, 64, 65.
Reversal on appeal, effect of, 1931-1942.
Roentgen rays, submission to, 428.
Sales, province of court and jury, 679.
Satisfaction of judgments, 1339, 1340.

Digitized by Google

Seal of court, 6, 7.
Sealed verdict,
civil cases, 928.
criminal cases, 2341.
Second trial of right in ejectment, 1140–1163.
Seduction under promise of marriage, corroboration, 2313.
Self-incrimination, rule against, 757–768.
Sentence in criminal cases, 2349.
Separate trials,
civil cases, 817, 818.
criminal cases, 2321.
Separation of witnesses, 840.
Sequestration of witnesses, 840.
Service of notices and papers, (See Notice.)
mode of service generally, 2028–2040.
service by mail, 2033.
must be on attorney generally, 2035.
waiver of irregularity in service, 2040.
Service of summons,
generally, 308–324.
by publication, 330–347.
out of state, 339.
who exempt from, 315.
Setting aside indictment, 2252–2253.
Severance on appeal, 1659.
Sheriff's certificate,
execution sales, 1522–1525.
foreclosure sales, 2170–2174.
Sickness of judge, 862.
Slander, province of court and jury, 669.
Special appearance, 359–363.
Special findings in connection with general verdict, 864–879.
Special venires, 23, 24.
Statute of limitations, 80–268. (See Limitation of actions.)
Stay,
notice of, rule of court, 2441a.
upon receiving verdict, 932.
of proceedings generally, 2096.
of execution on bond, 1478–1483.
on appeal to supreme court, 1698–1718, 2354.
by certiorari, 2008.
offer of judgment as, 1314.
to settle case, 1765.
effect of on levy, 1483.
Steamboats, actions against, 28.
Stranger cannot move in action, 854, 957.
Striking out evidence, 1816–1823.
Subpœna,
generally, 683–694.
tecum duces, 691–694.
Summons, 298–347.
actions commenced by, 298.
contents and nature of, 302–307.
service of, generally, 308–324.
publication of, 330–347.
personal service of out of state, 339.

Digitized by Google

Summons—(Cont'd),
proof of service of, 325–329. 342.
filed nunc pro tunc, 344, 1353.
Sunday, courts how far open on, 26.
Supplementary proceedings,
the statute, 1598.
court commissioners, 1599.
general nature and object of proceeding, 1600.
showing necessary, 1601.
nature of judgment basis of proceeding, 1602.
effect of as a lien, priority, 1603.
second execution, concurrent remedies, 1604.
officer's return conclusive on, 1605.
who may initiate proceedings, 1606.
against whom allowable, 1607.
service of order, 1608.
filing order, 1609.
scope of examination of judgment debtor, 1610.
successive examinations, 1611.
referees, 1612, 1613.
witnesses, counsel, incriminating questions, 1614–1617.
orders for application of property, 1618.
receivers, 1620–1622.
examination of debtors of judgment debtor, 1623 1627.
contempt of court, 1628.
arrest of judgment debtor, 1629.
Sureties on bonds, qualifications, 2120.
Tax judgments, not appealable, 1741.
Taxes to be paid on redemption from foreclosure and execution sales, 1538.
Tecum duces, 691–694.
Tender as affecting costs, 1202–1207.
Terms,
imposing in granting relief, 970, 1423, 2094.
Terms of court, 16.
adjourned, 20.
special, 20, 21.
Theory of case, 1899–1908.
Time, how computed, 2051, 2052.
extension of time, 2038.
Transcript of evidence, rule of court, 1779.
Trial by court, 496–545.
when a matter of right, 496–498.
findings of fact and conclusions of law, 499–536.
issues to the jury, 537–545.
new trial after, 954, 1065–1068, 1112.
Trial by jury. (See Trial procedure and Jury.)
right to in civil cases, 579–589.
waiver of right to, 586–589.
right to in criminal cases, 2290–2294.
Trial procedure, civil actions,
impaneling the jury, 590–659.
province of court and jury, 660–682.
witnesses,
securing attendance of, 683–690.
tecum duces, 691–694.
who competent, 695–700.

Digitized by Google

Trial procedure, civil actions—(Cont'd),
who incompetent, 701–720.
examination of, 721–768.
impeachment of, 769–803.
corroboration, 804.
burden of proof, 805–808.
degree of proof, 809.
general supervision of court over trial, 810.
contempt of court, 811–816.
separate trials, 817, 818.
general order of trial, 819–822.
order of proof, 823, 824.
admissibility of evidence for court, 825.
competency of witnesses for court, 826.
court may put questions to witness, 827.
allowing leading questions on direct examination, 828.
rebuttal of inadmissible evidence, 829.
admitting evidence on assurance of counsel, 830.
allowing party to follow up inadmissible evidence, 831.
allowing party to recall witness, 832.
limiting number of witnesses, 833.
preventing useless examination, 834.
requiring witness to perform physical act, 835.
allowing experiments in presence of jury, 836.
holding court on holiday, 837.
granting a view, 838, 839.
sequestration of witnesses, 840.
dismissal of action for failure of proof, 841–854.
directing a verdict, 855–861.
sickness of judge, 862.
argument of counsel, 863.
interrogatories, 864–879.
requests for instructions, 880–888.
charging the jury, 889–902.
allowing jury to take papers to jury room, 902.
keeping jury out and urging to agree, 903.
the verdict, 904–933.
receiving the verdict, 921–933.
polling the jury, 925, 926.
sending jury back to correct verdict, 927.
sealed verdict, 928.
recording verdict, 929.
entries on receiving verdict, 931.
Triers of jurors, decision final, 658, 659.
Unknown heirs, 324.
parties, 323.
Unlawful detainer,
service of summons, 319.
limitation of actions, 201.
Usury,
province of court and jury, 668.
as a defence, party incompetent as witness, 704.
degree of proof requisite, 809.
Vacating judgments, 1366–1386.
distinction between opening default and vacating judgments, 1366.
power to vacate inherent, 1367.

Digitized by Google

Vacating judgments—(Cont'd),
void judgments, 1368.
for want of jurisdiction, 1369.
return of service of summons not conclusive, 1370.
unauthorized action, 1371.
erroneous judgment, 1372.
because of facts arising subsequent to judgment, 1373.
for fraud, 1374.
on the ground of surprise, 1375.
failure to file or serve complaint not a ground, 1376.
against infant, 1377.
adjudication of bankruptcy not a ground, 1378.
merits need not be shown, 1379.
laches, 1380.
notice of motion, 1381.
application by non-resident, attachment, 1382.
when stranger may apply, 1383.
application by assignee, 1384.
motion to vacate defeated by amendment, 1385.
appeal, 1386.
judgments by confession, 1306.
Vacation of judgments, 1366–1386.
Vacation, power of court in, 17, 18.
Variance,
necessity of objection to on the trial, 1825.
as a ground for dismissal, 843.
between summons and default judgment, 1281.
Venires, special, 23, 24.
court may fix time for convening of petit jury, 25.
Venue,
civil cases, 269–279.
criminal cases, 2286–2289.
change of,
rule of court, 2439.
civil cases, 280–297.
criminal cases, 2288.
Verdicts,
statute defining general and special, 904.
definition of, 905.
effect of as determining rights, 906.
general verdicts,
nature of, 907.
must cover all the issues, 909.
be confined to issues, 910.
be definite and certain, 911.
include assessment of damages, 912.
special verdicts,
kinds of, 916.
in legal action must cover all the issues, 918.
counsel must prepare forms for, 919.
how far optional with jury, 920.
receiving,
court always open to receive, 921.
presence of counsel and parties unnecessary in civil cases, 922.
must be in open court, 923.
practice as to reading to jury and recording, 924.

Digitized by Google

Verdicts—(Cont'd),
polling the jury, 925, 926.
sending jury back to correct verdict, 927.
sealed verdict,
in civil cases, 928.
in criminal cases, 2341.
entries on receiving verdict, 931, 932.
stay on receiving, 931.
remedies for defective, 933.
judgment notwithstanding, 875.
directing, 855–861.
in criminal actions, 2340–2348.
View,
civil cases, 838, 839.
criminal cases, 2326.
Voir dire, examination on, 653.
Waiver,
of right to jury trial, 586–589.
of objections to indictment, 2265, 2295.
of right to trial by court, 498.
of right to new trial, 958, 959.
of right to appeal, 1642.
of objections to pleadings, 1826.
by failure to object in the trial court, 1802–1837.
by proceeding to trial after objections overruled, 362, 1837.
Witnesses,
who competent,
statutes, 695.
accused persons, 696.
convicted persons, 697.
accomplices, 698.
co-defendants, 699.
parties in interest, 700.
who incompetent,
general statute, 701.
grand jurors, 703.
when usury set up as a defence, 704.
husband and wife, 705, 706.
attorney and client, 705, 707.
physician and patient, 705, 708.
clergyman and priest, 705.
public officers, 705.
when adverse party dead, 709–720.
examination of,
ordinary witness,
order of examination, 721.
scope of direct examination on merits, 722, 723.
cross-examination on merits, 722.
re-direct examination, 724.
scope of cross-examination to credit, 769–773.
adverse party,
as upon cross-examination under statute, 727–735.
scope of cross-examination independent of statute, 725.
accused person,
on the merits, 744.
to credit, 802.

Digitized by Google

Witnesses— (Cont'd),
experts,
direct examination, 736–741, 743.
cross-examination on the merits, 742.
to credit, 803.
hostile witness, 726.
impeachment of,
by cross-examination to credit, 769–773.
by proof of conviction, 774, 775.
bias, 776.
contradictory statements, 777–786.
bad reputation for veracity, 788–797.
abnormal mental condition, 798.
of one's own witness, 799–801.
of accused person, 802.
of experts, 803.
corroboration of,
by proof of similar statements, 804.
attendance, how secured,
subpœnas, 683.
prepayment of fees, 685, 686.
attachment for, 689.
habeas corpus, 690.
use of memoranda to refresh memory, 745–756.
rule against self-incrimination, 757–768.
competency of, a question for court, 826.
court may put questions to, 827.
leaving questions on direct examination, 828.
court may limit number, 833.
sequestration of, 840.
requiring witness to perform physical act, 885.
allowing witness to be recalled, 832.
credibility of for jury, 665.
necessity of objections to on the trial, 1824.
insanity of, 702, 798.
imbecility of, 702, 798.
drunkenness of, 798.
delusions of, 798.
defective memory of, 798.
Writ of error,
abolished in civil cases, 1636.
in criminal cases, 2352–2370.
notice of, 2400.
Writings, construction of for court, 664.
Writs, formal requisites of,
district court, 6.
supreme court, 2399.
subscribed with name and residence of attorney, 2422.
Wrong reason for right decision, 1865.
X-rays, submission of party to, 428.

Digitized by Google

Digitized by Google

INDEX TO FORMS

[The references are to sections.]

Acknowledgment,
of bonds, 2469.
of instruments generally, 2469.
of satisfaction of judgment, 2566.
Admission of service of summons, 2459.
Adverse claims,
summons, notice of lis pendens and no personal claim in actions to determine, 2448.
Affidavit,
of merits, 2467, 2468.
for publication of summons, 2450, 2451, 2452.
for attachment, (Minn. Pl. § 984.)
for garnishment, (Minn. Pl. § 1293.)
in claim and delivery, (See Replevin.)
for taking deposition before justice, 2485.
for commission to take deposition, 2486.
of publication of summons, 2453.
of service of summons, 2454.
of service of notices, 2461.
of service of subpœna, 2522.
of no answer, 2539.
of service on occupant in foreclosure proceedings, 2623.
of costs and disbursement on foreclosure, 2623.
Alimony, pendente lite, 2658.
Amendment,
of conclusions of law, 2547, 2548.
of pleadings, 2512.
Appeal from justice to district court,
civil cases,
notice and affidavit, 2639.
bond, 2640.
return of justice, 2641.
criminal cases,
notice of, 2642.
recognizance, 2643.
Appeal from probate to district court,
notice of, 2644.
bond, 2645.
return, 2646.
Appeal to the supreme court,
notice of, 2626.
bond for costs on, 2627.
bond for stay on, 2628.
bond for costs and stay on, 2629.
notice of argument, 2630.

Digitized by Google

Appeal to the supreme court—(Cont'd),
note of issue, 2631.
case for use on, 2632.
proposal of, 2633.
notice of settlement, 2634.
certificate of judge to, 2636.
certificate of judge to return on appeal from interlocutory order, 2637.
return of clerk on, 2638.
Appearance, notice of, 2460.
Approval of bonds, 2469.
Argument in supreme court, notice of, 2630.
Assignee,
substitution of as plaintiff, 2490.
Assignment,
of judgment, 2568.
of sheriff's certificate, 2569.
Attachment,
affidavit for, (Minn. Pl. § 984.)
indemnifying bond, (Minn. Pl. § 992.)
writ of, (Minn. Pl. § 992.)
bond for release of, (Minn. Pl. § 1022.)
sheriff's certificate to copies of, 2608.
return of levy on, 2609.
return when bond given to plaintiff, 2610.
for witness, 2525.
notice of claim by third party, 2575.
levy on debts, notice and demand of certificate, 2592.
vacation of, 2660.
Attorney,
substitution of, 2490.
Bill of particulars,
demand of, 2502.
form of, 2503.
Bond,
for guardian ad litem, 2481.
for costs by non-resident, 2518.
for costs on appeal to supreme court, 2627.
for stay on appeal to supreme court, 2628.
for costs and stay on appeal to supreme court, 2629.
on appeal from justice to district court, 2640.
on appeal from probate to district court, 2645.
upon entry of default judgment, 2544.
to indemnify sheriff, 2577.
for six months' stay of execution, 2536.
in habeas corpus proceedings, 2651.
by debtor in supplementary proceedings, 2565.
leave to sue on official, 2505.
demand of indemnifying by sheriff, 2576.
Bringing in parties, 2489.
Case,
form of, 2632.
proposal of, 2633.
notice of settlement, 2634.
stipulation for settlement of, 2635.
certificate of judge to, 2636.

Digitized by Google

Certificate,
of judge to case, 2636.
of judge to return on appeal from order, 2637.
of sale on execution, 2606.
of sale on foreclosure, 2613, 2620.
of redemption from execution sale, 2607.
of redemption from foreclosure sale, 2617, 2622.
assignment of certificate of sale on execution, 2608.
Certiorari proceedings, 2647.
Change of venue,
as of right, 2493.
for convenience of witnesses, 2494.
Claim and delivery, (See Replevin.)
Claim of property seized by sheriff, 2575.
Conclusions of law,
form of, 2528.
amendment of, 2547, 2548.
Confession of judgment, 2498.
Consolidation of actions, 2661.
Continuance to secure witnesses, 2500.
Costs,
taxation of, 2557, 2667.
motion for bond for by non-resident, 2517
form of bond for by non-resident, 2518.
bond for on appeal to supreme court, 2627.
Default,
entry of judgment on,
notice, 2537.
admission of counterclaim, 2538.
affidavit of no answer, 2539.
orders for, 2540–2543.
bond, 2544.
for want of a reply, 2545.
opening,
affidavit by resident, 2570.
affidavit by non-resident, 2571.
notice of motion, 2572.
order, 2573.
Definite,
motion to make pleading more, 2509.
Demurrer,
order sustaining, 2514.
order overruling, 2515.
frivolous, motion for judgment on, 2511.
Deposition,
notice of taking by party, 2482.
notice of return, 2483.
stipulation for taking, 2484.
affidavit for commission, 2486.
order for commission, 2486.
commission, 2487.
motion to suppress, 2488.
notice of by justice of the peace, 2485.
Divorce,
affidavit for publication of summons, 2652.
alimony pendente lite, 2658.

Digitized by Google

Documents, notice to produce, 2473.
Ejectment,
demand of second trial, 2551.
notice of entry of judgment, 2552.
notice of determination on appeal, 2553.
Election between causes of action, 2506.
Execution,
general form, 2578.
indorsements on, 2579.
sheriff's certificate to copies, 2580.
renewal of, 2581.
for delivery of real property, 2582.
for delivery of personal property, 2583.
against several defendants, 2584.
against administrator, 2585.
against garnishee, 2586.
on judgment of justice, 2587.
on judgment of municipal court, 2588.
levy on real property, 2589.
levy on debts, 2590.
return on, 2591.
certificate of debtor to sheriff, 2593.
examination of third party, 2594.
return: of partial satisfaction, 595.
return wholly unsatisfied, 2596.
return of levy on personal property, 2597.
sheriff's certificate to copy of execution and inventory, 2598.
receipt for goods left with receiptor, 2599.
appraisal of property seized, 2600.
notice to sheriff of homestead claim, 2601.
notice to sheriff of claim by third party, 2575.
sale on,
notice of, 2602.
certificate of, 2603.
report on, 2604, 2605.
notice of intention to redeem, 2606.
certificate of redemption, 2607.
bond for six months' stay of, 2536.
Executor, substitution of as plaintiff, 2491, 2492.
Extension of time to plead, 2508.
Findings of fact by court, 2528.
Foreclosure of chattel mortgage,
notice of sale and sheriff's report of sale, 2624.
Foreclosure of real estate mortgage,
by action,
notice of sale, 2612.
certificate of sale, 2613.
order confirming sale, 2614.
report of sheriff on sale, 2615.
notice of intention to redeem from sale, 2616.
certificate of redemption, 2617.
by advertisement,
power of attorney, 2618.
notice of sale, 2619.
notice of postponement of sale, 2619.

Digitized by Google

Foreclosure of real estate mortgage—(Cont'd),
certificate of sale, 2620.
notice of intention to redeem, 2621.
certificate of redemption, 2622.
affidavits to perpetuate evidence of sale, 2623.
sheriff's report of sale, 2624.
affidavit of costs and disbursements, 2628.
affidavit of service on occupant, 2623.
Framed issues, 2527.
Frivolous demurrer, motion for judgment on, 2511.
Garnishment,
form of summons and notice, 2449.
affidavit for, (Minn. Pl. § 1293.)
bond for release of property, (Minn. Pl. § 1342.)
affidavit of service of summons, 2455.
Guardian ad litem,
application for appointment of, 2474–2480.
bond for, 2481.
Habeas corpus,
proceedings generally, 2649–2657.
ad testificandum, 2524.
Injunction,
order to show cause why temporary should not issue, 2663.
order for temporary, 2664.
writ of, 2665.
Inspection of papers, 2501.
Interpleader, 2516.
Interrogatories to jury, 2535.
Irrelevant allegations, motion to strike out, 2510.
Issue, note of,
district court, 2520.
supreme court, 2631.
Issues to jury in court cases, 2527.
Judgment,
by default, 2537–2544.
offer of, 2495–2497.
confession of, 2498.
for want of reply, 2545.
leave to sue on a domestic, 2504.
satisfaction of, 2566.
assignment of, 2568.
partial release of lien, 2567.
opening judgment by default, 2570–2573.
on frivolous demurrer, 2511.
Jury, issues to, 2527.
Justice court, appeal from, 2639–2643.
Justification of sureties on bonds, 2469.
Leave to plead after time, 2507.
Leave to sue,
on domestic judgment, 2504.
on official bond, 2505.
Libel, notice to publisher, 2472.
Lis pendens, notice of, 2448.
Mandamus proceedings, (Minn. Pl. § 1591.)
Merits, affidavit of, 2467, 2468.

Digitized by Google

Motion, general form of notice of, 2462.
Municipality, notice to before suit, 2471.
New trial,
notice of motion for, general form, 2546.
after trial by court, notice of motion for, 2547.
order granting, 2554.
order denying, 2555.
order on alternative motion for, 2556.
affidavit for, newly discovered evidence, 2549, 2550.
in ejectment,
demand for, 2551.
notice of entry of judgment, 2552.
notice of determination on appeal, 2553.
Newly discovered evidence, 2549, 2550.
Note of issue,
district court, 2520.
supreme court, 2631.
Notice,
of motion, general form, 2462.
of trial, 2519.
of appeal to supreme court, 2626.
of appeal from justice to district court, 2639, 2642.
of appeal from probate to district court, 2644.
of argument in supreme court, 2630.
of order to limit time to appeal, 2625.
of claim of property seized by sheriff, 2575.
of no personal claim, 2448.
of lis pendens, 2448.
of taking deposition, 2482.
of return of deposition, 2483.
to municipality in personal injury cases, 2471.
to publisher of libel, 2472.
to produce documents at trial, 2473.
to defendant in garnishment proceedings, 2449.
Offer of judgment, 2495–2497.
Opening default judgments, 2570–2573.
Order,
general form of, 2463.
denying motion, general form, 2464.
to show cause, 2465, 2466.
Order to show cause, 2465, 2466.
Papers,
inspection of before trial, 2501.
notice to produce at trial, 2473.
Particulars, bill of, 2502, 2503.
Parties,
bringing in new, 2489.
substitution of assignee as plaintiff, 2490.
substitution of executor as plaintiff, 2491, 2492.
Personal injury, notice of claim for, 2471.
Petition, general form of verification to, 2470.
Pleadings,
motion to make more definite, 2509.
amendment of, 2512.
after time, 2507.

Digitized by Google

Pleadings—(Cont'd),
extension of time to plead, 2508.
motion to strike out sham, 2513.
motion to strike out redundant and irrelevant allegations, 2510.
judgment on for want of reply, 2545.
judgment on frivolous demurrer, 2511.
Probate court, appeal from, 2644–2646.
Production of books and papers at trial, notice, 2473.
Prohibition proceedings, 2648.
Publication of summons,
affidavit for, general form, 2450.
against unknown heirs, affidavit and order for, 2451.
in actions for divorce, affidavit and order for, 2452.
affidavit of printer as to publication, 2453.
Quo warranto proceedings, (Minn. Pl. § 1707.)
Recognizance on appeal from justice court, 2643.
Recognizance on appeal in criminal cases, 2666.
Redundant pleadings, motion to strike out, 2510.
Referee, report of, 2530.
Reference,
stipulation for, 2529.
report of referee, 2530.
Release of judgment lien, 2567.
Replevin,
affidavit of general owner for delivery, (Minn. Pl. § 791.)
requisition to be indorsed on affidavit. (Minn. Pl. § 792.)
affidavit of special owner for delivery, (Minn. Pl. § 793.)
bond by plaintiff, (Minn. Pl. § 794.)
bond of defendant, (Minn. Pl. § 795.)
exception to sureties, (Minn. Pl. § 796.)
notice of justification of sureties, (Minn. Pl. § 797.)
return of sheriff, 2611.
Reply, judgment for want of, 2545.
Restraining order, 2465, 2466, 2663, 2664.
Retainer, notice of, 2460.
Return of clerk on appeal to supreme court, 2638.
Return of sheriff,
service of summons, 2456, 2457.
that defendant cannot be found, 2458.
service of subpœna, 2523.
to execution for delivery of real property, 2582.
levy on real property, 2589.
levy on debts, 2591.
partial satisfaction of execution, 2595.
wholly unsatisfied, 2597.
of proceedings on execution sale, 2604, 2605.
levy on attachment, 2592, 2609, 2610.
in claim and delivery proceedings, 2611.
of proceedings on foreclosure sale by action, 2615.
of proceedings on foreclosure of chattel mortgage, 2624.
Service of notice on occupant in foreclosure proceedings, 2623.
Service of notices, affidavit of, 2461.
Service of orders, affidavit of, 2659.
Service of summons,
affidavit of, 2454.
motion to set aside, 2574.

Digitized by Google

Satisfaction of judgment, 2566.
Setting aside service of summons, 2574.
Settled case, 2632.
Sham pleadings, motion to strike out, 2513.
Sheriff,
notice to of claim to property seized by, 2575.
indemnifying bond to, 2576, 2577.
certificate of sale by, on execution sale, 2603.
certificate of redemption by, on execution sale, 2607.
certificate of sale by, on foreclosure sale, 2613, 2620.
certificate of redemption by, on foreclosure sale, 2617, 2622.
Stay,
bond for six months stay of execution, 2536.
bond on appeal, 2628.
Subpœna,
general form, 2521.
tecum duces, 2521.
to appear before grand jury, 2526.
affidavit of service, 2522.
return of service, 2523.
Substitution,
of attorney, 2499.
of assignee as plaintiff, 2490.
of executor as plaintiff, 2491, 2492.
Summons,
general form, 2447.
form of in actions to determine adverse claims, 2448.
garnishee, 2449.
affidavit for publication of, general form, 2450.
affidavit for publication of, unknown heirs, 2451.
affidavit for publication of, divorce proceedings, 2452.
affidavit of printer as to publication of, 2453.
affidavit of service of, 2454, 2455.
return of officer as to service of, 2456.
motion to set aside service of, 2574.
admission of service of, 2459.
motion to set aside service of, 2574.
return of sheriff that defendant cannot be found, 2458.
Supplemental answer, motion for leave to serve, 2662.
Supplementary proceedings,
affidavit and order for examination of judgment debtor, 2558.
affidavit and order for examination of third party, 2559.
order appointing receiver, 2560.
report of referee, 2561.
affidavit for arrest of judgment debtor, 2562.
bench warrant for arrest of judgment debtor, 2563.
order for bond by judgment debtor, 2564.
bond by judgment debtor, 2565.
Taxation of costs,
district court, 2557.
supreme court, 2667.
Time to plead, extension of time, 2508.
Trial, notice of, 2519.
Venue,
change of as of right, 2493.
change of for convenience of witnesses, 2494.

Digitized by Google

Verdict,
general form, 2531.
in action of replevin, 2532.
in action of ejectment, 2533.
special, forms of, 2534.
when special interrogatories are submitted, 2535.
Verification to petition, 2470.
Witness,
habeas corpus for, 2524.
attachment for, 2525.
subpœna for, 2521, 2526.
continuance to secure, 2500.

WEST PUBLISHING CO., PRINTERS AND STEREOTYPERS, ST. PAUL, MINN.

Digitized by Google

Digitized by Google

Digitized by Google

Digitized by Google

Digitized by Google

UNIV. OF MICH.
BINDERY

FEB 5 1942

Digitized by Google

LAW LIBRARY
University of Michigan
3 5112 104 033 610